Circuit Court for Baltimore City
Case No. 117053004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 127

September Term, 2018

JERMAINE DOGGETT

v.

STATE OF MARYLAND

Fader, C.J.
Arthur
Leahy

JJ.

Opinion by Leahy, J.

Filed: April 15, 2019

This appeal arises out of the five-day joint trial of Jermaine Doggett ("Appellant"), and his co-defendant, Randy Case, before a jury in the Circuit Court for Baltimore City. Doggett was on trial for first-degree murder and other charges relating to the stabbing death of Darrell Webb. As his counsel informed the court before trial, Doggett's trial strategy was to concede criminal agency and to argue justification, mitigation, and/or excuse.

At the close of all the evidence, the court held a brief bench conference to review the jury instructions with the prosecutor and defense counsel. The court read the header for the Maryland Pattern Jury Instruction on Homicide, MPJI Cr 4:17: "Homicide. First-Degree premeditated murder and second-degree specific intent murder, no justification or mitigation generated." Immediately thereafter, the court asked if any party had an objection to the instruction. Doggett's counsel expressly stated that he did not have an objection to that instruction, but requested that the court also give the pattern jury instruction on voluntary manslaughter. The court agreed to give the additional instruction. Later, when the court instructed the jury, neither the prosecutor nor Doggett's counsel raised any objections. The jury found Doggett guilty of first-degree murder and wearing and carrying a deadly weapon.

Before this Court, Doggett presents one issue:

> "Where the trial court determined that the Rule of Provocation had been generated, and instructed the jury as to that form of homicidal justification or mitigation, should Doggett's murder conviction be reversed because the court also instructed the jury that, as to the murder, there was "no justification or mitigation generated."

We hold that Doggett waived any right to plain error review by affirmatively advising the court that he did not object to the instruction, rather than merely failing to raise

an objection, when the circuit court asked during a bench conference if any party had an objection to the pattern jury instruction. Even if Doggett had not affirmatively waived his right to plain error review, he has failed to establish an error that would justify the exercise of our discretion to undertake such review. We also discern no ineffective assistance of counsel in failing to object to the instruction under the circumstances of this case. Accordingly, we affirm.

BACKGROUND

Because the single question before us on appeal only challenges the court's jury instruction, we need not provide a detailed account of the evidence. We shall, nevertheless, briefly address some of the relevant facts adduced at trial.

A. The Murder of Darrell Webb

Darrell Webb died of sharp-force injuries he suffered in the late afternoon of January 29, 2017, in an alley behind East 25th Street off the 2400 block of Brentwood Avenue in Baltimore City. He suffered six stab wounds and five cutting wounds, mostly to the left side of his head, neck, shoulders, and left arm, as well defensive wounds on each of his hands. Webb also had a 1/8-inch contusion on the left side of his forehead.

B. The Investigation

Police began their investigation into Webb's murder at the scene of the crime, where they found two separate blood trails leading away from the scene and collected several samples of blood and saliva to analyze any DNA present. Detectives also obtained surveillance videos from Mana House and the Brentwood—buildings that are located on

either corner of Brentwood Avenue and East 25th Street in Baltimore City. Both buildings had cameras facing the rear alley in which Webb was attacked.

1. Surveillance Footage

The State played portions of the videos for the jury at trial without objection. One video showed a Honda CRV with ladders tied to its roof turn onto Brentwood Avenue from East 25th Street at 4:15 p.m. The driver (later identified as Case) idled in front of an alley behind Mana House for a few minutes before parallel parking on the east side of Brentwood Avenue, where he remained in his car. On the corner where the alley met Brentwood, a man who wore a brown leather jacket over a brown hoodie, later identified as Doggett, had a brief exchange with Webb before Webb headed north, up Brentwood toward 25th Street. Doggett disappeared out of the camera's view, south down Brentwood.

A minute later, Webb walked back down Brentwood and turned into the alley with another man. Just after the two men headed down the alley, Doggett came back into the camera's view from the south and followed behind both men, walking with a large knife held behind his back. All three men then turned right into an adjoining alley. Thirty seconds later, Rahman heard shouting from where he stood on Brentwood. He and another man jogged into the alley after Webb and Doggett, stopping where the two alleys intersected, still in the view of the surveillance camera behind Mana House. Rahman, Webb, Doggett, and the other two men congregated together for another 30 seconds near the alleys' intersection. As those five men stood in the alley, Case exited the driver's seat of the Honda CRV that he parked on the east side of Brentwood minutes prior. He, too, walked to join the men in the alley.

Just as Case reached the group in the alley, Webb walked away by himself, back toward Brentwood. But, then he stopped before he got to the road, turned around, and walked back. Webb walked right up to Doggett and the two men stood face-to-face at the intersection of the two alleys for a moment before Doggett punched Webb twice in the face, toppling Webb onto the ground. As Webb and Doggett tumbled over, Case ran up and kicked Webb in the head. Webb tried to force his way to his feet, but Case threw him back down and kicked him in the head again. While Case kicked Webb, Doggett removed a knife from his back pocket and leaned over Webb, stabbing him six times until one of the other men looking on approached apprehensively and pulled Doggett away from Webb. That man led Doggett out of the alley back toward Brentwood Avenue, and Case followed. Webb got to his feet and staggered down the alley in the opposite direction.

Case walked back to the CRV and got in. Moments later, Doggett walked up to the parked CRV, opened the rear door on the driver's side and put something inside that door. After speaking to a few of the men who witnessed the murder, Doggett climbed into the back seat of the CRV and the vehicle drove off.

2. An Eyewitness

Two days after Webb's death, police arrested Rahman on the 2400 block of Brentwood Avenue for drug possession. Rahman told police he had information on Webb's murder and gave two taped statements at the police station, both of which were admitted into evidence at trial and published to the jury.[1]

[1] At trial, Rahman testified that, although he recalled the details of his arrest and that the police questioned him and showed him pictures, he could not remember what he

In the first recorded statement, Rahman told police that he knew Webb as "a kid . . . by the name Rell." Rahman said he ran into the alley because he heard Webb and Doggett arguing. According to Rahman's taped statement, Webb was angry with Doggett over something and yelling at him in the alley. Doggett, who Rahman knew by the nickname "Black," "popped" Webb in the face and caused him to "f[a]ll to the ground," at which point a "tall skinny guy," who Rahman identified as Case, "started back up over top of him hitting him." While Case kicked Webb, "Black just [] pulled out a knife and started chopping [Webb] with it in his back and in his head." The two men—Doggett and Case—then went into what Rahman described as a "green truck . . . like a Ford Explorer truck" with "little racks on it . . . on the roof" that "was right across the street when you come out the alley[,]" and drove off together.

Detective Curtis McMillan, who was not otherwise involved in the investigation, administered a double-blind photo array procedure[2] with Rahman as Detective Christopher

told the police at the interview or who he identified in the photo arrays because he was on drugs. He did, however, recognize his initials on State's Exhibits 7 and 8, the photo arrays of Doggett and Case and admitted that "[i]t looked like I signed it." This prompted the State to attempt to introduce into evidence Rahman's two recorded statements and to play the video recording of Rahman's statements to the jury. The court ruled, over defense counsels' objections, that "Mr. Rahman's inability to recollect meeting with the detectives at all and inability to recollect being shown a photo array, and inability to recognize his own handwriting . . . on the photo arrays, after he authenticated his initials then sa[id] he didn't recognize his signature or handwriting is, for the record, unequivocally, in the view of this Court, wholly disingenuous and wholly incredible and not worthy of belief."

[2] To guard against the possibility that the investigating officer may inadvertently suggest the suspect's identification to the witness, the officer who administers the photo array is not otherwise involved with the investigation, making him or her "blind" to which photograph, if any, depicts the suspect. *See Smiley v. State*, 216 Md. App. 1, 38 (2014) (explaining the mechanics of a double-blind photo array procedure), *aff'd*, 442 Md. 168

Kazmarek, the lead homicide detective in the case, watched a video feed of the interview on his computer monitor. In the first array, Rahman identified Doggett in Photo 4 as the man who stabbed Webb, and wrote below the photo: "This is Black. The Guy that had a fight with Rell stab him and killed him." In the second array, he identified Case in Photo 2. Rahman also identified a picture of the CRV as the vehicle that was there the day of Webb's murder. Later, in a second recorded statement, Det. Kazmarek asked Rahman to view stills from the surveillance footage, in which Rahman identified himself, Case, and Doggett.

3. Arrests and Forensic Evidence

The next day, police arrested Doggett and Case separately and photographed them at the station. Doggett had cuts on the inside of his right thumb and right pinky at the time of his arrest.

Following the arrests of Case and Doggett, police found and processed a 2002 Honda CRV that had a ladder tied to its roof, just like the one that appeared in the surveillance video. By the front passenger seat inside the vehicle, police found a Save-A-Lot bag containing a brown leather jacket. Swabs for DNA revealed Doggett's blood on the plastic bag and his DNA inside the cuffs and collar of the jacket.

C. The Jury Trial

On February 22, 2017, a grand jury in Baltimore City indicted Doggett on seven counts: (1) first-degree murder; (2) conspiring with Case to commit first-degree murder,

(2015). In this case, Det. Kazmarek testified that, as lead officer, he compiled the photo array but Det. McMillan administered it.

(3) first-degree assault; (4) conspiring with Case to commit first-degree assault; (5) second-degree assault; (6) conspiring with Case to commit second-degree assault; and (7) wearing and carrying a deadly weapon. The circuit court joined the cases of Doggett and Case and held one jury trial.

1. Jury Instructions

After the close of evidence at trial, the court reviewed written drafts of the jury instructions with the prosecutor and defense counsel. The court read aloud the header for the pattern jury instruction on homicide (first- and second-degree murder) and asked if the parties had any objections. Defense counsel replied: "I don't object to those instructions." Defense counsel tried to move on but the court stopped him and asked, again, "[a]ny objection to that instruction as it's posed[?]" Neither defense counsel nor the prosecutor objected.

Later, Doggett's counsel requested that the court also give the pattern jury instruction for "voluntary manslaughter, hot-blooded response to a legal provocation" on the basis of Rahman's video-recorded statement, in which he said that Webb caused Doggett to snap. The State objected, arguing that the evidence had not generated the instruction; namely, there was no evidence of a mutual affray because the surveillance footage didn't reveal what Webb said to Doggett in the alley. Notwithstanding the State's objection, the court agreed to give the voluntary manslaughter instruction.

Before instructing the jury, the court handed printed copies of the instructions to the jurors, counsel, and the parties, and explained to the jurors how to read each instruction

and stated: "there is a brief title or what I call a header to the instruction, really [it] is just a reference point of what the instruction is about."

Then the court proceeded to instruct the jurors, reading verbatim the pattern jury instructions appearing on each juror's printed copy of the instructions. As relevant to this appeal, the court instructed the jury on first- and second-degree murder, reading:

> "Homicide. First-Degree premeditated murder and second-degree specific intent murder, *no justification or mitigation generated*. . . ."
>
> "First-degree murder. First-degree murder is the intentional killing of another person with willfulness, deliberation, and premeditation. In order to convict [] Doggett[] of first-degree murder, the State must prove (1), that the defendant[] caused the death of [] Webb; and (2), that the killing was willful, deliberate and premeditated. . . ."
>
> "Second-degree murder. Second-degree murder is the killing of another person with either the intent t[o] kill or the intent to inflict such serious bodily harm that death would be the likely result. Second-degree murder does not require premeditation or deliberation. In order to convict the [] Doggett[] of second-degree murder, the State must prove (1) that the defendant[] caused the death of [] Webb and (2) that the defendants engaged in the deadly conduct either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result."

(Emphasis added). Neither the State nor Doggett objected to the court's reading of this instruction.

Next, the court instructed the jury on voluntary manslaughter as follows:

> ". . . You have heard evidence that [] Doggett killed [] Webb in hot-blooded response to legally adequate provocation. In order to convict [] Doggett, of murder, *the State must prove* that [he] did not act in hot-blooded response to legally adequate provocation. If [] Doggett did act in hot-blooded response to legally adequate provocation, the verdict should be guilty of voluntary manslaughter *and not guilty of murder*."
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> "Killing in hot-blooded response to legally adequate provocation is a mitigating circumstance[.] . . ."
>
> "In order to convict [Doggett] of murder, *the State must prove* that the mitigating circumstance of hot-blooded provocation was not present in this case. This means that *the State must persuade you beyond a reasonable*

> *doubt* that at least one of the five factors [for finding hot-blooded provocation] was absent. . . . "
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> ***
>
> In order to convict [Doggett] of murder, *the State must prove* that [he] did not act in hot-blooded response to legally adequate provocation."

(Emphasis added).

2. Verdict and Sentencing

The jury found Doggett guilty of first-degree murder, assault in the first-degree, and wearing and carrying a deadly weapon. The jury found Doggett not guilty of conspiracy to commit first-degree murder and conspiracy to commit first-degree assault.

On March 8, 2018, the court sentenced Doggett to life in prison for the first-degree murder offense, and three years for the wearing and carrying a deadly weapon offense, to be served consecutive to the sentence for murder. The murder and assault convictions were merged. That same day, Doggett timely appealed to this Court. We shall furnish additional facts throughout our discussion.

DISCUSSION

I.

Jury Instructions

Doggett contends that the trial court erred in instructing the jury that there was "no justification or mitigation generated" despite having determined that the facts generated a "Rule of Provocation" manslaughter instruction. Conceding that he took no exceptions to any of the jury instructions, Doggett asks this Court to review his appeal for plain error. Specifically, Doggett complains that the court, in reading this portion of the instruction,

"directed the jury that the Rule of Provocation was not factually present and, thus, relieved the State of its burden to prove that Doggett did not act in provocation." He asserts that the instruction was "egregious and had a considerable impact on [him]" because it vitiated his only defense that the killing was mitigated to manslaughter, which explains the jury's verdict of guilty on the murder charge. According to Doggett, this error was "particularly grave" and amounted to a "structural error" because the court resolved a factual matter for the jury (the factfinders), which effectively relieved the State of an element of its burden of proof. He concludes that, despite his failure to object to the homicide instruction, this Court should "recognize[] and correct[]" the instructional error under the plain error doctrine.

In response, the State argues that Doggett is not entitled to relief under the plain error doctrine" because he affirmatively waived any error. Moreover, even if plain error review is available, the State argues that it is inapplicable because: (1) the jury instruction itself was not erroneous and the complained-of language was only part of the instruction's heading; (2) any such error was neither clear nor obvious; and (3) "there is no reasonable likelihood that the jury would understand the court's instructions as a whole to relieve the State of its burden of proving that Doggett did not act in hot-blooded response to legally adequate provocation." The State argues, further, that even if this Court has discretion to notice plain error, we should decline to do so because Doggett was not entitled to a jury instruction on the rule of provocation and was, therefore, not prejudiced.

It is undisputed that Doggett failed to object to the court's homicide instruction. Maryland Rule 4-325(e), which governs the preservation of instructional errors, states, in relevant 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.

Maryland courts have "consistently repeated that the failure to object to an instructional error prevents a party on appeal from raising the issue under Rule 4-325(e)." *Watts v. State*, 457 Md. 419, 426 (2018) (citations omitted).

Notwithstanding, Rule 4-325(e) concomitantly provides this Court discretion to review an unpreserved issue. *Yates v. State*, 202 Md. App. 700, 720, *aff'd*, 429 Md. 112 (2012). The Rule states, in pertinent part, that "[a]n appellate court, on its own initiative or on the suggestion of a party, may[ ] take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." Md. Rule 4-325(e). The exercise of this discretion, however, is "a rare, rare, phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003). As the Court of Appeals explained:

> It 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).

Recently in *Newton v. State*, 455 Md. 341 (2017), the Court of Appeals explained the four-part test that we apply in determining whether to undertake plain error review:

> (1) "there must be an error or defect—some sort of 'deviation from a legal rule'—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings'"; and (4) the error must "seriously affect[] the fairness, integrity or public reputation or judicial proceedings."

Id. at 374 (citing *State v. Rich*, 415 Md. 567, (2010)). The fact that an error may have been plain and "prejudicial to the accused does not *ipso facto* guarantee that it will be noticed" and is "no more than a trigger for the exercise of discretion[.]" *Morris*, 153 Md. App. at 512-13 (alteration omitted); *Williams v. State*, 34 Md. App. 206, 211 (1976) ("Even granted harmful and material error of constitutional dimensions, notice thereof is *still the exception and not the rule*.") (Moylan, J., concurring) (emphasis added)).

A. Waiver of Plain Error Review

We must begin by addressing the State's argument that Doggett affirmatively waived his right to plain error review. *See Yates*, 202 Md. App. at 722 (addressing, as an initial matter, the State's claim that appellant cannot seek plain error review because he affirmatively waived it).

In support of this argument, the State relies on the Court of Appeals's decision in *Booth v. State*, 327 Md. 142 (1992). In *Booth*, during a bench conference, the State asked the court for a supplemental instruction on allocution. *Id*. at 178. The court then "specifically asked defense counsel if he had 'any objection to [the instruction],' to which defense counsel replied: 'Actually, no. We would not have any objection to that.'" *Id*. The court then gave that instruction to the jury, without any objection from defense

counsel. *Id*. at 178-79. Before the Court, Booth argued that the trial court's allocution instruction, "coupled with part of the prosecutor's rebuttal argument, unfairly denigrated Booth's allocution." *Id*. at 177. The Court of Appeals held that "Booth's argument on the allocation instructions does not even require plain error analysis." *Id*. at 180. The Court reasoned as follows:

> "This is because there is more here than the simple lack of an objection to the instruction as given. Here defense counsel *affirmatively advised the court that there was no objection to the instruction* which the court immediately thereafter gave to the jury. *Error, if any, has been waived*."

Id. (citations omitted) (emphasis added).

Almost two decades later, the Court of Appeals in *State v. Rich* drew a distinction between forfeiture and waiver. 415 Md. 567, 580 (2010). In *Rich*, the court's jury instructions included the pattern jury instruction on voluntary manslaughter, as specifically requested by defense counsel. *Id*. at 572-73. Defense counsel did not note any exceptions to the court's instructions. *Id*. at 573. Rich was convicted of voluntary manslaughter and appealed his conviction to this Court, arguing that the court erred in giving a voluntary manslaughter instruction in the absence of any evidence of a hot-blooded response to legally adequate provocation. *Id*. at 569. This Court, in an unreported opinion, exercised our discretion to conduct a "plain error" review of his argument and vacated his conviction. *Id*. at 570. The Court of Appeals granted certiorari and held, *inter alia*, that Rich's argument should be rejected under the invited error doctrine because "the manslaughter instruction was specifically requested by [defense] counsel[.]" *Id*. at 570, 575.

In reaching its holding, the Court, relying on United States Supreme Court precedent, announced the rule that: "**Forfeited rights are reviewable for plain error, while waived rights are not.**" *Id*. at 580 (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)) (emphasis in original). The Court elaborated on this distinction between forfeited and waived rights:

> "Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right. . . ."
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> ***
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> "**What we are concerned with is evidence in the record that the defendant was aware of, i.e., knew of, the relinquished or abandoned right.**"

Id. (citations omitted) (emphasis in original). In other words, "the defendant considered the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction." *Id*. at 581.

One year after *Rich*, this Court in *Yates* revisited the distinction between forfeited and waived rights for purposes of plain error review. 202 Md. App. at 718. In that case, a jury found Yates guilty of, among other crimes, second-degree felony murder. *Id*. at 706. The trial court instructed the jury, including an instruction on second-degree felony murder and, after concluding the instructions, asked whether counsel had any objections. *Id*. at 719. Yates replied, "None." *Id*. On appeal to this Court, Yates argued that the court plainly erred in giving the second-degree felony murder instruction because it failed to instruct the jury that "the act resulting in the death occurred during the commission or attempted commission or escape from the immediate scene of the distribution[,]" which Yates contended was an "essential element of felony murder." *Id*. at 718-19 (internal

quotations omitted). We first considered whether Yates affirmatively waived his right to challenge the jury instruction and, therefore, whether plain error review was available to him. *Id*. at 719.

In rejecting the State's argument that Yates affirmatively waived plain error review of the complained-of jury instruction, this Court reasoned that, unlike in *Rich*, Yates "did not request specifically the instruction that the court gave on felony murder[,]" but only acquiesced to the instruction. *Id.* at 722. This Court concluded that this acquiescence did not amount to an affirmative waiver of his right to challenge the jury instruction. "Rather, his failure to object constituted a forfeiture of his right to raise the issue on appeal, but it did not preclude this [C]ourt from deciding whether to exercise its discretion to engage in plain error review." *Id*. (citation omitted).

Returning to the instant case, although counsel for Doggett did not specifically request the homicide instruction, he also did not merely acquiesce to the instruction. Unlike the circumstances in *Yates* where the trial court asked whether the parties had any objections at the conclusion of the instructions to the jury, in this case the trial court read the complained-of header for the homicide instruction to the parties during a bench conference, before the jury was instructed, and immediately asked whether counsel had any objections. In response, Doggett affirmatively advised the court: "I don't object to those instructions." The court then asked a second time, "Before I get to another one, . . . [a]ny objection to that instruction as it's posed[?]" Doggett failed to object. Later, when the court read the homicide instruction, including its header, to the jury, neither parties noted an exception. Accordingly, "there is more here than the simple lack of an objection

to the instruction as given." *Booth*, 327 Md. at 180. Doggett affirmatively waived any right to plain error review. *Id*.

B. Plain Error

Even if Doggett did not affirmatively waive his right to plain error review, he has failed to establish an "error, let alone plain error," that would justify the exercise of our discretion to undertake such review. *Wiredu v. State*, 222 Md. App. 212, 225 (2015).

As explained in *Sydnor v. State*, 133 Md. App. 173, 184 (2000), we encourage the use of pattern jury instructions. This Court has held that the use of a pattern jury instruction weighs heavily against plain error review. *Wiredu*, 222 Md. App. at 224-25 (declining to exercise discretion to undertake plain error review of jury instruction because the instruction came directly from the Maryland Pattern Jury); *Yates*, 202 Md. App. at 723-24 (holding "that the circuit court's use of a pattern jury instruction, without objection, weigh[ed] heavily against plain error review of the instructions given").

The complained-of instructional error in this case is found in the header for the homicide instruction. Significantly, the instruction, including its header, came directly from the Maryland Pattern Jury Instructions, MPJI—CR 4.17, which reads as follows:

> "MPJI—Cr 4:17 HOMICIDE—FIRST DEGREE PREMEDITATED MURDER AND SECOND DEGREE SPECIFIC INTENT MURDER (NO JUSTIFICATION OR MITIGATION GENERATED)"

Both the court's oral instruction and the jurors' printed copy of the instruction reflected the pattern jury instruction verbatim. We agree with the State that "there is no reasonable likelihood that the jury would understand the court's instructions as a whole to relieve the State of its burden of proving that Doggett did not act in hot-blooded response to legally

adequate provocation." The record reflects that after the court gave each of the jurors printed copies of the jury instructions, and prior to instructing the jury, the court informed the jurors that each instruction included a header that was "just a reference point of what the instruction is about." Moreover, the court gave the voluntary manslaughter instruction immediately after it gave the homicide instruction. Accordingly, we decline to exercise our discretion to conduct plain error review.

II

Ineffective Assistance of Counsel

Alternatively, Doggett argues that we should review his lawyer's failure to preserve the instructional error for appeal for ineffective assistance of counsel.[3] The State responds that this Court may not address Doggett's ineffective assistance of counsel claim on direct appeal because the trial court was unaware of any claim of error. Even assuming this Court could address this issue, the State argues, Doggett has failed to establish ineffective assistance of counsel.

Criminal defendants have a constitutional "right to the assistance of counsel at critical stages of the proceedings" under the Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights. *Mosley v. State*, 378 Md. 548, 556 (2003) (citations

[3] We note that Doggett did not raise the issue of ineffective assistance of counsel in his questions presented. He has not, however, waived this issue because he argues it throughout his brief. *See Janelsins v. Button*, 102 Md. App. 30, 35 (explaining that appellant's failure to raise issue in the questions presented did not constitute waiver because appellant argued the issue throughout his brief).

omitted). Ineffective assistance of counsel claims are assessed under the Supreme Court's two-pronged test in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, "a defendant must prove that counsel's competence failed to meet an objective standard of reasonableness and that counsel's performance prejudiced the defense in order to be successful in an ineffectiveness of counsel claim." *Mosley*, 378 Md. at 557 (citation omitted).

The Court of Appeals has explained repeatedly that a post-conviction proceeding[4] is generally the most appropriate mechanism for raising a claim of ineffective assistance of counsel. *See, e.g.*, *Smith v. State*, 394 Md. 184, 199 (2006); *Mosley*, 378 Md. at 559. The underlying rationale being that "the character of counsel's representation is not the focus of the proceedings and there is no discussion of counsel's strategy *supporting the conduct in issue*." *Smith*, 394 Md. at 200 (emphasis added). Moreover, "the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley*, 378 Md. at 560. Thus, "the trial record clearly must illuminate why counsel's actions were ineffective because, otherwise, the Maryland appellate courts would be entangled in the perilous process of second-guessing without the benefit of potentially essential information." *Id*. at 561 (internal quotations omitted).

[4] A post-conviction proceeding "is not an appeal of the judgment; rather, it is a collateral attack designed to address alleged constitutional, jurisdictional, or other fundamental violations that occurred at trial." *Mosley*, 378 Md. at 559-60.

Review on direct appeal may be appropriate, however, when "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, [such that] there is no need for a collateral fact-finding proceeding." *Smith*, 394 Md. at 200 (internal quotations omitted). For instance, review on direct appeal may be appropriate when "the trial record reveals counsel's ineffectiveness as to be 'so blatant and egregious.'" *Mosley*, 378 Md. at 563 (citation omitted).

In the instant case, the record reveals that before trial, defense counsel agreed on the record that his trial strategy was to concede criminal agency but to contest only certain elements of first-degree murder. Defense counsel's request for a voluntary manslaughter instruction, together with his statements during opening and closing argument, indicate a strategy to contest, specifically, the required absence of justification, mitigation or excuse for a finding of first-degree murder. This, however, is all that we know about defense counsel's trial strategy.

The briefing in this case does not establish an ineffective assistance of counsel claim, and certainly none that is "'so blatant and egregious' that direct review is appropriate." *Mosley*, 378 Md. at 563 (citation omitted). The conduct at issue is Doggett's counsel's failure to object to the court's reading of the parenthetical in the header for the pattern jury instruction which states "no justification or mitigation generated." Doggett insists that defense counsel's trial strategy in a general sense is undisputed, and the record does not reveal any "discussion of counsel's strategy supporting *the conduct in issue*." *Smith*, 394 Md. at 200 (emphasis added). Neither party objected to the instruction, but in this case there is also no reason to consider "what input counsel might have had in crafting

the language" of a pattern jury instruction. *See Steward v. State*, 218 Md. App. 550, 571 (2014). As a result, there is no basis for us to discern whether this particular omission—if it can even be considered an omission—was the result of counsel's "strategy, distraction, mistake, or ignorance." *Id*. Nor are we willing to partake in "the perilous process of second-guessing without the benefit of potentially essential information." *Mosley*, 378 Md. at 561. In short, we discern no ineffective assistance of counsel in failing to object to the heading on the pattern jury instruction under the circumstances of this case, and in any case, we fail to see how Doggett was prejudiced by it.

Discerning no error sufficient to compel this court to exercise plain error review, nor any basis, on this record, to conclude counsel's representation was ineffective, we shall affirm the judgment.

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