Circuit Court for Charles County
Case No. C-08-CR-18-000098

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 582

September Term, 2018

SHAWN TYRONE FARMER

v.

STATE OF MARYLAND

Leahy,
Reed,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: August 8, 2019

The Charles County Sheriff's Department received a 9-1-1 call that Shawn Tyrone Farmer, the appellant, was "tearing up" the house. The caller, Farmer's brother, told the dispatcher that Farmer fights police. The dispatcher then relayed to the responding officer, Officer Steven Miller of the Charles County Sheriff's Department, that Farmer is known to assault police. When Officer Miller arrived on the scene, Farmer's brother also told him that Farmer fights police. Standing at the bottom of Farmer's driveway, Officer Miller witnessed Farmer inside the house destroying property and screaming that he would "F up the police." Farmer soon stormed out of the house toward Officer Miller, threatening to beat the officer's ass and "beat the brakes off" of him. Officer Miller told Farmer he was under arrest; Farmer replied, "No, I'm not," and tried to run. As Officer Miller grabbed Farmer by the shoulder to place him under arrest, Farmer swung around and struck Officer Miller in the chest. Farmer continued to struggle against his arrest as Officer Miller tased him.

Farmer stood trial in the Circuit Court for Charles County on charges of disturbing the peace, second-degree assault, and resisting arrest. Officer Miller was the only witness to testify. In addition to testifying to his own observations of Farmer, Officer Miller testified, over Farmer's hearsay objections, that both Farmer's brother and the dispatch officer told him that Farmer fights police officers. The court also admitted the 9-1-1 call sheet, which stated that Farmer "fights the police."

The jury found Farmer guilty of resisting arrest and not guilty of the other two charges. Farmer timely appealed. We have consolidated and rephrased slightly the questions he presents for our review:[1]

I. Did the circuit court err when it permitted Officer Miller to testify about out-of-court statements concerning Farmer's alleged propensity to fight police officers?

II. Did the circuit court err by denying Farmer's motion for judgment of acquittal for resisting arrest?

III. Did the circuit court err when it denied Farmer's request for jury instructions on an arrestee's use of force?

Having properly preserved the issue for our review, we hold that the trial court should have sustained Farmer's hearsay objections to Officer Miller's testimony relaying the out-of-court statements made by Farmer's brother and the dispatch officer, and to the statements included on the 9-1-1 call sheet. Although the statements were relevant as non-hearsay evidence showing their effect on Officer Miller, the limited probative value of this evidence was outweighed by the unfair prejudice to Farmer. The court's error in admitting

[1] Farmer phrased his questions presented as follows:

I. "Whether the Circuit Court erred when it permitted Officer Miller to testify about out-of-court statements concerning Farmer's alleged propensity to fight police in violation of the Maryland Rules of Evidence?"

II. "Whether the Circuit Court erred when it permitted Officer Miller to testify about out-of-court statements made by Farmer's brother in violation of the Confrontation Clause of the Constitution of the United States?"

III. "Whether the Circuit Court erred when it denied Farmer's request for jury instructions regarding an arrestee's use of force in response to an arresting officer's use of unreasonable force?"

IV. "Whether the Circuit Court erred when it denied Farmer's motion for judgment of acquittal regarding the charge of resisting arrest despite the fact that Officer Miller lacked probable cause to arrest Farmer for the crime of disorderly conduct?"

Officer Miller's testimony relaying these out-of-court statements was not harmless beyond a reasonable doubt. We must, therefore, vacate Farmer's conviction and remand the case to the circuit court. We do not reach the third question, but because the issue concerning Farmer's proposed jury instruction is likely to reoccur in the event of retrial on remand, we determine that the trial court acted within its discretion by denying the proposed instruction.

BACKGROUND

Farmer stood trial on April 26 and 27, 2018, charged with disorderly conduct, resisting arrest, and second-degree assault. The following facts are derived from the evidence presented at trial, at which Officer Miller was the lone witness.

A. Farmer's Arrest

On June 22, 2017, shortly before midnight, Officer Miller was heading home from a patrol shift in the town of La Plata when he received a call to respond to domestic disturbance on Lizzy's Place. Farmer's brother, Hicks, had called 9-1-1. Officer Miller testified at trial that Hicks told the dispatch officer that Farmer was "tearing the house up, going crazy." Because the call came in as a "normal response," rather than a Code II emergency response, Officer Miller proceeded to the scene at normal speed without lights or sirens.

Lizzy's Place was "kind of a broken-up road" that served a few houses clustered close together about 100 yards back from the main road. When Officer Miller exited his patrol car, he met Hicks. Hicks told him, "My brother is going crazy. You know, he's done this before. He's either drunk or on something. And you better get more officers

here because he's going to fight you." Officer Miller responded that he "was made aware of that" and that he was "not going anywhere." According to Officer Miller, hearing this "heightens [] alertness."

From where he stood outside, Officer Miller could see Farmer inside his house, and "could clearly hear him, stuff breaking, and yelling what he's going to do to me, or not to me, but to the police in general." Officer Miller heard Farmer saying repeatedly that "he was going to F the police up. He was going to kick their ass." Farmer then came to the door, still screaming, and broke the screen door by slamming it. Officer Miller waited outside rather than engaging with him because "[i]f he's just messing up the house, there's no danger for anybody else. . . . So, I was just going to wait for backup to get there. Especially if his brother said he's on something, it's easier just to wait."

Farmer exited and re-entered the house a few times, allowing Officer Miller to observe that Farmer was "acting really, like, crazy." This caused Officer Miller to "step up" his units, meaning backup would come more quickly with lights and sirens. But before backup arrived, Farmer came out, "[a]nd . . . he kept coming. And he was walking real fast and pointing, 'I'm gonna beat your ass, I'm gonna beat your ass. Fuck the police. Get off, get out of my yard.'" Officer Miller noted, however, that he "wasn't in [Farmer's] yard, [but] was still out by the main little court."

Officer Miller related that he told Farmer, "Just, 'Stop, stop,' and those are basically my only commands I gave him. I kinda . . . I backed up a couple feet, then the brother kinda . . . [] knew, so he kinda moved off to the side. And that's when I took my taser out." Officer Miller "pulled it out, and [] said, 'You'd better stop or I'm going to tase you.'"

Aiming the taser at Farmer's chest caused Farmer to finally stop about five to six feet from Officer Miller, but Farmer continued to "ha[ve] a lot of words for [Officer Miller]," and he said he was going to "beat the brakes off" Office Miller a few times. "Just talking trash, basically." Officer Miller also described Farmer as "squar[ing] up," like getting into a fighting posture. He thought Farmer "was just going to charge [him]."

At that point, the neighbors, maybe six of them, started to emerge from their houses to see what was going on. Officer Miller did not know at the time, but they were all members of Farmer's family. Officer Miller told Farmer he was under arrest and to put his hands behind his back. Farmer replied, "something like, 'No, I'm not,' and just like turned to run back to the house." When Farmer turned and ran, Officer Miller gave chase, catching him about 15 to 20 yards down the driveway. Officer Miller, running with his taser still in his right hand, grabbed Farmer by the shoulder with his left hand as he caught Farmer from behind. Farmer swung around, striking Officer Miller in his chest with his forearm, like "get away." Farmer then "kinda put his hands up like . . . to wrestle or whatever else." Taser still in hand, Officer Miller took a step back and tased Farmer in the stomach, just below his sternum.

This caused both men drop to the ground, with Officer Miller landing on top and Farmer landing face-down. As the men fell, backup arrived. Farmer got on all fours and tried to get back up, at which point Officer Miller deployed the taser's other two barbs to try to keep Farmer down. Officer Miller said Farmer continued to be disorderly as he was on the ground; Farmer was "still yelling, he's gonna beat my ass and you know, all these other cusswords and stuff. And [Officer Miller was] just yelling, 'Put your hand behind

your back, just put them behind your back'" because Farmer "was holding [his hands] underneath" of himself.

Eventually, the officers got Farmer's arms out from under him and handcuffed him. When they stood up, Farmer "was still bouncing around, trying to pull away[,]" and "just cussing and just being belligerent basically." It took three officers to carry Farmer to the police cruiser and get him inside.

Officers called an ambulance for Farmer as he sat inside the cruiser, banging his head on the window. Hicks, who had made the 9-1-1 call, told Officer Miller, "We don't want any charges, just get him out." Meanwhile, members of Farmer's family who had come outside were "getting irate," so the officers decided to just leave and take Farmer to jail, where he had the taser darts removed (except for one that still remains lodged in the bone of his arm). The next morning, Officer Miller brought Farmer to the Detention Center and filed a statement of charges, which outlined his probable cause for arresting Farmer for second-degree assault and disorderly conduct. The State later charged Farmer with resisting arrest as well.

B. The Conclusion of Trial

After Officer Miller testified, the State rested its case. Farmer moved for judgment of acquittal on all three counts. With regard to the resisting arrest charge, Farmer argued that the State failed to show that Farmer knew a law enforcement officer was arresting or attempting to arrest him, and that passive resistance or swatting away an officer's hand does not amount to the physical force required to prove resisting arrest. The State responded that it wasn't Farmer's swatting of Officer Miller's hand that constituted

resisting arresting in this case—it was his attempts to get up when he was subdued on the ground, the minutes it took officers to get Farmer's arms behind his back, and Farmer's refusal to get in the police car.

After the trial court denied the motion for all three counts, the defense rested and renewed its motion, which the court denied again. The jury deliberated and found Farmer not guilty of disorderly conduct and second-degree assault but found him guilty of resisting arrest. On May 17, 2018, the court sentenced Farmer to three years in prison, with all but 60 days suspended. Farmer noted his timely appeal to this Court one week later.

We include additional facts in the discussion as necessary.

DISCUSSION

I.

Officer Miller's Testimony

Farmer argues that permitting Officer Miller to testify to out-of-court statements violated both the Maryland Rules of Evidence and the Confrontation Clause of the United States Constitution. The State asserts, however, that Farmer failed to preserve these objections for our review and that any error, if considered, was harmless. We address these arguments in turn.

A. Preservation

The State contends Farmer failed to preserve his hearsay objections during Officer Miller's testimony because, after the trial court overruled his objections, Farmer "did not request a continuing objection and did not object when Officer Miller subsequently related out-of-court statements by another officer and Hicks." Additionally, the State asserts that

we cannot consider the admissibility of Officer Miller's testimony about the 9-1-1 call sheet after Farmer waived any objection by agreeing with the State's redactions of that document and stating that he had no objection to the admission of the call sheet as redacted.

Farmer replies that the State "misconstrue[s] establish Maryland caselaw and ignore[s] the repeated objections Farmer raised to the introduction of out-of-court statements at trial." Specifically, Farmer asserts that the timing of his hearsay objection made clear that he was objecting to the State's line of questioning, and that he "repeatedly objected to the admission of out-of-court statements suggesting that he had an alleged propensity to fight police." As to the 9-1-1 call sheet, Farmer avers that he was not required to take formal exception at the time the court admitted the call sheet because he had already made his objection known to the court.

Prior to trial, Farmer moved *in limine* to suppress out-of-court statements that Hicks and the dispatch officer made to Officer Miller, as well as the statements contained in the police call sheet that said Farmer "fights the police" and will try to fight Officer Miller, and that he was "acting crazy" and "tearing up [the] house." Farmer argued that these statements were: (1) hearsay, (2) irrelevant, (3) more prejudicial than probative because Officer Miller could testify to his own observations of Farmer, (4) improperly showed that Farmer had a propensity for fighting the police, and (5) violated Farmer's constitutional right to confront witnesses against him because Hicks was not available to testify. The State responded that the statements were all relevant for showing Officer Miller's state of mind and should be admitted with a limiting instruction telling the jury to consider the

statements only for that purpose. Agreeing with the State, the court ruled it would allow the statements and "give a limiting instruction."

When Officer Miller began testifying at trial about his response to the call at Lizzy's Place, Farmer renewed his objection based on hearsay, reliability, prejudice, and the Confrontation Clause of the Sixth Amendment. The trial judge overruled the objection. The trial judge also overruled Farmer's objection to Officer Miller's testimony that Hicks told him Farmer was tearing up the house and that the officer on the radio told him "[Farmer's] going to fight you." The State continued its line of questioning, asking Officer Miller what Hicks said when he arrived on the scene. Officer Miller testified that Hicks told him, "My brother is going crazy. You know, he's done this before. He's either drunk or on something. And you better get more officers here because he's going to fight you." The State then sought to reiterate the point, asking: "Okay, so he specifically said to get the . . . that he was going to fight you?" Officer Miller responded, "Oh yea. *He said, 'You better get more officers here, because he's going to fight you.' And I said, 'I was made aware of that.* I'm not going anywhere.'" (Emphasis added).

Maryland Rule 8-131(a) provides that appellate courts will not, ordinarily, decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" The Court of Appeals has instructed that a party forfeits an objection "if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008). But, as the Court of Appeals reiterated recently, a defendant does not necessarily forfeit an appellate issue by failing to reassert objections, already overruled, if doing so "would only spotlight for the jury the remarks of the State."

State v. Robertson, 436 Md. 342, 366-67 (2019) (quoting *Johnson v. State*, 325 Md. 511, 515 (1992)) (brackets omitted).

In *Robertson*, the defendant objected immediately when the State began its line of inquiry about the statements at issue, the trial court overruled the objection, and the State continued its line of questions without further objection. *Id.* at 366. The Court of Appeals held that "defense counsel's initial objection to the State's continuing line of questioning was sufficient" because "[c]ontinuing objections would have been futile and would likely spotlight for the jury the remarks of the State." *Id.* at 377 (internal quotations omitted).

The same principle applies here. Farmer raised the issue for the circuit court when he moved *in limine* to suppress Officer Miller's testimony on the out-of-court statements and renewed his objection when Officer Miller took the stand. Significantly, Farmer objected a third time as soon as the State began eliciting the out-of-court statements at issue. The court overruled Farmer's objection, "demonstrat[ing] that [the court] was permitting the [State] to continue along the same line[,]" and making clear that the court's "ruling on further objection would be unfavorable to the defense." *Johnson*, 325 Md. at 515. We are satisfied that Farmer's objection to the State's continuing line of questioning raised the issue sufficiently at trial, allowing the trial court to decide the issue in the first instance. Md. Rule 8-131(a).

Similarly, we disagree with the State's contention that Farmer waived any objection to the police call sheet. When the State sought to admit the call sheet, Farmer objected to its inclusion of "conclusory statements that are made by other individuals, and I don't know who made them, that an assault on a police officer occurred," as well as "references [to]

him being incarcerated at the jail[.]" Farmer's counsel noted that Officer Miller could testify to his own observations about Farmer's behavior throwing things around,

> rustling about in the house, . . . doing something to the front door that was arguably destructive, and again, being loud, and using profanity, and that sort of thing.
>
> So, to say that the need to put in otherwise inadmissible hearsay from a witness that's not going to be offered for cross-examination today is . . . duplicative, number one. And then, number two, that also diminishes whatever probative value the State is arguing weighs into this whole equation.

The court sustained Farmer's objection to the call sheet's reference to his incarceration, but not the other objected-to statements by the unidentified individuals, and the parties then discussed which portions the State should redact. At the close of the State's case, the Stated moved to enter the redacted call sheet into evidence. The court asked if Farmer had any objection to the admission of the call sheet, and Farmer replied, "No, it's the redacted one, right?" The State agreed that it was the redacted version and the court admitted the document as State's Exhibit 2.

The State would have us read Farmer's agreement to the admission of the redacted call sheet as a waiver of his prior objection to the call sheet's inclusion of the unidentified individuals' statements. We think a more fair and reasonable reading of Farmer's response was that he was satisfied that the State had redacted the call sheet in the manner the court had ordered, not that he was satisfied with the court's prior ruling and was withdrawing his prior objection. Accordingly, we conclude that Farmer's assignment of error to the court's admission of the 9-1-1 call sheet is also preserved for our review. *See* Md. Rule 8-131(a).

B. Out-of-Court Statements

Farmer challenges the admission of Officer Miller's testimony to out-of-court statements concerning Farmer's "alleged propensity to fight police," including statements made by Hicks and another police officer over the radio and statements appearing on the police dispatch call sheet.[2] According to Farmer, it is "unclear on what ground the [c]ircuit [c]ourt permitted Officer Miller to testify." He insists that these statements were not admissible for the non-hearsay use of showing Officer Miller's state of mind because Officer Miller's state of mind was not relevant to the elements of the three crimes with which Farmer was charged: (1) disorderly conduct; (2) second-degree assault; and (3) resisting arrest. To the extent that Officer Miller's state of mind was material in determining whether he had probable cause to arrest, Farmer highlights that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probably cause," quoting *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004), and citing *McCorkick v.* State, 211 Md. App 261, 270 (2013). Further, Farmer continues, even if the out-of-court statements were relevant for the non-hearsay use of showing their effect on Officer Miller, the statements had little probative value and were "mere surplusage" because Officer Miller saw Farmer tearing up his home and cursing the police. Finally**,** he maintains that the state-of-mind exception to the rule against hearsay is inapplicable here because that rule operates to prove the state of mind of the declarant (here, the dispatch

[2] Farmer also asserts that the admission of these statements violated his constitutional right to confrontation. We do not need to address Farmer's constitutional arguments because we hold that the trial court erred under our laws of evidence in admitting the extrajudicial statements. *See Graves v. State*, 334 Md. 30, 38 (1994).

officers and Farmer's brother—*not* Officer Miller), and the states of mind of Hicks and the dispatch officers are "equally immaterial" to proving the crimes charged.[3]

The State responds that the statements had relevant, non-hearsay purposes because Officer Miller "reasonably believed them to be true," which was relevant to establishing two contested issues at trial: that (1) Officer Miller had probable cause to arrest Farmer and (2) was objectively reasonable in using force to effect that arrest.

The Maryland Rules prohibit the admission of hearsay "[e]xcept as otherwise provided by the[Maryland Rules] or permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5-802. Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "[T]estimony is not hearsay merely because the witness

[3] Farmer is correct that the state-of-mind exception to the rule against hearsay has no applicability in this case. As his trial counsel pointed out, these are "conclusory *statements* that are made *by other individuals*, and I don't know who made them, *that an assault on a police officer occurred.*"

As relevant to this case, Maryland Rule 5-803(b)(3) provides for an exception to the rule against hearsay for "statement[s] of *the declarant's* then existing state of mind, emotion, sensation, or physical condition . . . offered to prove the declarant's then existing condition or the declarant's future action, *but not including a statement of memory or belief to prove the fact remember or believed*[.]" The exception does not apply when the proponent seeks "to prove a fact that purportedly happened before the statement was made." *Edery v. Edery*, 193 Md. App. 215, 234 (2010) (quoting 6A LYNN MCLAIN, MARYLAND EVIDENCE § 803(3):1 at 198-99 (2001)).

In this case, Rule 5-803(b)(3) does not apply because the State offered the statements to prove Officer Miller's state of mind—not the states of mind of the declarants (Hicks, the dispatch officers, and the unknown declarant on the 9-1-1 call sheet). Further, the statements were not covered by the rule because the declarants conveyed "memory or belief to prove the fact remembered or believed," *i.e.*, that Farmer has fought police officers in the past. Finally, the states of mind of the declarants were not relevant to proving the crimes for which Farmer stood trial.

testifies about words spoken by another person outside of court." *Wallace-Bey v. State*, 234 Md. App. 501, 536 (2017). As the definition sets out, the declaration must be both a statement *and* offered for the truth of the matter asserted. *Id.*

In this case, it is uncontested that the out-of-court declarations were statements. The State contends, however, that the statements were not hearsay because they were not admitted for the truth of the matter asserted, but instead, were relevant for the permissible *non*-hearsay use of showing the effect the statements had on Officer Miller's determinations that probable cause existed to arrest Farmer and reasonable force was necessary to effect that arrest. *See, e.g.*, *Banks v. State*, 92 Md. App. 422, 434 (1992) ("Statements offered, not to prove the truth of the matters asserted therein, but as circumstantial evidence that the declarant had a particular state of mind, when that state of mind is *relevant*, are not hearsay." (citation and ellipses omitted)). But relevance alone does not resolve admissibility because "evidence must [] be both relevant *and* not unduly prejudicial." *Id.* (emphasis added).

The Maryland Rules set out this standard of admissibility. Evidence is relevant if it "tend[s] to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Relevant evidence is admissible unless prohibited by constitutional law, statutes, or the Maryland Rules, "or by decisional law not inconsistent with th[o]se rules." Md. Rule 5-402. Even if otherwise admissible, however, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste

of time, or needless presentation of cumulative evidence." Md. Rule 5-403. When a party challenges the relevancy of evidence admitted at trial, this Court reviews *de novo* the trial court's relevancy determination but reviews for abuse of discretion the trial court's decision to admit or exclude relevant evidence. *Williams v. State*, 457 Md. 551, 563 (2018) (citations omitted).

In this case, we need not hold that Officer Miller's testimony was irrelevant to hold that the trial court erred by permitting the officer to testify to the prejudicial out-of-court statements at issue. *See Banks*, 92 Md. App. at 434. The Court of Appeals' decision in *Graves v. State* is instructive on this point. 334 Md. 30, 33 (1994). The Court in *Graves* also examined the admissibility of out-of-court statements made to a police officer during an investigation. Officer Reynolds, the investigating officer in *Graves*, interviewed Kenneth Trusty, who identified Graves as his accomplice. *Id.* at 34. At trial, Trusty did not testify but the State called Officer Reynolds to the stand and asked him whether Trusty identified his accomplice. *Id.* at 35. Over Graves's objection, the court permitted Officer Reynolds to testify that Trusty identified his accomplice as Graves and that Officer Reynolds recorded this identification in his investigatory notebook. *Id.* The court also admitted Officer Reynolds' notebook into evidence. *Id.* at 36.

After this Court affirmed the trial court's evidentiary ruling, he petitioned for *certiorari*, challenging the admission of both Officer Reynolds' testimony relaying Trusty's identification of Graves, as well as Officer Reynolds' notebook. *Id.* at 33. The Court of Appeals began its discussion by emphasizing the distinction between the inadmissibility of hearsay as evidence of guilt or innocence and the admissibility of hearsay

when it is directly relevant to issues like probable cause or the lawfulness of an arrest. *Id.* at 38-40. When dealing with the latter—specifically, testimony by a police officer relaying the specific complaints of witnesses about the crime at issue—the Court cautioned that such statements may be "of misleading probative force" and "likely to be misused by the jury as evidence of the fact asserted." *Id.* at 39-40 (citations omitted). "This limitation on the admission of extrajudicial statements relied upon to justify police conduct is in accord with the well-settled rule that the trial court, in its discretion, may exclude relevant evidence if it believes that the probative value of the evidence is substantially outweighed by the dangers of unfair prejudice, confusion of the issues or misleading the jury." *Id.* at 40 (citations omitted).

Applying this concept to Graves's case, the Court reasoned that "when Officer Reynolds' testimony that Trusty told him that Graves was his accomplice was offered before the jury, its only possible relevance as nonhearsay at the guilty/innocence stage was to demonstrate that the investigating officer relied on that information[.]" *Id.* at 42. Because Officer Reynolds could have explained that conduct "just as effectively" by testifying that he acted "on information received," the Court concluded that the limited probative value of Officer Reynolds' testimony was outweighed by "the unfair prejudice to [Graves] because of the likelihood that the jury would misuse that information as substantive evidence of guilt[.]" *Id.* at 42. For this reason, the Court also concluded that the trial court abused its discretion by admitting Officer Reynolds' notebook, which contained the out-of-court statement. *Id*. at 42-43.

The Court of Appeals in *Parker v. State* revisited "the risk inherent in admitting an informant's statement implicating the defendant through the testimony of a police officer, purportedly for a non-hearsay purpose." 408 Md. 428, 430 (2009). Parker was arrested by Detective McGowan after "an informant told him that a black male wearing a blue baseball cap and black hooded sweatshirt was 'at the corner of Cary and Laurens selling heroin from his person, meaning the drugs were on him.'" *Id.* at 431. Parker raised a hearsay objection to Detective McGowan's testimony relating the specifics of the informant's statement, but the trial court overruled based on the State's representation that the testimony was offered for its effect on Detective McGowan, not the truth of the informant's tip. *Id.* at 435. After reiterating the holding of *Graves*, the Court observed that jury could have "misuse[d] the informant's information as substantive evidence of Parker's guilt." *Id.* at 443. The Court reasoned that "the timing and particularity of the description, without evidence that there were other individuals wearing this type of clothing, left the jury with the virtually inescapable inference that the individual observed by the informant selling heroin at the corner of Cary and Laurens was Parker, who was wearing exactly these clothes when arrested." *Id.* Accordingly, the Court held that Detective McGowan's testimony "was inadmissible hearsay because it contained too much specific information about the defendant and his criminal activity to be justified by the proffered non-hearsay purpose of establishing why the detective was at the intersection." *Id.* at 431.

Applying the teachings of *Graves* and *Parker*, we assess the risks inherent in the proffered non-hearsay use of Officer Miller's testimony in this case, and after weighing those risks against the limited probative value of his testimony, we conclude that it was an

abuse of discretion to permit Officer Miller to testify about the out-of-court statements made by the dispatch officer and Farmer's brother.

On the one side of the balance was the very limited probative value of Officer Miller testifying to the out-of-court statements. Officer Miller related that the dispatch officer and Hicks both cautioned him that Farmer fights police officers. He then testified that he personally observed Farmer "acting really, like, crazy" and threatening to "F up the police" no fewer than 40 times. Officer Miller also testified at least four other times that Farmer threatened to fight him and "squar[ed] up" like he was going to fight Officer Miller. Given Officer Miller's testimony relaying his repeated first-hand observations of Farmer threatening to fight the police, the increased marginal value of Officer Miller also testifying that others had told him of Farmer's penchant for fighting the police was minimal, at best. *See Graves*, 334 Md. at 42. Similarly, the statement by an unidentified declarant on the 9-1-1 call sheet that Farmer "fights the police" added little probative value given Officer Miller's in-court testimony to the same effect.

On the other side of the balance was the danger of unfair prejudice to Farmer that the jury would likely "misuse that information as substantive evidence of [Farmer's] guilt." *Graves*, 334 Md. at 42. That danger was particularly prevalent in this case because Officer Miller was the State's only witness.

Even though the State proffered that Officer Miller's testimony was for the non-hearsay purpose of showing the effect of Farmer's statements on Officer Miller, like in *Graves* and *Parker*, the limited probative value of those statements in showing the existence of probable cause or the reasonableness of Officer Miller's use of force "was

greatly outweighed by its unfair prejudice to [Farmer] because of the danger of misuse by the jury." *Graves*, 334 Md. at 43. Accordingly, the trial court abused its discretion by allowing Officer Miller to testify to those out-of-court statements. *See* Md. Rule 5-403.

C. Harmless Error

To show the harmlessness of any error in the admission of these statements, the State points to the fact that the jury found Farmer not guilty of two of the three charges against him, and notes that Farmer attempted to use the statements to his benefit by arguing in closing that Officer Miller was acting on assumptions and a preconceived notion of Farmer rather than the facts.[4] Farmer insists that admission of these statements cannot be harmless error because they tainted the jury's impression of him and because the State highlighted the statements in its closing argument.

When a criminal defendant establishes error on appeal, we will generally reverse the judgment below unless the State proves, "beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dorsey v. State*, 276 Md. 638, 659 (1976). We may find an error to be harmless only if, on our review of the record, we are "satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Id.*

[4] We reject the State's contention that Farmer's attempts at trial to limit the impact of these closing statements should be held against him on appeal. When the trial court admits evidence over a party's objection, that party may still cross-examine witnesses about the evidence "and make other reasonable efforts to show that the evidence, admitted over his objection, should nevertheless be discounted or disregarded by the trier of fact." *Mayor & City Council of Baltimore v. Smulyan*, 41 Md. App. 202, 219 (1979).

The harmless-error analysis in this case is straightforward, having already determined that the hearsay testimony of Officer Miller, the State's only witness, was prejudicial. Considering the State's case depended on Officer Miller's testimony, permitting him to relay similar statements by other non-testifying observers who expressed familiarity with Farmer effectively bolstered the credibility of Officer Miller's own observations—especially because those non-testifying observers were another police officer and Farmer's own brother. And, in the case of the 9-1-1 call sheet, we do not even know the declarant of the statement. The cumulative effect of the trial court permitting the jury—in a trial for the assault of a police officer—to know that the defendant's sibling, a non-testifying police officer, and another unidentified speaker all said that the defendant had a propensity for fighting the police was prejudicial to Farmer. Because we cannot say, beyond a reasonable doubt, that the admission of Officer Miller's testimony did not influence the jury in this case, we must vacate Farmer's conviction.

II.

Resisting Arrest

We must also address Farmer's argument that he was entitled to judgment of acquittal on the count for resisting arrest because, if he prevails on this issue on appeal, "there can be no new trial." *See Sewell v. State*, 239 Md. App. 571, 606 (2018) (brackets omitted) (quoting *Bloodsworth v. State*, 307 Md. 164, 167 (1986)). Farmer argues that the trial court erred in denying his motion for judgment of acquittal for the crime of resisting arrest on the theory that Officer Miller lacked probable cause to arrest him for disorderly conduct. According to Farmer, his arrest was unlawful "[b]ecause there was no evidence

that Farmer was in a public place or engaging in conduct that was intentionally disturbing the peace."

The State argues that Farmer failed to preserve this issue as well because he challenged the sufficiency of the evidence for resisting arrest on different grounds before the trial court than before this Court. We agree.

In his motion for judgment of acquittal, with respect to the charge of resisting arrest, Farmer argued that the State had not met its burden of proving that Farmer knew he was under arrest or that he intentionally refused to submit to the arrest. He also asserted that neither passive resistance nor swatting away Officer Miller's hand was sufficient to prove he resisted. But Farmer did not raise before the trial court, as he does on appeal, his theory that Officer Miller lacked probable cause to arrest him. Accordingly, Farmer failed to preserve this contention for our review. *See* Md. Rule 8-131.

III.

Jury Instruction

Because the issue concerning Farmer's proposed jury instruction is likely to reoccur on remand, we will address the issue to provide guidance to the trial court. At Farmer's trial, he proposed the following non-pattern jury instruction that his counsel drafted on a defendant's right to use force in response to an officer's excessive force:

> You have heard evidence that officer(s) used force in arresting Mr. Farmer. If you find that the police officer(s) used more force than was reasonably necessary to arrest Mr. Farmer, then Mr. Farmer was entitled to use reasonable force to resist the officer's excessive force. This is a complete defense and you are required to find the Defendant not guilty in such a circumstance.

The State objected to the instruction because there was no evidence that Officer Miller used excessive force, the instruction did not explain how the jury should decide what force was "reasonably necessary to arrest Mr. Farmer," and the last sentence on the requirement to find Farmer not guilty was a "loophole that [Farmer was] trying to put in to just make it an obvious [] not guilty."

The trial judge agreed that there was nothing excessive about Officer Miller's use of force considering Farmer struck him in the chest when he tried to arrest Farmer. Farmer then argued that the excessiveness (or not) of Officer Miller's force was a jury question. The trial judge responded that the instruction would "confuse the jury." Farmer noted his objection for the record and renewed the objection after the court instructed the jury.

Farmer contends on appeal that the trial court erred by failing to instruct the jury about his right to respond to an officer's unreasonable use of force because the requested instruction (1) accurately stated the law; (2) was supported by the facts of his arrest; and (3) was not fairly covered by the instruction on resisting a warrantless arrest because nothing in that instruction "would permit a jury to conclude that Farmer was justified in responding to Officer Miller's excessive use of force."

The State responds that the trial court was right to decline giving Farmer's proposed instruction "because it d[id] not accurately state the law pertaining to the defendant's right to use reasonable force to defend himself against an officer's alleged use of excessive force in effecting arrest[.]" Specifically, the State contends that his proposed instruction would have instructed the jury that he had a broader right of self-defense against the police than exists against ordinary citizens.

The purpose of jury instructions is "to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict. Jury instructions direct the jury's attention to the legal principles that apply to the facts of the case." *General v. State*, 367 Md. 475, 485 (2002) (citations omitted). Maryland Rule 4-325 governs instructions to the jury in criminal cases. Subsection (c) states,

> 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. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Md. Rule 4-325(c).

The Court of Appeals has interpreted the rule as requiring trial courts to give an instruction a party requests "when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197-98 (2008) (citations omitted). Only the first element, whether an instruction is a correct statement of law, "is independent of the facts of the case in which it is given[.]" *Thompson v. State*, 393 Md. 291, 303 (2006). We review *de novo* whether the instruction stated the law correctly and whether the evidence was sufficient to generate the instruction. *Howell v. State*, 237 Md. App. 540, 562 (2018) (citation omitted). The decision of whether to give the requested instruction, we review for abuse of discretion. *Albertson v. State*, 212 Md. App. 531, 551-52 (2013).

According to the notes of the Maryland State Bar Standing Committee on Pattern Jury Instructions, when a defendant is charged with resisting arrest, "[i]f there is evidence

that the officer used excessive force and that the defendant acted in self-defense, the court should modify the instruction as needed. *See* MPJI-Cr 5:07 (Self-Defense)." Maryland Pattern Jury Instructions—Criminal ("MPJI-Cr") 4:27.1 RESISTING ARREST (WARRANTLESS) (2018). Maryland Pattern Jury Instruction 5:07, which governs self-defense, states that trial courts should instruct the following when a defendant is charged with an assaultive crime and the issue of justification is generated by evidence of self-defense:

> You have heard evidence that the defendant acted in self-defense. Self-defense is a complete defense and you are required to find the defendant not guilty if all of the following four factors are present:
>
> (1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];
>
> (2) the defendant actually believed that [he] [she] was in immediate or imminent danger of bodily harm;
>
> (3) the defendant's belief was reasonable; and
>
> (4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual harm.
>
> * * *
>
> In order to convict the defendant, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty, unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete self-defense was absent.

MPJI-Cr 5:07 SELF-DEFENSE.

Farmer's proposed instruction stated the law incorrectly. The second sentence of Farmer's proposed instruction overstates the law in his favor: "If you find that the police officer(s) used more force than was reasonably necessary to arrest Mr. Farmer, then Mr. Farmer was entitled to use reasonable force to resist the officer's excessive force." The first clause fails to explain to the jury how and when an arresting officer may use force that

might otherwise constitute assault. In doing so, the first clause of the second sentence fails to aid the jury in understanding the law and how to apply that law to the facts of the case. *See General*, 367 Md. at 485.

The second clause of the second sentence, regarding Farmer's right to respond with reasonable force, does no better at elucidating the law for the jury. As the State points out correctly, *if* there is sufficient evidence of excessive force, a proper instruction would have directed the jury to the four elements of self-defense. Farmer's proposed instruction lacks all four of these elements—that he not be the first aggressor, that he have a reasonable and actual belief that he was in imminent or immediate threat of bodily harm, and that he respond with no more force than was reasonably necessary. With no instruction on the elements of self-defense, the jury could not know how to determine the reasonableness of the force that Farmer used to resist Officer Miller. The jury would also not know to—or how to—assess whether Farmer was the first aggressor when he struck Officer Miller on the chest before Officer Miller deployed his taser.

Finally, the third sentence of the proposed instruction ("This is a complete defense and you are required to find the Defendant not guilty in such a circumstance.") again falls short of providing the jury a complete and accurate explanation of the law. Farmer's instruction would have left the jury with the impression that it was required to find him not guilty if the jury determined the amount of force he used was reasonable—again, without consideration of the other three elements of a complete self-defense. Put simply, Farmer's instruction was an incorrect statement of law. We discern no abuse in the trial court's discretion to deny his proposed instruction.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY ON COUNT II (RESISTING ARREST) VACATED; CASE REMANDED TO THE CIRCUIT COURT. CHARLES COUNTY TO PAY COSTS.