Circuit Court for Kent County
Case No. 14-K-16-008934

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2048

September Term, 2016

TIMOTHY AARON COVINGTON

v.

STATE OF MARYLAND

Woodward, C.J.,
Shaw Geter,
Fader,

JJ.

Opinion by Shaw Geter, J.

Filed: February 6, 2018

Appellant, Timothy Covington, was charged in the District Court of Maryland for Caroline County with second degree assault on a law enforcement officer, second degree assault, and resisting arrest. Ultimately, after appellant requested a jury trial and removal from Caroline County, the case was transferred to the Circuit Court for Kent County. There, the State nol prossed the first count, and a jury acquitted appellant of second degree assault, but convicted him of resisting arrest. After appellant was sentenced to three years in prison, he timely appealed, presenting the following questions for our review:

> 1. Was the evidence insufficient to convict appellant of resisting arrest?
>
> 2. Did the circuit court err in giving the jury an incorrect instruction on resisting arrest?

For the following reasons, we conclude the first issue is unpreserved, but answer the second question in the affirmative. Accordingly, we shall vacate appellant's conviction and remand for further proceedings consistent with this opinion.

BACKGROUND

The Honorable Broughton Earnest, a retired Circuit Court Judge from Talbot County, testified that, on November 23, 2015, he was sitting as designated in the Circuit Court for Caroline County, and presiding over a criminal jury trial involving appellant. During the jury selection process, appellant asked to leave the court room to make a telephone call. Informing him that he did not want to delay *voir dire*, Judge Earnest denied the request at that time, but told appellant he could make his phone call later during an upcoming recess. He also told appellant that if his subpoenaed defense witnesses did not appear for trial, then the court would likely declare a mistrial.

Despite telling appellant he could not leave the courtroom, moments later, the judge noticed that appellant was gone from the courtroom. Because no one knew where he was, the judge took a short recess. Approximately ten minutes later, a bailiff located appellant and brought him back to the courtroom.

Judge Earnest then asked appellant why he left. Although the judge did not recall appellant's exact words, appellant replied, something to the effect of, "that he felt it was necessary." Acknowledging that appellant may have stated that he went to get some "paperwork for the trial," or possibly that he wanted to contact some of his witnesses, Judge Earnest testified that "[h]e gave a reason which I felt was not satisfactory." The judge testified that, while the jury was out for a recess:

> Well, I…at that point, the jury had been held up for at least 10 minutes while we looked for him and then a little longer while we had this conference out of their presence, and I didn't think it was fair to the jury to take a chance that he was going to leave again, so I told him that I was revoking his bond and that he was no longer on personal bond or whatever the bond was that had [sic]…I believe it was personal bond prior to that time, and that was my response to make sure he was going to be there when we needed him there.

Asked to describe the process involved, Judge Earnest explained as follows:

> Q. And what does it mean to revoke somebody's bond or pre-trial release?
>
> A. Well, when there's a criminal charge pending against an individual, he can ask to have pre-trial release in the form of some bond and courts are…have discretion to allow criminal defendants to be released on their personal promise to…to be there, or courts can set monetary bonds to make sure that someone is going to be there, or, in some cases, courts can take the position that the defendant is not entitled to bond of any kind and that he be held in detention prior to trial.

> Q. I guess what I mean is, on…when you…when you revoke somebody's bond or pre-trial release on the day of their trial, what does that mean for them logistically?
>
> A. Well, that…it means that they can no longer come and go from the court room on their own, that they…they can be in the court room with their attorney, but, if there is some kind of recess, they must be in the custody of the Sheriff.

At that time, appellant was "mad" and cursed at the judge. Thereafter:

> Well, you know, after he cursed me, he, you know, he started getting loud I believe with the deputy who was trying to reason with him. And, at that point, I think I took a recess because I didn't want to punish him and I didn't want to hold him in contempt. I figured he was…he had created enough problems for himself. And even though he had cursed me and I was…it was a contempt of court, I could have ordered him to pay a fine or go to jail for some period of time for contempt of court, I chose not to do that, and I didn't want to disrupt things more than he had already disrupted.[1]

Throughout the trial that day, appellant was "loud," "obstructive," "very unhappy," and "somewhat out of control." But, Judge Earnest did not yell or raise his voice, and instructed appellant to remain calm so as not to disrupt the proceedings. The altercation that was the impetus of the charges in this case happened near the end of trial, during jury deliberations,

[1] The Court of Appeals has observed that there are "'two forms of contempt—direct and constructive—and two types of each form—criminal and civil. Direct contempt is committed in the presence of the trial judge…while constructive contempt is any other form of contempt.'" *Hammonds v. State*, 436 Md. 22, 33 (2013) (quoting *Smith v. State*, 382 Md. 329, 338 (2004)); *see also* Md. Code (1973, 2013 Repl. Vol.) § 1-202 of the Courts and Judicial Proceedings ("C.J.P.") Article ("A court may exercise the power to punish for contempt of court or to compel compliance with its commands in the manner prescribed by Title 15, Chapter 200 of the Maryland Rules"); Md. Rule 15-201 et seq. (setting forth the provisions with respect to contempt of court).

when the judge, who was out of the courtroom at the time, was informed that there had been a "problem" in the courtroom involving appellant.

An audiotape from the November 23, 2015 trial was played for the jury. That clip included portions of several conversations wherein: (1) Judge Earnest was overheard telling appellant not to leave the courtroom; (2) the conversation when appellant was returned to the courtroom after leaving without permission; and, (3) portions of the discussion between Judge Earnest and appellant while the jury was deliberating.[2] During the portion of the recording that transpired before the altercation at issue, appellant could be heard cursing at the judge, "loud and clear." Judge Earnest agreed he could have held appellant in direct contempt, but instead, "I chose to ignore it." Judge Earnest then declared a recess to give appellant "an opportunity to calm down." After the altercation, the jury returned its verdict, acquitting appellant of the underlying charge at issue in that case.[3]

[2] The audiotape of the November 23, 2015 trial is included with the record on appeal.

[3] The Maryland Judiciary Casesearch website reveals that appellant was originally charged in the District Court for Caroline County with second degree assault, where he was served by summons. *See State v. Covington*, District Court of Maryland For Caroline County, Case Number 4J00026471 (filed May 4, 2015). Appellant then prayed a jury trial and was found not guilty in the Circuit Court for Caroline County, as indicated. *See State v. Covington*, Circuit Court for Caroline County Case Number 05-K-15-010844 (filed July 14, 2015, disposition November 23, 2015). We take judicial notice of the records of the Casesearch website. *See Marks v. Criminal Injuries Comp. Bd*., 196 Md. App. 37, 79 n. 17 (2010). The State did not enter the original summons into evidence or include it in the record. We do note that, ordinarily, a generic summons in criminal cases, found on the District Court website, provides that failure to obey the summons may result in the issuance of a warrant for the defendant's arrest. *See e.g.,* http://www.courts.state.md.us/district/forms/criminal/dccr045sample.pdf

On cross-examination, Judge Earnest agreed that, following his order during *voir dire*, appellant was in the custody of the Sheriff. Pursuant to that order, appellant was taken back and forth to a holding cell throughout the course of the trial.

Judge Earnest also confirmed he was familiar with Maryland Rule 4-216.2(b).[4] Although Judge Earnest also agreed that revoking pre-trial release often does not happen during trial, he testified that, in this instance:

> I waited until he got back and then called him up and asked him why he had left the court room in violation of my order, and he was given an opportunity then and there to hear. So, as far as I'm concerned, the rule was complied with.

Dale Minner, the Clerk of Court for Caroline County, was present in Judge Earnest's courtroom throughout the entire trial day in question. During jury selection, Minner heard Judge Earnest, in response to a query by appellant, tell appellant that he could not leave the courtroom during *voir dire*. Approximately three to five minutes later, appellant did, in fact, leave the courtroom.

[4] At the time of appellant's 2015 trial in Caroline County, that rule provided as follows:

> After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of pretrial release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record. A judge may alter conditions set by a commissioner or another judge.

Maryland Rule 4-216.2(b) (2015), *subsequently renumbered as Rule 4-216.3* (effective July 1, 2017)

After Sheriff's Deputy Jacob Andrew was dispatched to locate appellant, appellant was returned to the courtroom, and Judge Earnest asked appellant "Where'd you go?" and "Why'd you leave," and reminded him that "I told you not to go make a phone call." According to Minner, appellant replied, "I didn't make a phone call. I went to get some papers." It was at that point that Judge Earnest directed Deputy Andrew to take appellant into custody. When asked later by defense counsel whether Judge Earnest gave appellant "notice" that he was going to revoke his pre-trial release, Minner initially testified that it was a "verbal" as opposed to "written" notice. He ultimately confirmed that he did not hear any notice, testifying "I think nobody knew it until it was said out loud" by the judge.

As the trial went on, Minner testified that appellant became more "agitated." Minner then described the altercation that ultimately led to new charges being filed against appellant, as follows:

> Q. Can you describe to the Court, or for the jury how that began and…and what you observed?
>
> A. Well, like happens throughout the day with a jury trial, when it's court recess and the Defendant had been placed in custody, he also leaves the court room and is taken back into a holding area while court's not in session. Well, on that last time in the evening, actually, I believe the Defendant addressed me about witnesses not being summonsed, which had been addressed already in the day, and, in a way, that my office didn't do something we were supposed to do, and I said, "That's a question for your lawyer.", and he kind of threw some papers in my direction and…and down on the floor. And, at that point, the Deputy says, "Come on. We need to go. We need", you know, "We are going to go back to the holding area", and he started to resist that.
>
> Q. How…how did he resist?
>
> A. Pulling away, flailing his arms. I believe he said, "I'm getting out of here. I'm leaving.", something like that, and the Deputy tried to restrain

> him more. And the more restraint that was tried to get him…just to get hi[m] moving, in my opinion, the more it was flailing and elbow throwing, that kind of thing in an effort…what…in what appeared to me being an effort to exit…to leave the court house, to leave the court room, not to go to the holding area.
>
> Q. Did you ever see any…any contact between the Defendant and Deputy Andrew's face?
>
> A. Yeah. It was…it was all upper body, so it was flailing of arms and elbows and appeared that an elbow struck, if I had to…I'd be speculating a little bit. But a lot flailing of arms up and around the Deputy's upper body and face and head.

Prior to playing the audiotape of the incident, Minner further testified:

> A. – It's, you know, "We"…"We told you what we know about it. That's a question for your attorney." And he threw the papers, and then the Deputy said, "Come on. We've to"…" We have to go back to the holding area." He said, "I'm not going.", you know. He…he insisted he wasn't going, whether he said that exactly. And I believe, at one point, he says, "I'm leaving. I'm going. I'm not", you know, "I'm not going back there. I'm"…" I'm leaving."
>
> Q. Okay. Well, let's --
>
> A. And that's when it got more physical --
>
> Q. Okay.
>
> A. -- with the Deputy trying to restrain him to move him in the direction of the holding area. And there was certainly yelling back and forth, but I don't recall what was said.[5]

Minner explained that appellant yelled a profanity at the judge as he left the bench, and then started resisting Deputy Andrew "right away." Minner further testified that two other law enforcement officers came to the aid of Deputy Andrew during the altercation, which

[5] Minner testified that an unidentified woman could be heard screaming in the background on the audiotape. Deputy Andrew later testified that the screaming woman was the "the mother of Mr. Covington's children."

ultimately lasted for several minutes. As the altercation went on, "it got worse. In the beginning, it's just pulling away, pulling away, and then it starts to be what I would consider to be aggressive, not resisting but actually flailing arms and elbow and in an effort…I…appeared in an effort to get free of the being detained or held."

On cross-examination, Minner gave an even more detailed account:

> Q. What did he initially do?
>
> A. Well, as is often observed and -- Well, maybe that doesn't apply. What I…what I observed in this instance would be you kind of take somebody by the elbow and you're kind of like "Come on. Let's go in this direction." And he passively resisted again. And then it was "Come on. We", you know, "Keep moving. We've got to get out of here." And then that…it gets…grows into something bigger and more physically…more physical resistance. And so, the more physical it got, the more the Deputy was holding on or, you know.
>
> Q. And, at some point in time, you say…did Deputy Andrew place Mr. Covington in a bear hug?
>
> A. He tried to wrap him up - it appeared to keep the arms from flailing and…and resisting the elbows from flying. So, yeah, in a…in a sense, it was probably trying to contain that, if you want to call it a bear hug or just containment.
>
> Q. Okay. Now, when he…when he placed…when he wrapped him in…in this bear hug, did he place his arms over Mr. Covington's arms, under his arms? Where did he…where did he wrap his arms around?
>
> A. It was not…it certainly wasn't that clean cut. It was get him for a while and then elbows would get loose again, and then try to contain him again, and then…. So it was…it was never as clean cut as "I got him in a bear hug and now I'm taking him away."
>
> Q. Uh-huh. And then --
>
> A. It was way more back and forth.

Minner then confirmed that, as the altercation continued, Deputy Andrew could be heard on the audiotape telling appellant, "Now I've got charges on you, m****r f****r." And, Minner agreed that he did not see appellant throw a punch or head butt Deputy Andrew, but that appellant was flailing his arms and elbows in an attempt to escape the deputy's grasp. Minner concluded his testimony by observing, "[t]he flailing had been going on for a few minutes, and it was after the point in which the Deputy had a bloody mouth."

Darrin Brown, the circuit court bailiff on duty in Judge Earnest's courtroom that day, testified that appellant "was just very argumentative all day." As far as the altercation during jury deliberations, Brown explained that appellant had been brought into the courtroom to see if the jury wanted to break for dinner or keep deliberating. After the jury decided to continue its deliberations, it was then that "Mr. Covington was being led back to the holding cell. As he was being led back to the holding cell, he began to argue with the Clerk's staff. He began to argue with anyone that was present." Brown testified:

> During his escort back to the holding cell, he threw his paperwork, ending up striking Deputy Andrew I believe in the lip area. After he struck him, he's still going towards the holding cell. Deputy Andrew yelled, "Watch out. He's going to pick up a chair." I stopped Covington from picking up the chair trying to throw the chair, and him and Deputy Andrew began to tussle. Deputy Andrew kept saying, "Stop resisting. Stop resisting." Next thing you know, they were on the floor and, a few minutes…few seconds later maybe, other officers came to assist.

Brown saw appellant strike Deputy Andrew in the mouth with his right hand. He also testified that, when the deputy told appellant to "stop resisting," appellant did not end his resistance.

Also on cross-examination, Brown testified that appellant struck Deputy Andrew before the deputy put him in a "bear hug motion." Appellant hit the deputy with his hand at around the same time appellant threw his papers and was being led towards the holding cell. On redirect, Brown confirmed that, once Deputy Andrew had hold of appellant, appellant was "swinging his body around to try to get away from him." Brown agreed that he had previously reported that appellant was "[c]ombative," meaning, according to Brown, that appellant was "fighting back, trying to get away."

Brown also testified that he was present earlier in the day when, shortly after Judge Earnest told appellant not to leave the courtroom, appellant did, in fact, leave the courtroom. On cross-examination, Brown testified that he did not recall if Judge Earnest gave appellant any notice before he was taken into custody.

Deputy Andrew testified that he was working security in Judge Earnest's courtroom at appellant's trial, and was present when the judge told appellant not to leave the courtroom during jury selection. However, no more than ten minutes later, appellant left the courtroom anyway. When the judge noticed appellant was missing, he dispatched Deputy Andrew to go find him. The deputy then found appellant out front of the courthouse, talking on his cell phone.

Deputy Andrew then brought appellant back to the courtroom. After appellant attempted to explain where he was, Judge Earnest ordered Deputy Andrew to take appellant into custody. Throughout the remainder of trial, appellant was "very agitated. He was very upset. He thought that it was an unjust, unfair ruling by the Judge."

Deputy Andrew explained that when a judge orders him to take someone into custody, that he normally does so. He testified there was nothing unusual about Judge Earnest's order and that he would not have followed an illegal order. Asked what he considered to be an illegal order, Deputy Andrew agreed that he would not take someone into custody if the court ordered him to do so because the subject had "blond hair." Deputy Andrew further testified as follows:

> Q. Okay. What about…what is your opinion on whether a Judge can order somebody to stay in the court room during their trial?
>
> A. The Judge can order somebody to stay in the court room if it's going to hamper the court proceedings.
>
> Q. Okay. And is that what happened that day?
>
> A. Yes, sir.
>
> Q. Okay. And is that why you did place Mr. Covington under arrest when he…you were ordered to?
>
> A. Yes, because it was a lawful order. Yes, sir.

At around 7:55 p.m., during deliberations, Deputy Andrew brought appellant into the courtroom to discuss giving the jury a break for dinner. After a discussion with Judge Earnest, Deputy Andrew started walking appellant back towards the holding cell. Deputy Andrew then testified that:

> [A]t that time, he saw Dale Minner, who's the Clerk of our court. Dale was standing approximately about I would say within 10 feet of us at the time. He was on the other side of the bar. By this time, we were already over…it would be over on the other side of the bar. And Mr. Covington actually…he kind of lunged towards the bar and was yelling at Dale and threw some paperwork at Dale. Well, when that happened, I was like it's…we…we can't be…we are not having that in the court room. I took my left hand, I actually grabbed Mr. Covington on his right arm, and I…I…I squeezed down on his arm to get him away from Dale because I was more worried about him trying

> to go over or something happening. So Darrin, who has the key to the holding cell, goes on over to the holding cell and is trying to open the door for us. I'm walking with Mr. Covington, actually almost dragging him to the holding cell. At the time, Mr. Covington says, "I'm leaving." - I believe that was his… - "I'm leaving." or "I'm going." He hangs a right and he goes up the edge of the court room. Well, the way the court room is set up is we have our pews, then we have chairs kind of like the chairs you guys are sitting in now. It's got this like with the blue except for ours are maroon. And we have them going up the side of the court room. Well, he makes a…before we go into the holding cell, he makes a right and he takes his left hand and he throws a chair back behind him, kind of flips it back trying to get the chair between me and him, and I yelled at Darrin to watch out, because I said the chair was just thrown. So, immediately, I go bear hug Mr. Covington around his waist and I'm pulling him back trying to get him away because he's… he's trying to leave the court room. He was trying to shake me off as best I could tell. So, when he's leaving, or I grab him around his waist because I'm not going to let him out of the court room. I'm dragging him back, and an elbow comes up and strikes me, and it strikes me in my lip and my tooth actually goes into my lip about a quarter of an inch to half an inch.

Three other officers then came to Deputy Andrew's aid "because of all the flailing and just it was just utter craziness going on." And, "when I grabbed him and after I got struck, he was continuing to try to get off me." The other officers eventually subdued appellant and placed him in handcuffs. A photograph of Deputy Andrew's injuries was admitted into evidence. Deputy Andrew also confirmed that he told appellant to stop resisting during the altercation, but appellant did not stop. Specifically, the deputy testified that "[i]t was pretty bad. It was even after we got…I… we got him pinned to the floor, he was still resisting and just trying to get out. He was just squirming."

On cross-examination, Deputy Andrew agreed that, after appellant was returned to the courtroom during *voir dire*, he never heard Judge Earnest tell appellant that he was considering revoking his pre-trial release status. But, he did hear the judge ask for an explanation why appellant left the courtroom, and he also overheard appellant state that he

wanted to retrieve some paperwork for trial. Deputy Andrew agreed that the judge found that answer unsatisfactory and ordered appellant into custody.

In addition, with respect to the altercation during deliberations, Deputy Andrew testified that there was a "verbal disagreement" between appellant and Judge Earnest. Afterward, Deputy Andrew escorted appellant towards the holding cell area, testifying that "I tried to give him a little bit of space, because I knew he was agitated. So I didn't lay hands on him when we first walked out. I said, 'Come on.' And, actually, I used a…I called him Timmy, trying to…I figured, if I could try to at least calm him down…" Deputy Andrew did not touch appellant until after appellant threw some papers at Minner. The deputy testified that the papers came within two feet of hitting Minner, but agreed they did not strike him. He further testified that appellant did not just grab a chair, he "chucked the chair behind him to try to get the chair between us so he could try to break free from me."

At that point, Deputy Andrew placed appellant in a "bear hug," wrapping his arms around appellant's waist from behind. Appellant then struck the deputy in the mouth, and Deputy Andrew testified that he exclaimed, "Timmy, you just hit me." Deputy Andrew testified that "[i]t was one deliberate strike, and then he started flailing his arms after I…I started dragging him back. Because I knew I was struck at that time because I could actually…I could taste the blood in my mouth." As a result, the deputy's tooth punctured his lip. Defense counsel's cross-examination of Deputy Andrew concluded as follows:

> Q. You didn't…didn't you indicate in…in your report that Mr. Covington was attempting to flee the court room throughout this encounter?
>
> A. He was trying to leave. He wasn't…he wasn't trying to stay. That's for sure.

> Q. He didn't want to stay and fight. He wanted to get out of there?
>
> A. He was leaving one way or another, and he wasn't… I wasn't going to let him out. That's…when the Judge ordered me to keep him there, he's going to stay there. If he leaves the court room at that time, then it's an escape charge.

Defense counsel moved for judgment of acquittal at the end of the State's case-in-chief, and, as will be discussed in more detail, the court denied that motion.

Thereafter, appellant presented a defense by testifying on his own behalf. Appellant explained that the November 23, 2015 trial, in the Circuit Court for Caroline County, concerned an unrelated second degree assault charge. Appellant arrived for trial that day at around 8:30 a.m. Shortly before jury selection, appellant learned that the clerk's office had not issued subpoenas for any of his witnesses. Upon learning that his witnesses were not in court, appellant asked Judge Earnest for a postponement of the trial.

After the court denied his request for postponement, appellant asked if he could leave the courtroom to make some phone calls. When that request was also denied, appellant sat with counsel, at least through the jury roll call. He then informed his attorney that he was going to go out to his truck, parked in the courthouse parking lot, to retrieve documents he believed were pertinent for trial.

After about five to ten minutes, his defense counsel came outside and found him and told him to return to the courtroom. Appellant met Deputy Andrew as he was reentering the courthouse. As soon as he returned to the courtroom, Judge Earnest called him up to the bench and "asked where I went and why I went." Judge Earnest then took appellant into custody.

Appellant testified that he had been given no notice that the judge was considering revoking his pre-trial release status, explaining "I never once for a second thought that my bond could be revoked because it was a criminal summons case. I was never arrested and I was not even out on a bond in fact." He clarified "[t]he charges arose from an application filled out by a person at the commissioner's office." And, when asked if he had been given notice and a hearing before he was taken into custody, appellant testified "I don't think that that was adequate enough to be called a hearing. It was more so I was asked one question, I gave my response truthfully, and then he made a ruling based off of that."

Following Judge Earnest's order directing Deputy Andrew to take appellant into custody, appellant went to a holding cell which was immediately adjacent to the courtroom. He was placed in handcuffs in that room. Videos of appellant in the holding cell, at various times during that day, were played for the jury.

At approximately 8:00 p.m., appellant was in the courtroom discussing whether to allow the deliberating jury to break for dinner. He denied that he threw papers at Dale Minner, but agreed that he was "infuriated and threw my papers on the floor." Believing that he was being unlawfully held in custody, appellant agreed he was simply "showing [his] displeasure by dumping them on the floor" and that he "just threw them out of my hands so they were no longer in my hand." However, appellant admitted that he got "a little aggressive or loud[.]" He also agreed that he was "belligerent, somewhat disrespectful," "misbehaving" and "just basically treating others how I was treated."

With respect to that part of the altercation with Deputy Andrew, appellant testified that "Deputy Andrew had approached me from behind and attempted to grab me, and I just

simply pulled away from him[.]" Appellant clarified that Deputy Andrew grabbed his right arm. Appellant denied that he threw a chair, explaining that he moved the chair in order to help him elude Deputy Andrew and "simply slid it behind me as to where he's at least got to take the effort to move it if he wants to go the same path I just went." Appellant then testified that the deputy put him in a "bear hug" and then "literally just lifted me off of my feet and slammed me right to the ground." Appellant denied elbowing Deputy Andrew in the mouth and that he did not believe "that any of my body parts caused any physical harm, and I definitely know that it wasn't intentional if that were the case." Appellant asserted that he sustained injuries at this point, testifying that it took at least six officers to subdue him. Appellant also testified that, after the jury returned a not guilty verdict, he was escorted over to the Sheriff's Office where he was charged in connection with the aforementioned altercation.

Appellant was then asked if he thought Deputy Andrew had the right to detain him at 8:00 p.m., and appellant testified:

> Well, in the morning when the Judge revoked my bond so to speak, you know, I…the reason I went with Bailiff Andrew because no matter if I agreed with it or I thought it was lawful, that was what…the best thing to do at the time and with respect to the Officer…the Deputy. That's why I just complied.
> . . .

On cross-examination, appellant agreed that, at around the time of the altercation, he called Judge Earnest and "old f**k." He also agreed that he told Judge Earnest "that he didn't know s**t[]."

The State then called Deputy Andrew in rebuttal. Deputy Andrew was shown defense video exhibits of the holding cell where appellant was detained throughout the trial and denied that he pushed appellant hard enough to warrant appellant's claimed injuries.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant contends that the evidence was insufficient to sustain his conviction for resisting arrest. More specifically, appellant argues that "the State charged Mr. Covington with the wrong crime. An attempt to escape pretrial custody is attempted second degree escape, not resisting arrest." Thus, appellant frames his argument such that any alleged "resistance" related to the original "arrest" that took place approximately nine to ten hours earlier when the trial court revoked his pre-trial release, and not to the altercation that took place in the courtroom while the jury was deliberating.

In response, although the State addresses the sufficiency of the evidence, the State's primary contention is that this issue is unpreserved because trial counsel failed to renew his motion for judgment of acquittal at the end of all the evidence. Conceding that there was no motion at the end of all the evidence, appellant asks this Court to grant relief either: (a) pursuant to its discretionary authority under Maryland Rule 8-131; or (b) because trial counsel was ineffective in not renewing the motion. The State maintains that appellant

waived this claim, and that this Court should decline to address appellant's ineffectiveness claim at this time.[6]

Looking to the trial record, appellant made a motion for judgment of acquittal at the end of the State's case-in-chief, arguing that the resisting arrest count was "incorrectly charged." Defense counsel insisted that appellant was arrested earlier in the day during *voir dire* of the jury, and that appellant's subsequent actions later were akin to second degree escape:

> The only "resistance" which has been testified to is…happened at 8:00, nearly - I don't know - 10 hours later as the jury was deliberating. I think Mr. Covington had long since been placed under arrest and he was merely…he was in custody throughout the…the duration of the trial. So I think any attempt by him to get away from the Deputy and to escape that confinement should be viewed as an attempt to escape pursuant to Criminal Law 9-405, which is escape in the second degree. I just don't think that…that …that what has been described by the witnesses is a resisting arrest.

In response, the State disagreed with defense counsel's timeline, stating, at one point, "the fact that one instant…one action can cause two different crimes doesn't mean that you have to…it's one or the other." Then, the State argued there was no time limit to resisting arrest, asserting that "Mr. Covington was under arrest that entire day."

In denying the motion for judgment of acquittal, the court first opined that there was no time limit to resisting arrest. The court then ruled as follows:

> Well, in the light most favorable…in the light most favorable to the State, in the absence of a… of a specified element somewhere, somehow in

[6] The State also counters appellant's argument by asserting that "plain-error review is not warranted in this case." But, appellant is not seeking "plain-error review," and instead is asking us to invoke our general discretionary review under Maryland Rule 8-131 to excuse trial counsel's failure to properly preserve the sufficiency claim as required by Maryland Rule 4-324.

> some state in some case or some statute, I'm gonna deny the motion on resisting. I…I think it does make a prima facie case, certainly. We have a prima facie case, I should say, of resisting arrest, even if it's not exactly contemporaneous with when the original arrest took place. It…it's almost like a continuum. It seems to me the…the arrest is a continuum and one is eligible to be trying to resist that arrest as long as a person is in custody, it seems to me, unless there's some case that somebody has to persuade me otherwise.

After the court denied this motion, appellant presented evidence by testifying on his own behalf. The State recalled Deputy Andrew in rebuttal. Then, after the reception of all the evidence in the case, appellant failed to renew his prior motion for judgment of acquittal.

Maryland Rule 4-324 (a) provides:

> (a) Generally. A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.

"Maryland Rule 4-324(a) is not satisfied by merely reciting a conclusory statement and proclaiming that the State failed to prove its case." *Arthur v. State*, 420 Md. 512, 524 (2011). This Court has noted that " '[t]he language of the rule is mandatory, and review of a claim of insufficiency is available only for the reasons given by [the defendant] in his motion for judgment of acquittal.'" *Peters v. State*, 224 Md. App. 306, 353 (2015) (quoting *Whiting v. State*, 160 Md. App. 285, 308 (2004), *aff'd* 389 Md. 334 (2005), *cert. denied,* 445 Md. 127 (2015)).

Furthermore, under Rule 4-324 (c), a motion made after the State's case in chief is withdrawn where the defendant then presents evidence and does not renew the earlier

motion. *See Haile v. State*, 431 Md. 448, 464 (2013) ("This motion [at the end of the State's case-in-chief] has no viability unless it is renewed, if counsel moves, again, for judgment of acquittal after the close of all evidence."); *Ennis v. State*, 306 Md. 579, 587 (1986) (failure to renew motion "effectively precluded the trial court from considering her insufficiency contention"); *Williams v. State*, 131 Md. App. 1, 5-7 (2000) (motion at end of State's case-in-chief withdrawn when defense presents evidence, and failure to make motion at the close of all the evidence precludes appellate review of sufficiency of the evidence), *cert. denied*, 359 Md. 335 (2000); *see also* Md. Code (2001, 2012 Repl. Vol.) § 6-104(a)(3) of the Criminal Procedure Article ("If the defendant offers evidence after making a motion for judgment of acquittal, the motion is deemed withdrawn."). We hold that appellant's sufficiency claim is unpreserved for appellate review.

Recognizing the procedural default, appellant asks us to reverse his conviction either under our discretionary authority under Maryland Rule 8-131 (a) or because his trial counsel was ineffective in not renewing the motion for judgment of acquittal. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (in order to prevail on acclaim of ineffective assistance, the defendant must prove that (1) "counsel's performance was deficient," and (2) that "the deficient performance prejudiced the defense").

As to the latter request, appellant relies on *Testerman v. State*, 170 Md. App. 324 (2006), *cert. dismissed as improvidently granted*, 399 Md. 340 (2007). In that unique case, the issue was whether, as a matter of law, a driver switching seats with his passenger after a traffic stop constituted "fleeing" and "eluding by other means." *Testerman*, 170 Md. App. at 336. Although this Court recognized that ineffective assistance claims are generally

decided on post-conviction review, we found that, because the critical facts were not in dispute and whereas that the record was sufficiently developed such that we were able to consider trial counsel's strategy and legal theories, we decided on direct appeal to find that defense counsel was ineffective for failing to articulate a motion for judgment of acquittal. *Testerman*, 170 Md. App. at 336.

In contrast to *Testerman*, we are persuaded that the record in this case is not sufficiently developed to properly assess appellant's *Strickland* claim. Moreover, we also note that the Court of Appeals has found that "although there may be instances where failure to make a motion for judgment for acquittal with particularity might be determined to be ineffective counsel based on the trial record alone, we are unwilling to make such a failure *per se* ineffective assistance of counsel." *Mosley v. State*, 378 Md. 548, 572 (2003). In *Mosley*, there was a question raised as to the sufficiency of the evidence necessary to support a conviction for robbery with a dangerous or deadly weapon. *Id.* at 568. However, because there was an actual dispute over the characteristics of the weapon at issue, an air gun, the Court was unable to conclude that the evidence was insufficient to sustain the conviction. *Id.* at 571. We agree with the following conclusion:

> As long as the sufficiency of the evidence is at issue, the possibility remains that Mosley's counsel lacked grounds to make the motion in the first place. *See State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003) (concluding that defendant's counsel was not ineffective because, even if his motion for judgment of acquittal was made without specificity, the jury had substantial evidence to find the defendant guilty). Given this possibility, under *Strickland's* two-pronged analysis, Mosley's counsel's failure to support the motion with particularity either may not have been ineffective assistance of counsel or may not have been prejudicial to the defendant. Therefore, we conclude that the issues presented are more appropriate for elucidation in a post-conviction proceeding.

Mosley, 378 Md. at 571-72.

Appellant also asks us to exercise our discretion under Maryland Rule 8-131(a) to excuse trial counsel's failure to renew the motion for judgment of acquittal. Maryland Rule 8-131(a) provides, in pertinent part:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The purposes of Rule 8-131 are:

> "(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation."

Fitzgerald v. State, 384 Md. 484, 505 (2004) (quoting *County Council v. Offen*, 334 Md. 499, 509 (1994)).

"[I]t is well-settled that Md. Rule 8-131(a) vests this Court with the discretionary power 'to decide such an [unpreserved] issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.'" *King v. State*, 434 Md. 472, 480 (2013). As further explained by the Court of Appeals:

> We have made clear that the word "ordinarily" has the limited purpose of granting to the appellate court the prerogative to address the merits of an unpreserved issue, in the appropriate case. Such prerogative to review an unpreserved claim of error, however, is to be rarely exercised and only when doing so furthers, rather than undermines, the purposes of the rule.
>
> We have said that the appellate court should exercise the discretion to review an unpreserved claim of error "only when it is clear that it will not work an unfair prejudice to the parties or to the court." Unfair prejudice may result, for example, when counsel fails to bring the position of her client to the attention of the trial court so "that court can pass upon and correct any

> errors in its own proceedings." It would be unfair to the trial court and opposing counsel, moreover, if the appellate court were to review on direct appeal an un-objected to claim of error under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent.

Robinson v. State, 410 Md. 91, 103-04 (2009) (internal citations omitted). Further, the discretion authorized by Maryland Rule 8-131(a)

> is a discretion that appellate courts should rarely exercise, as 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 so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007).

Appellant raises a number of reasons why he believes discretionary review is warranted, chief among them being his contention that he was charged with the wrong crime. Appellant reasons that Judge Earnest's order during *voir dire* directing Deputy Andrew to take him into custody after he left the courtroom without permission, was the "arrest" and that the altercation at around 8:00 p.m. during jury deliberations was the "resistance." Appellant analogizes to *Washington v. State*, 87 Md. App. 132 (1991), wherein this Court considered the following question:

> [W]hether the physical resistance element of the crime of resisting arrest must be effected before or at the time of the arrest or whether the physical resistance may occur after the arrest is effected but during the time the arrestee is in the physical custody of the arresting officer.

Washington, 87 Md. App. at 137.

As part of its instructions to the jury on the law of resisting arrest, the trial judge there instructed that "[a]n arrest is the detention of a known or suspected offender for the

purpose of prosecuting him for a crime. The act of arresting includes the taking, the seizing or the detaining of the person of another, touching or putting hands upon him, or any act indicating an intention to arrest." *Washington*, 87 Md. App. at 137. This Court explained that

> In defining arrest, the trial judge explained that an arrest includes both a "taking" and a "detaining." By doing this, the trial judge effectively instructed the jury that the crime of resisting arrest could be committed if the resistance occurred anytime while the suspect was in the custody of the arresting officer, even for a period of time after the arrest was first effected.

Id.

After noting that an "arrest" was defined as either "(1) when the arrestee is physically restrained or (2) when the arrestee is told of the arrest and submits," *id.* at 138, we upheld the trial court's instruction, stating:

> In defining arrest as it did, the Court considered the state of arrest to include both the initial restraint and some period of detention following the initial restraint. The Court did not define how long the subsequent detention remains part of the arrest - when resistance would cease to be resisting arrest and become an attempted escape; nor is it necessary for us to define that outer limit in this case. *It may depend upon the circumstances*. The resistance here occurred while the police were attempting to place appellant into a van to transport him to the police station for booking. It was within a short time after the initial restraint, at the scene of the initial restraint and before any formal charges had been filed. In these circumstances, we think that it could properly fall into the category of restraining the arrestee, that the court's instruction was not incorrect, and that the requested instruction was not an accurate statement of the law.

Washington, 87 Md. App. at 138-39 (emphasis added).

Appellant contends that, under *Washington*, he was arrested during *voir dire* and in custody pursuant to that same arrest some ten hours later when he resisted. Thus, appellant asserts that his acts were no longer resisting the original arrest, but instead, were consistent

with the offense of attempted second degree escape. *See* Md. Code (2002, 2012 Repl. Vol.), § 9-405(a)(1) of the Criminal Law ("Crim. Law") Article ("A person who has been lawfully arrested may not knowingly depart from custody without the authorization of a law enforcement or judicial officer"). Given that appellant maintains that he was unlawfully arrested, we suspect that appellant would raise similar arguments to a charge of escape. But, in any event, we observe that the ultimate suggestion in *Washington* is that the determination of when a subsequent detention transforms from a resistance into an escape *depends upon the circumstances*. This qualification persuades us not to excuse the procedural default in this case.

Moreover, we note that the underlying charges concerning the altercation in the courtroom on November 23, 2015, filed in the District Court of Maryland for Caroline County, appear to be quite specific:

> IT IS FORMALLY CHARGED THAT THE DEFENDANT
>
> 1 . . . did intentionally cause physical injury in the second degree to Cpl. Jacob A. Andrew #0168, a law enforcement officer engaged in the performance of his official duties, in violation of CR 3-203.
>
> 2 . . . did assault Cpl. Jacob A. Andrew #0168 in the second degree in violation of CR 3-203, contrary to the form of the act of the assembly in such case made and provided and against the peace, government, and dignity of the state.
>
> 3 . . . did intentionally resist a lawful arrest.

Accordingly, we hold that appellant's sufficiency challenge is unpreserved for appellate review. In addition, we decline to consider the issue under either *Strickland* or our discretionary authority pursuant to Maryland Rule 8-131 (a).

II.

Appellant next contends that the trial court erred in giving an incorrect instruction on the law of resisting arrest. The State responds that the instruction was an accurate statement of law and that its inclusion was harmless beyond a reasonable doubt.

Appellant's argument concerns the third paragraph of the following jury instruction:

> The Defendant is charged with the crime of resisting arrest. In order to convict the Defendant of resisting arrest, the State must prove: (1) that a law enforcement officer attempted to arrest the Defendant; (2) that the Defendant knew that a law enforcement officer was attempting to arrest him; (3) that the Defendant intentionally refused to submit to the arrest or resisted the arrest by force; and (4) that the arrest was lawful.
>
> One illegally arrested may use any reasonable means to effect his escape even to the extent of using such force as it reasonably necessary.
>
> * * *
>
> In general, if the arrest or attempted arrest was made pursuant to *a judge's order*, the Defendant cannot defend against the offense by proving that the arrest was illegal. However, resistance is allowed where the arrest was made pursuant to *a judge's order* if it contains a defect so glaring that any person of ordinary intelligence could know that the *order* is null and void merely by hearing it.

(Emphasis added).[7]

[7] The trial court also instructed the jury, without objection:

> After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for a hearing, may revoke an order of pre-trial release or amend it to impose additional or different conditions of release. If it's decision results in the detention of the Defendant, the court shall state the reason for its action in writing or on the record. A judge may alter conditions set by a commissioner or another judge.

Prior to instructions, defense counsel objected to giving the last paragraph quoted above on the grounds that appellant was arrested based on an unlawful order and that "there was no warrant signed by a judge that Deputy Andrew was acting on when he…when he made this arrest." The court responded:

> Alright. Well, it's not a Maryland Pattern Jury Instruction, and I'm usually loathe to go off onto things that are not Maryland Pattern Jury Instructions unless it's such an unusual case I think it's appropriate. And I think it is an appropriate case to…to go off the path a little bit here because it's such a different case. First of all, it's an accurate statement of the law and it particularly fits into this case. I know the Defense doesn't like that, but I think it is accurate, and you certainly are still free to argue the…the fact that it's an illegal arrest nevertheless and that that should be the thing that prevails, and the jury just might buy into that quite frankly. That's my guess. But, at this point, I'm going to deny that. And please make your…obviously, your objection again after I make the instructions to preserve it. Okay?[8]

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard." *Arthur v. State*, 420 Md. 512, 525 (2011) (citations omitted). In determining whether a trial court has abused its discretion we consider whether "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction." *Berry v. State*, 155 Md. App. 144, 156 (2004) (citation omitted).

[8] Defense counsel renewed his objection to the instruction, and it is undisputed that this issue is preserved for our review.

The complaint in this case comes down to whether the instruction was an accurate statement of the law of resisting arrest. In making that assessment, the Court of Appeals has stated:

> We have said that whether the instruction is a correct statement of law "is independent of the facts of the case in which it is given, which results in it being determinative of whether the instruction . . . is *per se* improper." [*Thompson v. State*, 393 Md. 291, 303 (2006)]. Thus, a trial judge is required to give a requested instruction that states applicable law correctly and has not been fairly covered by other instructions. [*Patterson v. State*, 356 Md. 677, 683-84 (1999)]; *Gunning v. State*, 347 Md. 332, 347 (1997).

Dickey v. State, 404 Md. 187, 198 (2008) (footnote omitted).

Generally, the law of resisting arrest is as follows:

> The crime of resisting arrest was a common law offense in Maryland until codified in 2004. *Rich v. State*, 205 Md. App. 227, 239, 44 A.3d 1063 (2012). The applicable statute, Md. Code (2012 Repl. Vol., 2013 Supp.), § 9–408(b) of the Criminal Law Article ("CL"), provides that "[a] person may not intentionally resist a lawful arrest." The elements of the crime 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. *Rich*, 205 Md. App. at 240, 250, 44 A.3d 1063. The purpose of criminalizing such behavior is "to protect police officers from the substantial risk of physical injury." *Id*. at 255, 44 A.3d 1063.

DeGrange v. State, 221 Md. App. 415, 421 (2015) (footnote omitted).

Further, "the statute establishes a mens rea element, which requires that a defendant know that a law enforcement officer is attempting to arrest him and that the defendant resists the arrest intentionally." *Rich*, 205 Md. App. at 239 n.3; *see also* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:27.1, at 755 (2012) ("MPJI-Cr") (including the additional element "that the defendant knew that a law enforcement offer [arrested] [was attempting to arrest [him] [her]]").

Appellant apparently concedes that he refused to submit when Deputy Andrew was arresting him and that he resisted by force. Instead, appellant's argument on the merits is to the remaining elements of the offense: (1) he did not know he was being arrested; and, (2) the arrest was not lawful. As to knowledge, appellant argues that the determinative issue is whether he was being arrested anew during jury deliberations or whether the arrest was a continuation of the earlier order during *voir dire*. We conclude that the court's instruction that "the State must prove: . . . (2) that the Defendant knew that a law enforcement officer was attempting to arrest him" was an accurate statement of law and that the element of knowledge was adequately covered by the instruction.[9]

Our focus is then on whether the instruction properly instructed the jury as to the element concerning the lawfulness of the arrest. Substituting "judge's order" for "warrant", it appears that the State fashioned the pertinent language from the Comment to MPJI-Cr 4:27, which provides:

> If the arrest or attempted arrest was made pursuant to *a warrant*, the defendant cannot defend against the offense by proving that the arrest was illegal. *Rodgers v. State*, 280 Md. 406, 415-21, 373 A.2d 944, 949-52, cert. denied, 434 U.S. 928 (1977); *cf. Hill v. California*, 401 U.S. 797 (1971) (holding that the arrest of X, based on an arrest warrant for Y, is a valid arrest if the officer honestly and reasonably believes that X is Y). The Court of Appeals recognized an exception to the *Rodgers* rule. The Court permitted resistance of an unlawful arrest made pursuant to *a warrant* if the *warrant* contains a defect so glaring that any person of ordinary intelligence could know that the *warrant* is null and void merely by looking at it and reading it. *Rodgers*, 280 Md. at 416-17, 373 A.2d at 950.

[9] Having concluded that the first paragraph of the instruction was an accurate statement of law, we also uphold the middle part of the instruction concerning a defendant's right to effect his escape following an illegal arrest. *See State v. Wiegmann*, 350 Md. 585, 601 (1998).

MPJI-Cr 4:27 at 753 (Comment) (emphasis added).

In *Rodgers v. State*, 280 Md. 406, *cert. denied*, 434 U.S. 928 (1977), police were in the process of arresting Rodgers on an outstanding facially defective warrant when Rodgers turned on one of the two arresting officers and slashed him with a razor blade. *Rodgers*, 280 Md. at 407-08. Rodgers was subdued by the other officer and placed in a patrol car. He was ultimately convicted of resisting arrest. *Id*. at 409.

After the arrest, it was determined that the actual warrant, which the arresting officers did not have in their possession, provided that Rodgers committed an assault, "via telephone." *Rodgers*, 280 Md. at 407. The State conceded that a person could not commit an assault on the telephone, and the Court initially concluded that the "warrant was defective," and "the arrest was illegal as a matter of law." *Id*. The issue, then, was whether Rodgers could resist an arrest made on illegal warrant. *Id*. at 410.

After discussing cases decided under the common law, the Court of Appeals quoted approvingly from a decision of the North Carolina Court of Appeals:

> When an officer attempts to make an arrest without a warrant and in so doing exceeds his lawful authority, he may be resisted as in self-defense and in such case the person resisting cannot be convicted under G.S. Sec. 14-223 of the offense of resisting an officer engaged in the discharge of his duties. *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100. But when an officer is acting under authority of process of a court, a different situation exists. In such case if the writ is sufficient on its face to show its purpose, even though it may be defective or irregular in some respect, yet the officer is protected. "It would be monstrous to lay down a different rule. It would put in jeopardy the life of every officer in the land. It never could be intended that they should determine, at their peril, the strict legal sufficiency of every precept placed in their hands."

Rodgers, 280 Md. at 416 (quoting *North Carolina v. Wright*, 162 S.E.2d 56, 62, *aff'd*, 163 S.E.2d 897 (N.C. 1968)).

And, concerning what type of facial defect or irregularity would be sufficient to nullify an otherwise lawful arrest, the *Rodgers* Court stated:

> 'It must, however, be distinctly understood, that in what we have thus said in regard to the invalidity of this paper as a warrant, we do not hold that any formal defect or irregularity, even though appearing on its face, will be sufficient to vitiate such a writ, and render the magistrate or constable liable in damages for issuing it or acting under it. On the contrary, the defect must be so glaring and palpable that any person of ordinary intelligence by merely looking at and reading it, will at once pronounce it null and void, and of no effect as a warrant.'

Rodgers, 280 Md. at 417 (quoting *Lewin v. Uzuber*, 65 Md. 341, 349 (1886)).

The *Rodgers* Court ultimately held that there was no right to resist an arrest pursuant to a warrant. After quoting from Judge Learned Hand that, resisting arrest because of a claim that the arrest was unlawful was "not a blow for liberty but on the contrary, a blow for attempted anarchy," *id*. at 418, the Court observed:

> Judge Hand's comment was intended to apply to any arrest made by a peace officer, but it certainly has overwhelming application to those cases, like the one at hand, where an officer makes an arrest upon a warrant that is defective through no fault of his. At least where a citizen resists with force an illegal arrest made by a police officer without a warrant, that force is directed at the individual responsible for the improper deprivation of the citizen's liberty but the officer engaged in carrying out the mandate of a court that he arrest an individual named in a warrant is blameless if that warrant has been issued in error, and it would be a betrayal of our duty to such an officer to say that the citizen is entitled to inflict injury on the officer because the courts had erred in issuing the warrant. Indeed, to sanction resistance to arrest under these circumstances would be to invite the very destruction of the entire judicial process, for we would then impose upon every police officer commanded by a warrant to make an arrest the duty to make his own independent judgment as to whether the judicial officer had properly performed his duty in issuing the warrant. Such a practice would make a

> mockery of the courts and place an impossible burden on police officers, who, however well trained in the performance of their police duties, cannot be expected to have sufficient training in the law to make a reasoned judgment as to whether the face of every arrest warrant contains any fatal defect or irregularity.

Rodgers, 280 Md. at 418-19; *see also Monk v. State*, 94 Md. App. 738, 744 (1993) ("[T]he potential harm to the officer, the arrestee, and the innocent bystander far outweighs the injustice resulting from limiting the arrestee's recourse in the courts.") (citing *Rodgers*, 280 Md. at 419-21).

The *Rodgers* Court concluded:

> We cannot believe that the General Assembly, having made peace officers agents of the court for the purpose of serving arrest warrants, could have intended that citizens arrested pursuant to such a warrant be free to dispute its validity by doing violence to the officer serving the judicial process. Moreover, to do other than uphold the Appellant's conviction in this case would be to reach a ridiculous result, as he is attempting to justify his use of force in resisting this arrest by pointing out a defect in a warrant that neither he nor the arresting officers saw until after the arrest had taken place.

Rodgers, 280 Md. at 421.

While there is no right to resist an arrest made pursuant to a defective warrant, the jury instruction in this case expanded that right to include arrests made pursuant to a defective judge's order. In considering that expansion of the law, both parties direct our attention to *State v. Wiegmann*, 350 Md. 585 (1998). In that case, a judicial master purported to hold Wiegmann in contempt for failure to pay child support. *State v. Wiegmann*, 350 Md. at 588-89. The master ordered the court deputies to take Wiegmann into custody, and immediately thereafter, in what this Court and the Court of Appeals described as a "courtroom brawl," *see Wiegmann v. State*, 118 Md. App. 317, 321 (1997),

Wiegmann struck a deputy and attempted to flee the courtroom. *Id*. at 589. He was subsequently charged in a separate proceeding with resisting arrest and assault. *Id*. Although he was acquitted by a jury of resisting arrest, this Court vacated his assault conviction on the grounds that his arrest was illegal because masters have no authority to order arrests and because the trial court refused to instruct the jury as to the conditions under which a person is entitled to resist arrest. *State v. Wiegmann*, 350 Md. at 590 (discussing *Wiegmann v. State*, 118 Md. App. at 348-50.[10]

After granting the State's petition for writ of certiorari, the Court of Appeals affirmed. Quoting approvingly from this Court's opinion, the Court agreed that the Maryland Rules "do not grant express power to a domestic master to hold a litigant against his will after a non-support hearing, although masters are authorized to conduct evidentiary hearings and to make findings of fact and recommendations to the circuit court." *State v. Wiegmann*, 350 Md. at 592 (quoting *Wiegmann v. State*, 118 Md. App. at 335). Furthermore, "[a] master is not a judicial officer, and the Maryland Constitution does not vest a master with any judicial powers." *State v. Wiegmann*, 350 Md. at 593 (quoting *Wiegmann v. State*, 118 Md. App. at 337). And, "a master's status as an 'officer of the court' does not confer judicial powers upon the master, such as the authority to hold someone in contempt, to sign a warrant, or to order a police officer to make an arrest. Indeed, '[a] master is not the trial judge. A master does not replace her or him.'" *State v. Wiegmann*, 350 Md. at 595 (quoting *Wiegmann v. State*, 118 Md. App. at 338-39 (other

[10] In the Court of Appeals, the State did not dispute this Court's conclusion that Wiegmann was under arrest. *See Wiegmann*, 118 Md. App. at 330-32.

citation omitted)). Therefore, this Court held that a master does not have the express authority "to arrest a litigant pending judicial review of the master's recommendations[.]" *State v. Wiegmann*, 350 Md. at 595 (quoting *Wiegmann v. State*, 118 Md. App. at 340).

The State argued for reversal of this Court's opinion on the grounds that "a master has the power to order a deputy sheriff to detain the party the master is recommending be found in contempt 'for the short time it takes for a circuit court judge to issue an order in accordance with the master's recommendation.'" *State v. Wiegmann*, 350 Md. at 599. The Court of Appeals concluded that that approach was "unworkable" and that "masters are not judges, nor are they judicial officers. Accordingly, they should not hold themselves out as such. Parties are entitled to understand clearly whether the person before whom they are appearing is a judge." *State v. Wiegmann*, 350 Md. at 600.

The Court of Appeals next addressed the State's argument that, even if the master could not order Wiegmann's arrest, that the order was "the functional equivalent of an arrest warrant," and appellant could not resist that arrest pursuant to *Rodgers, supra*. *State v. Wiegmann*, 350 Md. at 600. The Court declined to adopt the State's argument because, not only can masters not order arrests or issue warrants, but also, "the deputies' good faith belief that the master, a non-judicial officer of the court, has the authority to order an arrest cannot transform an unlawful, warrantless arrest into a legal, valid arrest made pursuant to a warrant." *Id*. Moreover:

> A master cannot issue a warrant, written or otherwise. In the present case, the order came from the master, not a magistrate or judge. Simply because the deputies honestly believed that [the master] had the authority to order them to take respondent into custody does not negate the fact that [the master] had absolutely no power to give that order. Additionally, without a warrant

> from a judge, "simple good faith on the part of the arresting officer is not enough…. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police." *Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968) (quotations and citations omitted). As the Court of Specials Appeals said, "[a] judicially authorized warrant is the cornerstone of the Fourth Amendment, and analogizing the situation in the case *sub judice* to an arrest pursuant to an invalid warrant denigrates the importance of the warrant to our constitutional framework." *Wiegmann*, 118 Md. App. at 347, 702 A.2d at 943. Accordingly, this argument fails.

State v. Wiegmann, 350 Md. at 601.

Having failed to persuade the Court that the master's order was the equivalent of an arrest pursuant to a warrant, the State then argued that the Court of Appeals should altogether abolish the rule in Maryland holding that "one illegally arrested may use any reasonable means to effect his escape, even to the extent of using such force as is reasonably necessary." *State v. Wiegmann*, 350 Md. at 601. The Court summarized the State's position:

> Petitioner essentially argues the right to resist an unlawful arrest should be abrogated on public policy grounds because it promotes violent interactions between peace officers and the public, few people actually are aware of or are able to contemplate use of the rule during the heat of an arrest situation, and the rule endangers the safety and lives of officers and arrestees. Petitioner also cites to the various cases and legislative enactments of our sister states that already have abolished the common law rule. Respondent does not counter petitioner's policy arguments other than to assert that most of the states that have abolished the right to resist have done so legislatively, and that the Legislature is the proper entity to abrogate the common law rule, particularly given our discussion of some of the negative aspects of this rule in *Rodgers* and the Legislature's failure thereafter to make any changes responsive to our concerns.

State v. Wiegmann, 350 Md. at 605-06.

The Court recognized that the State's argument held some merit, but nevertheless, it could not conclude that "the right to resist is unsound or unsuitable to a modern society." *State v. Wiegmann*, 350 Md. at 606. The Court continued "[w]ere we to abrogate the common law rule, the only remaining remedies for an unlawful arrest would be release followed by a civil or criminal action, such as an action for false imprisonment. We have said that such remedies often may be inadequate." *Id*. (citing *Rodgers*, 280 Md. at 421). The Court further noted that "of those states that have abolished the right to resist an illegal arrest, the majority have done so by legislative enactment." *Id*. at 607. Accordingly, the Court of Appeals declined to abolish the common law in Maryland "permitting persons to resist an illegal warrantless arrest." *Id*.

Neither *Rodgers*, which holds that there is no right to resist an arrest pursuant to a warrant, nor *Wiegmann*, which reaffirms the right to resist an unlawful, warrantless arrest, in that case, a master's order, answer the question presented in this case. For further guidance, both parties cite *Hill v. State*, 419 Md. 674 (2011). That case involved "springing start dates" and orders from the same circuit court judge involved in *Montgomery v. State*, 405 Md. 67 (2008).

In *Montgomery*, the circuit court judge convicted Montgomery of violating a condition of probation in an underlying arson case for failure to pay child support. *Montgomery*, 405 Md. at 70. The court sentenced Montgomery on that violation to serve 10 years of the remaining portion of his previously suspended sentence for arson, but ordered that he report three years from the date of disposition, purportedly pursuant to Maryland Rule 4-348(d). *Id* at 70-72. The condition for the deferred starting date, *i.e.*, the

"springing sentence," was the judge's admonishment that if Montgomery was "of good behavior between now and three years from now I will reconsider it and vacate it and not make you serve another day." *Id*. at 70. Thereafter, when Montgomery failed to report on the date previously set by the judge, he was "picked up" and incarcerated at the Maryland Correctional Institution in Hagerstown, Maryland. *Id*. at 71.

On appeal, the Court of Appeals agreed that the springing sentence was an illegal sentence under Maryland Rule 4-345. *Montgomery*, 405 Md. at 81. The Court held that the circuit court's authority to stay a sentence was not as broad as the State suggested, and that, historically, the authority to defer the reporting date for a sentence was "for a limited period of time and for limited reasons[.]" Id. at 79. Because the circuit court's sentencing in *Montgomery* exceeded that limited authority, the Court of Appeals held that the sentence was illegal. *Id*. at 79-81.

Prior to issuance of the Court of Appeals decision in *Montgomery*, the same circuit court judge had imposed springing sentences on a number of other defendants, including the petitioners in *Hill, supra*. Like the defendant in *Montgomery*, these petitioners did not report on their deferred starting date, which resulted, for them, in convictions for second degree escape. *Hill*, 419 Md. at 676. Seeking to vacate their escape convictions, the Court of Appeals considered "[w]hether a conviction and/or sentence for second degree escape is legally [] valid if it is predicated on the failure 'to obey a court order to report to a place of confinement,' where that court order was legally invalid." *Id.*

The Court began by acknowledging that a limited right to "self-help" in Maryland, stating that "one illegally arrested may use any reasonable means to effect his escape, even

to the extent of using such force as is reasonably necessary." *Hill*, 419 Md. at 683 (citations omitted). The Court even accepted that "we allow self-help when a defendant escapes in response to threats to his life, and immediately reports to the proper authorities upon reaching a position of safety." *Id*. at 683 n.5. However, the Court continued:

> This limited allowance for self-help, however, does not extend to facially valid court orders. For example, a person may not resist an arrest carried out pursuant to a court-issued warrant. *See Rodgers v. State*, 280 Md. 406, 421, 373 A.2d 944, 952 (1977) *cert. denied*, 434 U.S. 928, 98 S.Ct. 412, 54 L.Ed.2d 287 (1977) (A person may not resist "an arrest [ ] made by a peace officer on a warrant duly issued by a judicial officer."). This distinction makes clear that Maryland law requires compliance with court orders, even if there are serious questions about the validity of the order. *Cf. United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947) (even where the court's jurisdiction is subject to serious doubt, violation of the court order is subject to sanction); *United States v. Petrella*, 707 F.2d 64 (2nd Cir.1983) (alleged invalidity of deportation order no defense to charge of illegal re-entry).

Hill, 419 Md. at 684.

The Court then held that the *Hill* petitioners were properly convicted of second degree escape, observing, "[t]hey were under a court order to report for a term of imprisonment, and failed to comply with these court orders[.]" *Hill*, 419 Md. at 684. Furthermore:

> A prisoner with an invalid sentence may not engage in self-help, and defy a court order of imprisonment, any more than a prisoner with a potentially invalid conviction. *See* [*Jennings v. State*, 8 Md. App. 321, 325 (1969)] (escape convictions are valid "even though [the defendant] might be able to show such defects in the procedure by which he was arrested and imprisoned as would justify his release."). Although Petitioners may have grounds to challenge their underlying, springing sentence, that challenge must be made through the appropriate channels.

Hill, 419 Md. at 684.

The Court concluded that the "Petitioners' failure to report for imprisonment was sufficient to support their escape convictions. The subsequent ruling in *Montgomery v. State* allowed Petitioners to challenge, in the appropriate venue, the validity of their 'springing' sentences. It did not, however, allow them to engage in self-help." *Hill*, 419 Md. at 686.

Like *Rodgers* and *Wiegmann*, we conclude that *Hill* does not answer the precise question presented. Although it is clear that compliance with court orders is required, and it is also clear that a person may not resist an arrest pursuant to a lawful warrant, we are not persuaded that the trial court's instruction in this case, essentially informing the jury that there is no right to resist a court order, lawful or not, is an accurate statement of law.[11]

Furthermore, there is arguably a difference between arrests made following non-contempt based orders issued during the middle of a trial and arrests resulting from search and seizure warrants issued under the precise requirements of the Fourth Amendment. One notable difference is that a warrant, based on probable cause, ordinarily issues after a review by a neutral and detached magistrate. As the Supreme Court has observed, "[t]he

[11] To be clear, we are not concerned here with an order of contempt because Judge Earnest specifically chose not to hold appellant in contempt for disrupting the court proceedings. Furthermore, in assessing the jury instruction, we need not decide whether Judge Earnest's order directing the Sheriff to take appellant into custody during *voir dire* was actually correct. However, we again note that the judicial record supports appellant's assertion that he appeared in court pursuant to a summons. And, even if former Maryland Rule 4-216.2 (b) applied in this case, that, presumably, other than the standard warning that may have been on that summons informing appellant that failure to comply could amount to issuance of a warrant for his arrest, *see* http://www.courts.state.md.us/district/forms/criminal/dccr045sample.pdf, the record also appears to support appellant's claim that he was not given adequate notice that he was about to be taken into custody after he left the courtroom without permission.

bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." *Franks v. Delaware*, 438 U.S. 154, 164 (1978). "The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search." *Steagald v. United States*, 451 U.S. 204, 212 (1981). The Supreme Court has also explained:

> We also have said that "[a]lthough in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," *United States v. Ventresca,* 380 U.S. 102, 109, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965). This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Illinois v. Gates, 462 U.S. at 237 n. 10 (1983); *see also Stevenson v. State*, 455 Md. 709, 723 (2017) (recognizing that "the Supreme Court has 'concluded that the preference for warrants is most appropriately effectuated by according "great deference" to a magistrate's determination'"), *cert. filed*, __ U.S.__, No. 17-796 (filed November 30, 2017); *State v. Johnson*, 208 Md. App. 573, 579 (2012) ("The law's preference for police resort to judicially issued warrants is so hydraulically powerful that the courts, by way of the practical endorsement of that preference, will uphold a warrant even should the warrant issuing judge have been technically wrong in the assessment of probable cause").

Ultimately, this issue is one of claimed instructional error. Whereas Maryland law permits resistance to an unlawful, warrantless arrest, the instruction in this case would create an exception in cases where the arrest follows a judge's non-contempt based order

during the middle of trial. We conclude that the court's instruction was not a correct statement of law and it was error to so instruct the jury.

We also are not persuaded by the State's alternative arguments that any error was harmless beyond a reasonable doubt. *See generally*, *Dorsey v. State*, 276 Md. 638, 659 (1976) (error will be harmless when reviewing court, upon independent review, is able to declare a belief beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the verdict). Although appellant's actions in the courtroom during jury deliberations not only could be considered: (1) a separate act of contempt; (2) a separate and independent assault on Deputy Andrew, followed by an accompanying arrest and resistance to that arrest; and, (3) disturbing the public peace and disorderly conduct, *see* Crim. Law § 10-201, the case as presented to the jury, both during instructions and closing argument, began and ended with the court's order directing Deputy Andrew to take appellant into custody during *voir dire*. And, more importantly, the instruction at issue focused on the judge's order. Under the unique circumstances of this case, we conclude that the instructional error was not harmless beyond a reasonable doubt and shall vacate appellant's conviction for resisting arrest and remand this case for further proceedings.[12]

[12] We recognize that, ordinarily, we would consider appellant's sufficiency claim under double jeopardy principles "because a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place." *Benton v. State*, 224 Md. App. 612, 629 (2015). However, considering "the strange posture of this case," we decline to do so because, as set forth in more detail in the discussion of Issue I, the issue was not properly preserved. *See Howell v. State*, 56 Md. App. 675, 683-85 (1983) (observing, where there was a failure to argue a motion for judgment after the State reopened its case, that "[t]he judicial machinery cannot, by definition, possibly malfunction when it has never been called upon to function"), *cert. denied*, 299 Md. 426, *cert. denied*, 469 U.S. 1039 (1984).

JUDGMENT VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

COSTS TO BE PAID BY KENT COUNTY.