Circuit Court for Prince George's County
Case No. CT170241X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 690

September Term, 2018

GEORGE MERKEL

v.

STATE OF MARYLAND

Arthur,
Leahy,
Beachley,

JJ.

Opinion by Leahy, J.

Filed: May 9, 2019

While on patrol in Prince George's County, Officer George Merkel attempted to rouse an elderly, homeless woman, Ruth Woldeab, who was sleeping at the entrance of a pawn shop. After Woldeab failed to respond to his verbal commands, he picked her up by her ears until she was standing. When she turned to walk away, Merkel slapped her face. Two other officers at the scene reported Merkel's conduct to their common supervisor. Merkel was subsequently indicted for second-degree assault and misconduct in office.

After a two-day bench trial, the court found Merkel guilty of both charges. Merkel filed a timely appeal to this Court, presenting one question for our review:

> "Was the evidence sufficient to support the verdicts of guilty as to second[-] degree assault and misconduct in office?"

We affirm the ruling of the circuit court. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Merkel used force greater than that reasonably necessary to fulfill his duties, constituting the essential elements of both second-degree assault and official misconduct.

BACKGROUND

During a two-day trial, which took place on November 13 and 14, 2017, three witnesses testified for the State: Officers Tawnya Ramirez and Noel Andres, who observed the incident, and William Gleason, an expert in use of force and Acting Commander of the Advance Officer Training Section of the Prince George's County Police Department. Merkel testified in his own defense, and four character witnesses testified on his behalf: longtime friends Tim Jumbulick and Christopher Grimes, and two colleagues from the

police department, Jaron Black and John Decker. The following facts are derived from the testimony and other evidence presented at trial.

In the early morning hours of September 22, 2016, Merkel, on patrol in Lanham, Maryland, stopped near a 7-Eleven where homeless people were known to sleep and panhandle. Merkel observed Woldeab, a 5'5", thin, elderly, and homeless woman, sleeping on the doorstep of a closed pawn shop.

Merkel called in a "Signal 7 stop" on his radio, notifying other officers that he intended to question a citizen. Merkel approached Woldeab, woke her up, and repeatedly asked her to leave. Woldeab sat up and seemed distant. With a blank stare she repeated the last word of sentences Merkel spoke to her; when he said "let's go," she repeated "go?" and when he said "it's time for you to leave," she replied "leave?"

Andres was in an adjacent plaza for a premises check when he heard Merkel's call. He quickly joined Merkel. Ramirez, also on patrol that evening, heard Merkel's call and joined Andres and Merkel about two minutes later. By the time Ramirez arrived, Merkel was screaming at Woldeab to get out of town as she sat cross-legged on the ground. Merkel put on his gloves. Andres, expecting to assist, began to put on gloves. Merkel then grabbed Woldeab by her ears and pulled her up, off the ground, into a standing position. Merkel continued to yell at Woldeab and then struck her face.

Then, Woldeab screamed "[y]ou hit me[.]" Merkel replied "[y]es, ma'am, it's time for you to go." Woldeab replied "I need my shoes." When she moved to get her shoes, Merkel got in her way. She tried to walk around Merkel, and then Merkel kicked over her Popeye's soda cup. Woldeab then walked toward the beltway, and Merkel drove off.

Andres and Ramirez discussed what to do about the incident with fellow officers, and decided to report the incident to their supervisor that same night. Merkel was ultimately charged with second-degree assault and misconduct in office.

Officers' Testimony

At trial, Ramirez testified that Merkel "grabbed the victim by both of her ears and pulled her off the ground." To her knowledge, Merkel had not engaged the pressure point behind the ears that police officers are trained to use in certain situations. Ramirez characterized Merkel's ear-grab as "[l]ike a mom picking up her child by the ears[.]" Once Woldeab was standing, Merkel "yelled at her to get out of his fucking town." Then, "he smacked her across the head with an open hand."

Merkel's slap was "[h]ard enough to make [Woldeab] move," after which Woldeab "stumbled to the side" and "screamed . . . '[y]ou hit me on the small of my head. You're supposed to be the police." Ramirez stated that Merkel asked Woldeab to start walking toward the beltway, but instead of following his direction, Woldeab asked if she could get her drink. When "she went down to reach for it, [] Merkel kicked it away from her hand." At that point, Woldeab left. Throughout the entire encounter, Merkel repeatedly screamed "get the fuck out of my town." Ramirez described Woldeab as "[d]istant" throughout the encounter, and that she "didn't seem like she was really comprehending anything."

Andres similarly described Woldeab as "kind of disoriented, kind of looking around as if she didn't understand what was going on[,]" and that he did not think she was "aware of what was going on." He testified that Merkel, in a "[h]igh pitch tone, [and in a] little angry, agitated" voice, told Woldeab to "get the fuck out of my town." He "grabbed

[Woldeab] by the ears" and "[k]ind of pulled her off the ground," causing Woldeab to "scream and yell." Then, Merkel "let go of her ears and [Woldeab] was . . . trying to walk away. That's when [Merkel] proceeded to smack her in the face." When Merkel "smack[ed] her with his right hand on the right side of her face," Woldeab "grabbed the right side of her face[.]" Only about a minute passed between the ear-pulling and the smack. Andres also clarified that he did not observe Merkel engaging the pressure point behind Woldeab's ears the way that police officers are trained to do in certain situations.

Andres recalled that after the smack, Woldeab "tried to get her slippers that were nearby," but "Merkel got in her face." When Woldeab "tried to walk around [Merkel] and grab the slippers[,]" Merkel kicked over Woldeab's Popeye's soda cup. Andres could not remember whether Woldeab was able to retrieve her slippers.

Andres testified that after the incident, he was "kind of in shock of what went on." After he left the scene, he pulled up next to Ramirez's cruiser. Then, he and Ramirez "met up with a few other squad mates to discuss the issue[.]" They "discussed what had happened" with their squad mates, and then informed their supervisor.

Gleason, the State's use-of-force expert, testified that officers are permitted to "use a respectful and necessary amount of force to achieve a lawful objective," and that there are four circumstances in which an officer can use force: (1) "to protect themselves or others from assault," (2) "to prevent escape," (3) "to effectuate a legal arrest," and (4) "to overcome resistance to a lawful order." The fourth circumstance can involve two types of resistors: passive and active. An active resistor is someone making "physically evasive movements to defeat the officer's attempt at control, such as bracing, tensing, pulling

away[,] or also verbally manifesting their intent to resist[.]" A passive resistor is someone "nonresponsive to verbal direction." Gleason characterized Woldeab as a passive resistor.

Gleason described a "5-level" continuum of force taught during officer training, which "help[s] officers understand different force options available to them, given certain levels of resistance." Force level one involves no force, and is for individuals who are "cooperative and compliant[.]" Level two is for individuals who are "passive" or "nonresponsive," for whom officers are trained to "continue[] verbal direction" and then to use "escort technique," such as "[j]ust grabbing somebody by the arm and lifting them up and moving them in the direction that you need them to move." Force levels three through five are for occasions of "active resistance," in response to which officers may "use intermediate personal weapons strikes . . . takedowns, pressure points, things like that." Gleason explained that officers are trained to conduct "flesh grab[s,]" which consist of "grabbing nerve endings just to get a response to [] distract that person[,]" only in instances of active resistance. He characterized slaps as "a stun and distraction technique [to] assist [] an officer in overcoming" active resistance.

Gleason agreed during cross-examination that some force was necessary to move Woldeab, but clarified on redirect that a "flesh grab" is not an appropriate technique to apply to a passive resistor. He testified further that officers are not taught to slap the faces of individuals who are passively resisting, nor to slap to "get a person's attention," nor to slap as an "escort tactic."

After Gleason's testimony, Merkel moved for acquittal on both counts, which the court denied.

Defense's Case

Merkel testified in his own defense. He recounted asking Woldeab to leave the premises, and her responding with a "blank, hollow stare." When she remained unresponsive, he raised his voice, and started to shout "get the fuck out of my town." When Woldeab still did not move, he "attempted to escort her[,]" "pick[ing] her up using a mandibular angle lift" by placing his hands "up under her jaw and . . . up on the side of her head[.]" He then then gave her a "[t]ap on the cheek[.]" Merkel demonstrated the tap for the court, describing it as "kind of gentl[e] on the side of [Woldeab's] cheek." He claimed the purpose of the strike was "[t]o attempt to get her focus." Merkel acknowledged that as a 5'11", 230-pound man, he could have hurt Woldeab "with no problem," had he wanted to. On cross examination, Merkel admitted that Woldeab was not an active resister and that the "tap on the face" was a use of force.

The court then heard testimony from Merkel's character witnesses. Jumbulick testified that he had been friends with Merkel for over 20 years and that Merkel was "very honest and very upstanding." Grimes testified to being friends with Merkel for about 40 years and attested that Merkel "is honest."

Black testified that he had worked with Merkel since Merkel's suspension and reassignment to the Community Service Division, and that Merkel had been helpful to him. He said Merkel was a truthful person. Decker, Merkel's supervisor for 14 and a half years, testified that Merkel was "a good man," and agreed that the incident with Woldeab was out of character. Decker also testified that he spoke with Andres the night of the incident, but when Internal Affairs became involved shortly thereafter, he was not further updated.

At the close of the defense's case, Merkel renewed his motion for acquittal, which the court denied.

Ruling

After closing arguments, on November 14, 2017, the court found Merkel guilty of both charges. The court declared that its verdict was "guided by two things which [it] deem[ed] somewhat extraordinary": (1) Merkel's slap "was such that it created an impression immediately upon two sworn law enforcement officers to take some action immediately"; and (2) the "actions of the homeless woman herself"— it was "clear from the testimony of everybody that she was incoherent. However, when she was slapped, all the witnesses agreed that even her sensibilities were offended." The Court concluded: "I cannot ignore the evidence in this case. It was an unconsented[-]to touching. That's common law battery; and, consequently, that is misconduct in office under the circumstances. So I am persuaded beyond a reasonable doubt the State has proven its case."

On May 3, 2018, the court sentenced Merkel to six months' incarceration, all but 14 days suspended, for each conviction, to be served concurrently. Upon his release, Merkel would be placed on supervised probation for six months. Merkel timely appealed to this Court on May 25, 2018.

DISCUSSION

Merkel argues that there is insufficient evidence to support his conviction because the force he used against Woldeab was objectively reasonable under the circumstances, particularly in light of the discretion afforded police officers making split-second decisions

in the line of duty. The State counters that Merkel's use of force was unreasonable because Woldeab "did not pose any threat to Merkel" or others' safety, the circumstances were not exigent, and Merkel's use of force did not comport with his police officer training.

When an action is tried before a judge, we review the court's findings of fact for clear error, and the court's legal findings *de novo*. Md. Rule 8-131(c); *Howell v. State*, 237 Md. App. 540, 553 (2018). "[W]e defer to the fact finder's resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Riley v. State*, 227 Md. App. 249, 255 (2016) (internal quotations omitted).

When an appellant challenges the sufficiency of the evidence, we review "the evidence and any reasonable inferences therefrom in the light most favorable to the State," determining if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Sewell v. State*, 239 Md. App. 571, 607 (2018) (internal quotations omitted). "[O]ur concern is not whether the trial court's verdict is in accord with what appears to be the weight of the evidence," but instead is "whether the verdicts were supported with sufficient evidence[.]" *State v. Albrecht*, 336 Md. 475, 478-79 (1994) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Sufficient evidence is direct or circumstantial evidence, or evidence supporting a rational inference, that "could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *Id.* at 479.

We begin with the essential elements of each crime for which Merkel was convicted. An "'[a]ssault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." Maryland Code (2002, 2012 Repl. Vol.), Criminal

Law Article ("CL") § 3-201(b). Second-degree assault, which is found in CL § 3-203, is a "statutory crime that encompasses the common law crimes of assault, battery, and assault and battery." *Quansah v. State*, 207 Md. App. 636, 646 (2012) (citations omitted). The Criminal Law Article states succinctly: "[a] person may not commit an assault[,]" CL § 3-203(a), and the commission of an assault is a misdemeanor punishable by up to 10 years' imprisonment. CL § 3-203(b). Second-degree assault encompasses three modalities: "(1) [a] consummated battery or the combination of a consummated battery and its antecedent assault;" (2) "[a]n attempted battery;" and (3) "[a] placing of a victim in reasonable apprehension of an imminent battery." *Lamb v. State*, 93 Md. App. 422, 428 (1992). The battery modality, of which Merkel was convicted, is an unconsented-to "touching that is either harmful, unlawful, or offensive." *Quansah*, 207 Md. App. at 647 (citations omitted); *see also Riley*, 227 Md. App. at 260 (applying Maryland Criminal Pattern Jury Instructions 4:01(c)). Because assault is a general intent crime, it does not require a finding of malice. *Riley*, 227 Md. App. at 258 (citation omitted).

The second crime for which Merkel was convicted, misconduct in office, is a common law misdemeanor. *Sewell*, 239 Md. App. at 601 (citation omitted). Misconduct in office is "corrupt behavior by a public officer in the exercise of the duties of his or her office or while acting under color of" law. *Id.* (citations, brackets, and internal quotations omitted). The crime of official misconduct includes malfeasance, whereby "the conduct in question falls outside of the official's discretion and authority, and if done willfully, is corrupt on its face." *Id.* at 604 (citation omitted).

We explained in *Riley* that a finding that an on-duty officer is guilty of second-degree assault is sufficient to find that he or she is also guilty of misconduct in office. 227 Md. App. at 264 n.7 (citations omitted). Accordingly, our assessment as to whether there was legally sufficient evidence to convict Merkel of second-degree assault will be dispositive of whether sufficient evidence supported his conviction for official misconduct.

When charged with assault, police officers are "entitled to raise the affirmative defense of law-enforcement justification[.]" *Riley*, 227 Md. App. at 258 (citations and internal quotations omitted). The Supreme Court in *Graham v. Connor*, 490 U.S. 386, 388 (1989), established that such a defense is properly analyzed under the Fourth Amendment "objective reasonableness" standard, which is "applied consistently in Maryland courts." *French v. Hines*, 182 Md. App. 201, 262 (2008). The standard involves contemplation of the unique circumstances of each case, which include (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he [or she] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396 (citation omitted).

Courts must consider the "facts and circumstances confronting" the officer, without regard to the officer's "underlying intent or motivation." *Graham*, 490 U.S. at 397 (citations omitted). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97. In other words, the force must be adjudged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of

hindsight." *Id.*; *see also Wilson v. State*, 87 Md. App. 512, 520 (1991) (affirming the trial court's application of the objective reasonableness test). This standard establishes the ceiling for the permitted amount of force: "a police officer . . . may use only that amount of force reasonably necessary under the circumstances to discharge his [or her] duties." *Wilson*, 87 Md. App. at 520 (citation omitted).

The Court of Appeals in *Okwa v. Harper* applied the *Graham* standard, albeit in a civil context, to conclude that the evidence could have supported a finding of unreasonable force. 360 Md. 161, 199-201 (2000). There, an airline employee informed Okwa that his ticket was invalid and would not explain why, and then advised approaching officers that Okwa was "causing trouble." *Id.* at 170-71. Okwa stated that, at that point, the officers demanded he leave the airport, handcuffed him without warning, dragged him away from the ticket counter, forced him to the ground, and struck him in the head, injuring his "head, neck, knees, and arms." *Id.* at 171-73. He sued the officers for excessive force under 42 U.S.C. § 1983. *Id*. at 174. At a pre-trial motions hearing, the circuit court granted the officers' motion for summary judgment, finding that they were entitled to qualified immunity. *Id.* at 176. The Court of Appeals granted certiorari on its own initiative and reversed the judgment of the circuit court, reasoning that the officers would not be entitled to immunity if they acted outside the scope of their employment. *Id.*

To gauge whether the force applied against Okwa went beyond that permitted by the officers' employment, the Court applied the *Graham* test. *Id.* at 199-200. The Court concluded that the facts, when viewed in the light most favorable to Okwa under the summary judgment standard, indicated that Okwa "did not resist or provoke" the officers;

he was "an unarmed man in a relatively sparsely populated" area of the airport and thus posed no danger to the public; and he was ultimately "confronted and restrained by three, and later more, officers" to whom he "posed no apparent danger[.]" *Id.* at 200-01. Thus, "for purposes of summary judgment, [the MTA officers] were not entitled, as a matter of law, to qualified immunity for their use of force," because a factfinder could have found that it exceeded the force police officers may use during such an arrest. *Id.* at 201.

In *Riley v. State* we addressed whether sufficient evidence existed to sustain an officer's convictions, which included, as in this case, second-degree assault and official misconduct. 227 Md. App. at 264. Riley, a Prince George's County police officer, pulled over a motorcycle, which seemed to be acting in concert with an SUV, for traffic violations. *Id*. at 251-52. The rider, Kyle, did not have identification and gave Riley a fake name. *Id.* at 252. After dispatch informed Riley that the motorcycle was stolen, he prepared to take Kyle to jail, handcuffing him, removing his shoes, placing him in the "front passenger seat of his police vehicle," fastening his seatbelt, and locking the door. *Id.* When Riley went to photograph the motorcycle, Kyle escaped the car and fled. *Id.* at 252-53. Riley took off after Kyle on foot, and first threw his baton at him, and then, fearing ambush by Kyle's associates in the SUV, yelled several times, "'stop or I'll shoot,' before firing two shots." *Id.* at 253. Riley fired a third shot, which hit Kyle, severing his spine and "leaving him paralyzed from the waist down." *Id.* at 253-54. Riley claimed that when he approached Kyle, he was "surprised to see that [] Kyle was still cuffed." *Id.* at 253. Riley was subsequently tried by a jury and convicted of first and second-degree assault, the use of a handgun in a crime of violence, and misconduct in office. *Id.* at 251.

At trial, the State presented evidence that Riley's use of force was unreasonable. William Gleason—the same expert who testified in the case underlying this appeal—testified that the force was unreasonable because "Kyle was running away from [] Riley for a relatively unserious offense while restrained in handcuffs behind his back," and thus "did not pose any imminent threat of harm because 'no reasonable person would believe that [Kyle] was armed at the time[.]'" *Id.* at 254. The defense presented its own expert, who testified that "the deadly force policy 'is deliberately vague' and not subject to 'bright line rules.'" *Id.* at 254-55. The jury disagreed, convicting Riley on all charges. *Id.* at 255.

On appeal, Riley argued that the "evidence was insufficient to sustain his conviction for assault" because the State had not proven that he acted with malice. *Id.* at 256. We rejected his theory because assault is a "general intent crime that does not require malice." *Id.* at 258 (internal citations omitted). Moreover, legally sufficient evidence supported his conviction for assault because "a rational trier of fact could have found that: (1) [] Riley caused Kyle physical harm; (2) the contact was the result of an intentional or reckless act and was not accidental; and (3) the contact was not consented to by Kyle." *Id.* at 260.

Regarding official misconduct, Riley argued that "mere errors in judgment did not come within the conduct proscribed by" official misconduct, and that the evidence in support of that conviction was legally insufficient. *Id.* at 251, 262-63. "The flaw in [] Riley's argument," we opined, was that "he focus[ed] on the portion of the State's experts' testimonies" that Riley "made an 'error in judgment,'" while disregarding the expert testimony that he "used unnecessary force and unreasonable force"—including testimony that "'no reasonable person is going to use deadly force . . . with the victim's hands

handcuffed behind his back.'" *Id.* at 264 (brackets omitted). We concluded that "[v]iewing this evidence in the light most favorable to the State, the jury could have found—and did, in fact, find—that [] Riley exercised a willful abuse of his authority[,]" and we affirmed the judgment of the circuit court. *Id.*

Returning to the case before us, we first assess whether, viewing the evidence in the light most favorable to the State, sufficient evidence exists so that a reasonable trier of fact could conclude that Merkel perpetrated second-degree assault of the common law battery variety. *See Sewell*, 239 Md. App. at 607; *Quansah*, 207 Md. App. at 647; *Lamb*, 93 Md. App. at 428. We conclude that they do. Merkel testified that he slapped Woldeab "[t]o attempt to get her to focus." Ramirez testified that Woldeab responded to the slap by stumbling and screaming. Andres testified that Woldeab clutched her face where she had just been smacked. Indeed, Ramirez testified that Woldeab exclaimed "[y]ou hit me on the small of my head. You're supposed to be the police." These facts would allow a reasonable factfinder to conclude that Merkel intended the slap, that the slap was an unconsented-to touching, and that the slap was harmful or offensive. *Quansah*, 207 Md. App. at 647; *Lamb*, 93 Md. App. at 428.

Next, we assess the "law-enforcement justification" for Merkel's use of force. *Riley*, 227 Md. App. at 258. To that end, we apply the *Graham* factors. *See Graham*, 490 U.S. at 396. Regarding (1) the severity of the crime, Merkel testified that Woldeab was trespassing. *See Graham*, 490 U.S. at 396. No evidence was presented regarding the level of force a police officer is permitted to use against trespassers, but Officer Gleason did testify as to what level of force was appropriate for passive and active resistors. Merkel

agreed that Woldeab was a passive resistor. Gleason stated that for passive resistors, police should "continue[] verbal direction" and then use an "escort technique[,]" such as "[j]ust grabbing somebody by the arm and lifting them up[.]" By contrast, "[f]lesh grab[s]" and slaps are not escort tactics appropriate for passive resisters. A reasonable fact-finder could conclude that "flesh grabs" and slaps were unreasonable under the circumstances.

Regarding (2) the immediate threat to Merkel or others, the evidence suggests that Woldeab was slight of frame and nonthreatening. Andres testified that Woldeab was 5'5", thin, and elderly. *Id.* Merkel testified that he was 5'11" and 230 pounds. When Merkel approached Woldeab, she was sleeping, and when he woke her, she seemed dazed and out-of-it. Neither Merkel nor the other officers testified to feeling threatened by Woldeab. It was late at night, and no other people, save Woldeab and the three police officers, were present. Like Okwa, Woldeab was "an unarmed [wo]man in a relatively sparsely populated" area. *Okwa*, 360 Md. at 200. A reasonable finder of fact could thus conclude that Woldeab "posed no apparent danger to the officers or the public." *Id*. at 200-01.

And finally, (3) Merkel testified that Woldeab was not actively resisting his commands. *See Graham*, 490 U.S. at 396. A reasonable trier of fact could have found that the second and third *Graham* factors support a finding that Merkel's use of force was unreasonable—that it was indeed force much beyond that "reasonably necessary under the circumstances to discharge his duties." *Wilson*, 87 Md. App. at 520. His use of force was thus reasonably found to constitute second-degree assault and, by extension, misconduct in office. *See Riley*, 227 Md. App. at 264 n.7.

We are careful to assess whether the circuit court adjudged the use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Ramirez and Andres *were* reasonable officers at the scene. Their sensibilities were so offended that they described the incident to their fellow squad members and reported it to their superior that very night. Ramirez and Andres' testimony was explicitly accepted by the trial judge when he stated that his "verdict is really guided by" the fact that Merkel's actions "created an impression upon two sworn law enforcement officers to take some action immediately."[1]

Merkel's reliance on *State v. Pagotto* does not change our determination. 361 Md. 528 (2000). In *Pagotto*, the Court of Appeals held that there was legally insufficient evidence to convict a police officer, who, gun drawn and attempting to extract a driver from a moving vehicle, killed the driver. *Id*. at 533. The Court explained that Pagotto was forced to make "an instinctive, split-second" reaction to "either [] move in to ambush or to attempt to retreat[.]" *Id.* at 552. Further, because Pagotto had used deadly force and was charged with reckless endangerment and involuntary manslaughter, the State was required

[1] At oral argument, Merkel's counsel argued that the court's statement that the slap was an "unconsented-to touching" indicates that the court applied the incorrect standard in adjudging Merkel's law-enforcement justification defense. Counsel urged that it is "seldom that an individual . . . who encounters a use of force from a police officer is going to [] consent[] to that." However, the Court stated specifically that it was guided by two things: 1) the testimony of two sworn law enforcement officers who witnessed the slap and were compelled to take immediate action, and 2) the "actions of the homeless woman herself." In our view, therefore, the record demonstrates that the court considered the "perspective of a reasonable officer on the scene" according to the proper objective reasonableness standard. *Graham*, 490 U.S. at 388.

to prove gross negligence, a "wanton or reckless disregard of human life." *Id.* at 548. Experts in *Pagotto* testified that Pagotto should have abided by police force "guidelines," but the experts disagreed as to how discretionary those guidelines were. *Id.* at 546-47.

First, Merkel's circumstances were certainly not "tense, uncertain, and rapidly evolving[.]" *Graham*, 490 U.S. at 396-97. In fact, it was Woldeab's slowness that purportedly caused Merkel to apply force: Merkel testified that Woldeab was not an active resistor, and that he struck her in "attempt to get her to focus" so that she would leave. Second, this is not the standard we must apply. *See Riley*, 227 Md. App. at 259-60 ("Riley, however, provides no argument to indicate why we should apply the elements of involuntary manslaughter or reckless endangerment to a case involving assault."). Merkel was not charged with a crime that required the State to prove gross negligence; for Merkel's charge of second-degree assault, the State needed only prove Merkel's general intent to touch Woldeab in a harmful or offensive way, without her consent. *Riley*, 227 Md. App. at 258; *Quansah*, 207 Md. App. at 647; *Lamb*, 93 Md. App. at 428. Third, Merkel's use of force exceeded the amount the guidelines allowed, which was "a respectful and necessary amount of force to achieve a lawful objective[.]" It was also contrary to his training, which established set levels for the amount of force proportionate to the amount of resistance—and, in the case of a passive resistor, called for him to "continue[] verbal direction" and then to use "an escort technique," such as "[j]ust grabbing somebody by the arm and lifting them up[.]" Unlike the competing experts in *Pagotto*, Gleason was the only expert to testify in this case; Merkel did not present an alternative theory at trial to counter Gleason's

determination of the appropriate use of force. Merkel's use of force is thus unlike Pagotto's both in kind and in circumstance.

Accordingly, we conclude, viewing the evidence in the light most favorable to the State, that a rational trier of fact could have found the elements of second-degree assault, and thus the evidence supporting Merkel's convictions is legally sufficient. *Riley*, 227 Md. App. at 264 n.7; *Albrecht*, 361 Md. at 533.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.