

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1076

September Term, 2015

DONALD JORDEN

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 16, 2016

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

Following a jury trial in the Circuit Court for Baltimore City, Donald Jordan¹ was convicted of theft of goods valued between \$1,000 and \$10,000.² The court sentenced him to three years in prison, after which he filed a timely notice of appeal. Jordan raises one question that he phrases as follows:

Did the court below commit plain error by giving jury instructions that invaded the province of the jury and omitted the standard of proof from the pattern instruction?

Finding no error, we shall affirm the judgment of the trial court.

FACTS and LEGAL PROCEEDINGS

On December 29, 2013, Baltimore City Police Officer Taras Hnatyshyn responded to an anonymous call regarding a possible burglary of an apartment located at 333 South Freemont Avenue, Baltimore City. Upon arrival at that address, Officer Hnatyshyn saw that the front door of the apartment appeared to have been “broken open.” The officer went inside and found that the apartment had been ransacked.

Through a cell phone bill he found, Officer Hnatyshyn determined that Cameron Connah lived in the apartment. He notified Mr. Connah of the break-in and had the front door of the apartment secured until Mr. Connah’s return.

¹ Appellant’s name is spelled “Jordan” in some record documents, but appellant spelled it for the court as “Jorden,” and the court utilized that spelling in its docket entries.

² The jury acquitted appellant of malicious destruction and two counts of breaking and entering.

At trial, the State proved that Mr. Connah and his wife³ locked their apartment and left on vacation about six days before the break-in. They returned from vacation on January 2, 2014 to find almost everything in their apartment that had value gone. The missing items included seven musical instruments, a laptop computer, a computer tablet, two bicycles, a jar of coins, some tools, a checkbook and a watch. They made a list of missing items and provided the list to the police.

In February 2014, Mr. Connah and his wife, both amateur musicians, went to a Bill's Music House in Baltimore County to replace one of the guitars that had been stolen; while there, Mrs. Connah found her clarinet, verified by its serial number, which had been taken during the break-in. The Connahs also located two of their stolen guitars at a store in Glen Burnie, and a police detective recovered their stolen mandolin and viola from a pawnbroker in Baltimore City.

In regard to the various items stolen from the Connahs, the State introduced into evidence certified business records from Bill's Music House. Those records showed that on January 16, 2014, appellant sold a "Buffett [clarinet] made in France w/hardshell case" for \$250. The records included a copy of appellant's identification card. The State also introduced certified business records from Cash USA, a pawnbroker in Baltimore City, which showed that on January 27, 2014, appellant had pawned a violin with case for \$30, and on February 4, 2014, he had pawned a mandolin with case for \$50.

³ At the time of the break-in, Mr. Connah was not yet married. He and his wife married prior to trial.

Appellant took the stand and admitted that he had sold the musical instruments to Bill's House of Music and Cash USA in January and February 2014, but he claimed he had purchased them for \$200 from a junkie selling those items from a shopping cart on the street. According to appellant, he made the purchase with the intent of reselling the items for more money. He denied ever having been in the Connahs' apartment or in any other dwelling in the 300 block of Fremont Avenue.

DISCUSSION

Appellant contends that the trial court twice erred in instructing the jury about the State's burden of proving his crimes beyond a reasonable doubt, once by omitting the line from the pattern jury instructions that explains that the State is required to prove each and every element of the crimes charged. He further claims that the trial court erred when it placed "improper emphasis" on the theft charge by repeating the instruction setting forth the elements of theft, which, in his view, implied that the trial court believed the State had proven theft. Conceding that in failing to object to the instructions as given, he did not preserve the issue for appellate review, appellant urges us to utilize our discretion and find plain error in the jury instructions. The State argues that we should decline to review the matter for plain error inasmuch as the instructions as given correctly stated the reasonable doubt standard and the repetition of the instructions did not invade the province of the jury.

At the close of all the evidence, the court gave the jury its instruction concerning the presumption of innocence and reasonable doubt, as follows:

The defendant, as I have told you from the first moment we met, is presumed to be innocent of the charges. And this presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden remains on the State throughout the trial. The defendant is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.

A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of a fact to the extent you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.

If you are not satisfied of the Defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty. But a—remember, a reasonable doubt is a doubt founded upon reason.^[4]

⁴ Compare Maryland Criminal Pattern Jury Instruction (“MPJI-Cr”) 2:02 (2nd Edition 2013 Supp.), which reads:

The defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. *This means that the State has the burden of proving, beyond a reasonable doubt, each and every element of the crime [crimes] charged. The elements of a crime are the component parts of the crime about which I will instruct you shortly.* This burden remains on the State throughout the trial. The defendant is not required to prove [his] [her] innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.

A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief
(continued...)

The court also instructed the jury concerning the elements of the crime of theft:

The defendant is charged with the crime of theft. In order to convict the defendant of theft, the State must prove that the dwelling—that the defendant willfully or knowingly obtained or exerted unauthorized control over the property of the owner, that the defendant had the purpose of depriving the owner of the property, that the value of the property was over \$1,000 and less than \$10,000. But for our purposes, the State must only prove that it was valued at more than \$1,000.

Now, property means anything of value. Owner means a person other than the defendant who has possession of or any interest in the property, and without whose consent the defendant has no authority to exert control over the property.

Deprive means to withhold the property of another permanently or for such a period of time as to appropriate its value.

Exert control, that means to take and carry away or appropriate to one's own use, or to sell, convey, or transfer title to or an interest in the property. Value means that the—means the market value of the property at the time and place of the crime.

If the market value cannot be satisfactorily ascertained, the cost of replacement of the property or service is within a reason—or service within a reasonable time after the crime may be used for valuation.

All right. *Let me read that one again, because there's lots of parts to it.*

The defendant is charged with the crime of theft. In order to convict the defendant of theft, the State must prove that the defendant willfully or knowingly obtained or exerted unauthorized control over the property of

without reservation in an important matter in your own business or personal affairs. If you are not satisfied of the defendant's guilt to that extent for each and every element of a [the] crime charged, then reasonable doubt exists and the defendant must be found not guilty of that [the] crime.

(Emphasis added).

the owner, that the defendant had the purpose of depriving the owner of the property, *that the defendant willfully or knowingly abandoned, used, or concealed the property in such a manner as to deprive the owner of the property, or knew that that abandon, [sic] use, or concealment of the property would deprive the owner of the property*, that the value of the property was over a thousand dollars.

Property means anything of value. Owner means a person other than the defendant who has possession of or any interest in the property, and without whose consent the defendant has no authority to exert control over the property.

Deprive means to withhold the property of another permanently or for such a period of time as to appropriate a portion of its value.

Exert control means to take, carry away, or appropriate to one's own use, or to sell, convey, or transfer title to or an interest in the property. Value means the market value of the property at the time and place of the crime, or if the market value cannot be satisfactorily ascertained, the cost of replacement of the property or service within a reasonable time after the crime.

(Emphasis added).

Appellant did not object to either instruction as given. As mentioned, he complains that the trial court's instruction concerning reasonable doubt omitted a critical part of the pattern instruction, i.e., the part that states that the State has the burden to prove each and every element of the crimes charged and that the repetition of the instruction concerning the elements of the crime of theft invaded the province of the jury, and both instructions should therefore be reviewed for plain error.

Md. Rule 4-325 governs instructions to the jury and states, in pertinent part:

(e) **Objection.** No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the

court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

Rule 4-325(e) makes clear that the absence of an objection to the giving or the failure to give a jury instruction at trial ordinarily constitutes a waiver of a claim that the instructions were erroneous. *Morris v. State*, 153 Md. App. 480, 509 (2003) (citing *Walker v. State*, 343 Md. 629, 645 (1996)). Only if a party takes exception to an error in the jury instructions does the court have the opportunity to correct it. *McMillan v. State*, 181 Md. App. 298, 359 (2008), *rev'd on other grounds*, 428 Md. 333 (2012).

Rule 4-325(e) does, of course, grant us “plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court.” *Id.* (quoting *Danna v. State*, 91 Md. App. 443, 450 (1992)). In the context of erroneous jury instructions, however, the plain error doctrine has been applied sparingly. *Conyers v. State*, 354 Md. 132, 171 (1999). The plain error hurdle, ““high in all events, nowhere looms larger than in the context of alleged instructional errors.”” *Martin v. State*, 165 Md. App. 189, 198 (2005) (quoting *U.S. v. Sabetta*, 373 F.3d 75, 80 (1st Cir. 2004)). With regard to reviewing alleged error in jury instructions, our appellate courts have “adher[ed] steadfastly to the preservation requirement.” *Morris*, 153 Md. App. at 508.

Our review of the record unearths no error in the instructions, much less error of sufficient magnitude as to persuade us to deviate from the preservation requirement and undertake the extraordinary step of plain error review.

In *Ruffin v. State*, 394 Md. 355 (2006), the Court of Appeals changed Maryland common law principles with regard to toleration of deviations from the pattern jury instructions concerning the reasonable doubt standard. The *Ruffin* Court proclaimed that the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights guarantee that an accused be convicted only upon proof beyond a reasonable doubt. *Id.* at 363. Therefore, a jury instruction in regard to that standard is “an essential component in every criminal proceeding.” *Id.*

To minimize errors in the reasonable doubt instruction, the *Ruffin* Court held that trial courts are “required to instruct the jury on the presumption of innocence and the reasonable doubt standard of proof which closely adheres to MPJI-CR 2:02. Deviations in substance will not be tolerated.” *Id.* at 373 (footnote omitted). The prohibition against deviations in substance from the pattern jury instruction does not, however, require a trial court to provide a *verbatim* recitation of MPJI-Cr 2:02. It need only “closely adhere” to the language used therein. *Turner v. State*, 181 Md. App. 477, 485 (2008).

In the present matter, the trial court’s reasonable doubt instruction was virtually identical to MPJI-Cr 2:02, with the exception of the court’s omission of the sentences added to the pattern instruction in 2013, i.e., the sentences that read: “This means that the State has the burden of proving, beyond a reasonable doubt, each and every element of the crime [crimes] charged. The elements of a crime are the component parts of the crime about which I will instruct you shortly.” Otherwise, the court thoroughly

instructed the jury, in accordance with MPJI-Cr 2:02, of the principles of burden of proof and presumption of innocence. Moreover, the court explained to the jury the elements of the crimes of which appellant was charged, advising that the State must prove each one.

Carroll v. State, 428 Md. 679 (2012), is instructive concerning the issue of what should be the remedy when the judge fails to include the two sentences at issue. In *Carroll*, as here, the defendant claimed that the reasonable doubt instruction given by the trial court, virtually a verbatim recitation of then-MPJI-Cr 2:02, violated Maryland Rule 4-325(c) because it did not include the advisement that, in order to convict the defendant, the jury must be convinced beyond a reasonable doubt that the State proved every element of every charged crime.⁵ *Id.* at 683.

The Court of Appeals, agreeing with the State’s invocation of *Victor v. Nebraska*, 511 U.S. 1, 5 (1994), that “no particular form of words” is required when instructing the jury concerning the State’s burden of proof, and went on to explain that the detailed description of the concept of proof beyond a reasonable doubt, as set forth in MJPI-Cr 2:02,

conveyed to the jurors that they must evaluate guilt based on that standard of proof. Then, in each of the separate instructions on the offenses charged, the court referred to the burden of proof when introducing the elements of each charged offense with the words ‘the State must prove’ those elements. Read together, the reasonable doubt instruction (emphasizing the meaning and importance of that standard of proof) and the repeated message in every instruction that the State ‘must prove’ the elements of each charged offense

⁵ *Carroll* also contended that the reasonable doubt instruction was constitutionally deficient. 428 Md. at 683. In this appeal, appellant does not raise a constitutional challenge.

adequately imparted to the jury the mandate that the State must prove each element beyond a reasonable doubt.

Carroll, 428 Md. at 690.

The *Carroll* Court held that “the instructions, read as a whole, satisfy the constitutional mandate that the jury be informed that it is the State’s burden to prove beyond a reasonable doubt each element of the crime(s) charged. It follows that there likewise is no violation of Maryland Rule 4-325(c).” *Id.* at 692. *See also McCree v. State*, 214 Md. App. 238, 274 (2013), *aff’d*, 441 Md. 4 (2014) (instructions, similar to those given in *Carroll*, read as a whole, satisfied the constitutional mandate that the jury be informed that it is the State’s burden to prove beyond a reasonable doubt each element of the crimes charged). The *Carroll* Court also reaffirmed “the strong message” it had sent in *Ruffin, supra*, approving the language of the MPJI-Cr 2:02. 428 Md. at 692-93.

Notwithstanding its holding, the *Carroll* Court did “urge the Maryland State Bar Association Committee on Maryland Pattern Instructions to consider amending MPJI-Cr 2:02 to include explicit language instructing that the State has the burden to prove beyond a reasonable doubt each element of each charged offense.” *Id.* at 693 (footnote omitted). The fact that the Committee did, at the invitation of both Maryland appellate courts,⁶ so amend the pattern jury instruction in 2013 does not change our conclusion that the reasonable doubt instruction and the instructions setting forth the elements of the charged crimes, read together, fairly conveyed the notion that the State was required to prove the

⁶*See* Comment to MPJI-Cr 2:02.

charged crimes beyond a reasonable doubt, which the average juror would understand could not occur in the absence of proof of every element of the crime. The additional language that the trial court omitted, although preferred, was not crucial in light of the totality of the instructions actually given. We therefore hold that the court did not err in instructing the jury concerning the presumption of innocence and reasonable doubt.

As previously mentioned, appellant also claims that the trial court committed plain error by improperly invading the province of the jury when it repeated a portion of the reasonable doubt instruction and a part of the theft instruction. He, however, provides no authority for that contention, and we are aware of none.

In repeating to the jury that “[a] reasonable doubt is a doubt founded upon reason,” the court did nothing more than emphasize the constitutional mandate that the jury be informed that the State bears the burden of proving the charged crimes beyond a reasonable doubt, which was certainly more beneficial than prejudicial to appellant’s case.

In repeating the theft instruction, the court told the jury that he was re-reading the instruction “because there’s lots of parts to it.” The repetition served to ensure the jury’s understanding of all the elements. Additionally, in repeating the instruction, the court included an element the State was required to prove, which it had originally omitted from its initial recitation of the instruction. The repetition of the lengthy instruction, including the additional requirement, reinforced the elements of the crime for the jury.

Moreover, the court had, in addition to the theft instruction that listed the elements of the crime, instructed the jury that it could find appellant guilty of theft if “the defendant was in possession of the property shortly after it was stolen, and the defendant’s possession has not otherwise been explained by the evidence.” In this regard, defense counsel conceded in her closing argument that, pursuant to the court’s instructions, the jury was “able to consider [that] exclusive possession of recently stolen property, unless reasonably explained, may be evidence of theft.” Given appellant’s admission that he possessed and sold items stolen from the Connahs shortly after the burglary at their apartment, coupled with appellant’s unlikely explanation as to how he gained possession of the Connahs’ property, the jury’s verdict on the theft charge was strongly supported by the evidence and not at all likely to have been affected by the court’s repetition of the theft instruction.

In summary, appellant’s claim that the court’s repetition of the theft instruction and a portion of the reasonable doubt instruction unfairly prejudiced him is purely speculative and does not come close to showing prejudice that would cause us to invoke the plain error doctrine.

**JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY
AFFIRMED; COSTS TO BE PAID
BY APPELLANT.**