

Circuit Court for Baltimore City
Case No. 116075027

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 196

September Term, 2017

KENNY HOPEWELL

v.

STATE OF MARYLAND

Woodward, C.J.,
Kehoe,
Moylan, Charles, E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: December 28, 2017

*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, Kenny Hopewell, appellant, was convicted of first-degree assault, reckless endangerment, discharge of a firearm, use of a firearm in a crime of violence, possession of a regulated firearm with a disqualifying conviction, and wearing, carrying or transporting a firearm. His sole claim on appeal is that the trial court erred in failing to instruct the jury on the “impeachment of a witness by prior testimony,” which is covered by Maryland Criminal Pattern Jury Instructions, § 3:19 (B) (2nd ed. & 2016 Supp.). For the reasons that follow, we affirm.

Maryland Rule 4-325(e) provides in pertinent part:

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.

Hopewell concedes that defense counsel failed to comply with Rule 4-325(e) by not objecting after the trial court instructed the jury. He nevertheless contends that we should consider the issue because he “substantially complied with the preservation requirement.” *See Gore v. State*, 309 Md. 203 (1987). To show “substantial compliance” with Rule 4-325(e), a party must meet the following requirements:

[T]here must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record[;] and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Gore v. State, 309 Md. at 209. Although defense counsel asked the court to instruct the jury on “impeachment of [a] witness by prior testimony,” she did not object when the trial court determined that the instruction had not been generated by the evidence. Instead,

defense counsel acquiesced to the court’s ruling, stating: “We can go with the Court’s instructions, Your Honor.” Consequently, we are not persuaded that Hopewell substantially complied with Rule 4-325(e). *See Choate v. State*, 214 Md. App. 118, 129-30 (2013) (finding no substantial compliance where defense counsel agreed with the instruction and told the court that he was satisfied with the instructions); *Braboy v. State*, 130 Md. App. 220, 226-27 (2000) (finding no substantial compliance where defense counsel told the court that the defense has no exceptions). Moreover, we decline Hopewell’s request that we exercise our discretion to review his claim for plain error.

Relying on *Testerman v. State*, 170 Md. App. 324 (2006), Hopewell alternatively asks us to conclude that defense counsel’s failure to comply with Rule 4-325(e) constituted ineffective assistance of counsel. “Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel . . . omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to the allegations of the counsel’s ineffectiveness.” *Mosley v. State*, 378 Md. 548, 560 (2003). Unlike *Testerman*, the record regarding defense counsel’s strategy in the instant case is not sufficiently developed to permit a fair evaluation of appellant’s claim that defense counsel was ineffective. Consequently, *Testerman* does not require us to consider Hopewell’s claim of ineffective assistance of defense counsel on direct appeal, and we decline to do so.

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