

UNREPORTED\*\*

IN THE APPELLATE COURT

OF MARYLAND\*

No. 212

September Term, 2022

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WILLIAM ERNEST KEYS, JR.

v.

STATE OF MARYLAND

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Ripken,  
Tang,  
Getty, Joseph M.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Ripken, J.

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Filed: March 28, 2023

\* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

\*\* 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.

A jury in the Circuit Court for Allegany County found William Ernest Keys, Jr. (“Keys”) guilty of negligent driving and driving under the influence of alcohol. The court sentenced Keys to one year of incarceration, with all but 15 days suspended, to be followed by two years of supervised probation.<sup>1</sup> Keys noted a timely appeal of his conviction.

On appeal, Keys argues that the court erred in refusing to give the jury a pattern instruction on scientific tests, specifically, regarding results of a breathalyzer test. For the reasons to follow, we shall affirm.

### **FACTUAL AND PROCEDURAL HISTORY**

The State called Maryland State Trooper Phillip Spicer as its only witness. Trooper Spicer testified that, on August 28, 2021, at approximately 1:00 a.m., he stopped a vehicle that Keys was driving after observing that the vehicle had “heavy front[-]end damage and sparks coming off of the driver’s side rear.” Trooper Spicer explained that one of the tires on the vehicle, which was driven by Keys, “was no longer on the rim [of the wheel,] and the rim riding on the asphalt was causing sparks to come off of it.”

Keys exited the vehicle and began walking toward Trooper Spicer’s patrol car. Trooper Spicer told Keys to remain at the vehicle. Keys walked back and leaned on the vehicle. Trooper Spicer observed that Keys appeared to be “unsteady on his feet” and was “stumbling.”

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<sup>1</sup> As special conditions of probation, the court ordered Keys to undergo an evaluation for substance abuse issues, abstain from alcohol use, and submit to random urinalysis.

As Trooper Spicer approached Keys, he detected the odor of alcohol on Keys's breath and observed that his eyes were "bloodshot and glassy." Trooper Spicer offered to administer field sobriety tests to Keys, and Keys agreed to submit to the tests.

Before explaining the tests, Trooper Spicer asked Keys if he had any medical conditions. Trooper Spicer explained that the question is routinely asked prior to administering field sobriety tests, to determine if there may be a medical reason for the person taking the test to be unable to perform the tests. Trooper Spicer did not recall how Keys responded to the question.

Video captured on the dashboard camera inside Trooper Spicer's patrol vehicle during administration of the field sobriety tests was admitted into evidence and was shown to the jury, without sound, while Trooper Spicer testified.<sup>2</sup> Trooper Spicer explained that Keys was unable to complete the horizontal gaze nystagmus test because he "constantly moved his head and failed to continue to follow the stimulus with his eyes." On the "walk and turn test," Keys failed to follow instructions and turned the wrong way, "missed heel to toe" on most of the steps, and "ended up raising his arms up to keep balance." The third and final field sobriety test administered to Keys was the "one leg stand" test. Trooper Spicer stated that, one or two seconds into the test, Keys fell backwards and "had to grab [the] patrol vehicle to stop himself from falling." Trooper Spicer did not ask Keys to try again because Keys "concurred" that he was unable to complete the test.

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<sup>2</sup> The dashcam video is not part of the record on appeal.

At that point, Keys was placed under arrest for driving under the influence of alcohol and was transported to police barracks. According to an audiovisual recording from inside the patrol vehicle, which was admitted into evidence and played for the jury, Keys said: “I ain’t trying to give you no hard time[,] man. . . . I know I messed up.”

Keys agreed to submit to a breathalyzer exam, which was administered by another Sergeant who did not testify at trial. Trooper Spicer testified that there were no results from the exam because the breath sample provided by Keys was not sufficient “for the machine to get a[n] adequate reading[.]” Trooper Spicer agreed with the prosecutor’s statement that the test does not require the arrestee to provide “a hard or special breath[.]” Trooper Spicer explained that he was not certified in the use of breathalyzer equipment, and that he was not familiar enough with the testing device to answer technical questions about possible test result readings.

On cross-examination, Trooper Spicer confirmed that he did not attempt to get a blood sample from Keys. He explained that blood tests are usually sought only after an accident or when someone has been transported to a hospital. On redirect, the State asked Trooper Spicer if it would “be fair to say” that, because a blood test was not offered to Keys, “it was believed [that Keys] was capable of providing a [breath] sample[,] and just was unwilling to do so.” Trooper Spicer said that was a “possible explanation[,]” but that he was “not sure.”

The defense called Keys’s fiancée, Leann Jackson, as its only witness. Jackson explained that Keys has COPD<sup>3</sup> and that, “when he takes deep breaths[,] he can’t bring out much oxygen and he gets short[-]winded[,] so it’s hard to blow out.” Jackson also said that Keys has “trouble focusing” because he is blind in one eye, and that he has trouble keeping his balance for long periods of time due to a back injury.

Keys requested that the court give the jury an instruction based on Maryland Criminal Pattern Jury Instruction (“MPJI-Cr”) 3:15, which is titled “SCIENTIFIC TESTS (NO EXPERT OPINION)”. The requested instruction reads as follows:

You have heard evidence concerning the results of the breathalyzer test. As with any other evidence, it is for you to decide how much weight to give this evidence. In deciding what weight to give the evidence, you should consider the training and experience of the technician, the equipment that was used, and the procedures that were followed.

MPJI-Cr 3:15. The court denied the request, stating that there was no evidence to warrant the instruction. As noted *supra*, Keys was convicted of negligent driving and driving under the influence of alcohol.

### DISCUSSION

“We review a trial court’s decision [whether] to give a particular jury instruction for abuse of discretion.” *Wright v. State*, 474 Md. 467, 482 (2021) (citing *Taylor v. State*, 473 Md. 205, 229-31 (2021)). The trial court’s decision “will not be disturbed on review except

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<sup>3</sup> Although it was not defined at trial, we assume COPD stands for chronic obstructive pulmonary disease. Centers for Disease Control and Prevention, *Chronic Obstructive Pulmonary Disease (COPD)*, <https://www.cdc.gov/copd/index.html#:~:text=What%20is%20COPD%3F,Americans%20who%20have%20this%20disease> (last visited Mar. 23, 2023).

on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Sayles*, 472 Md. 207, 230 (2021) (quoting *Appraicio v. State*, 431 Md. 42, 51 (2013)). “A trial court abuses its discretion if it commits an error of law in giving an instruction.” *Wright*, 474 Md. at 482 (citing *Harris v. State*, 458 Md. 370, 406 (2018)).

Pursuant to Maryland Rule 4-325(c),<sup>4</sup> the trial court is required to give a specific instruction to the jury when three conditions are met: “(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 jury instruction[s] actually given.” *Wright*, 474 Md. at 484 (quoting *Thompson v. State*, 393 Md. 291, 302 (2006)). “[I]f any one part of the test is not met, we will affirm the trial court’s denial of the request for instruction[.]” *Collins v. Nat’l R.R. Passenger Corp.*, 417 Md. 217, 230 (2010) (quoting *Fearnow v. Chesapeake and Potomac Tel. Co.*, 342 Md. 363, 385 (1996)).

The parties’ contentions focus solely on the second prong of the test. Keys contends that the requested instruction on scientific tests was applicable under the facts of the case because the State’s “theory as to the breathalyzer test seemed to be that [he] sabotaged the test by deliberately blowing an insufficient breath[.]” while the defense sought to prove

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<sup>4</sup> 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. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

that Keys was unable to produce a sufficient breath because he has COPD. The State maintains that the instruction was not applicable here because there was no scientific evidence introduced at trial regarding results of a breathalyzer test. We agree with the State.

“A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate.” *Rainey v. State*, 480 Md. 230, 255 (2022) (quoting *Bazzle v. State*, 426 Md. 541, 550 (2012)). The minimum threshold of evidence required to generate a jury instruction is “low,” with the requesting party needing only to produce “‘some evidence’ that supports the requested instruction[.]” *Bazzle*, 426 Md. at 551 (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990)). The determination of whether the evidence is sufficient to generate the desired instruction is a question of law. *Rainey*, 480 Md. at 255. On appeal, the appellate court reviews independently whether there was “some evidence” to generate the instruction, and, in doing so, “views the facts in the light most favorable to the requesting party.” *Id.*

Here, Keys, as the requesting party, failed to identify “some evidence” to warrant the instruction. The “factual predicate” of the requested instruction is that the evidence at trial included: (1) results from the breathalyzer test; and (2) evidence regarding the training and experience of the technician who performed the breathalyzer test, the equipment that was used, and the procedures that were followed. There was no such evidence before the jury, however. Accordingly, the instruction was not “applicable under the facts of the case.” *See Wright*, 474 Md. at 484 (quoting *Thompson*, 393 Md. at 302).

Our conclusion is consistent with the “Notes on Use” for MPJI-Cr 3:15, which explain that the instruction “should be given when the witness has testified as a technician

and not as an expert (e.g., radar, breathalyzer) or records of the technician have been admitted.” Trooper Spicer did not testify as a breathalyzer technician, and no records of a breathalyzer technician were admitted into evidence.

Keys did not dispute that he provided an insufficient breath sample, or that, consequently, the breathalyzer equipment was unable to measure his blood alcohol level. He claims, however, that the requested instruction should have been given because it “would have advised the jury that it [was] for the jury ‘to decide how much weight to give’ evidence related to the breathalyzer test.” Here, however, the evidence “related to” the breathalyzer is limited to evidence regarding the reason why his breath sample was insufficient. Although the reason why Keys failed to provide a sufficient sample may have been an issue before the jury, the evidence related to that issue did not generate an instruction on the factors to be considered in weighing results of a breathalyzer test.<sup>5</sup>

Viewing the facts in the light most favorable to Keys, we conclude that the requested instruction was not applicable under the facts of the case. Accordingly, the court did not abuse its discretion in declining to give the instruction.

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<sup>5</sup> Even if, at trial, Keys had tailored his requested instruction to be consistent with his argument on appeal, the court would not have been required to instruct the jury “that it was for the jury to weigh evidence related to the breathalyzer test.” Such an instruction was “fairly covered elsewhere” in the court’s instructions. The jury was instructed that they were “the ones to decide the facts” and “[could] draw any reasonable conclusion from the evidence” that they believed was “justified by common sense” and their own experiences. The court also instructed the jury that they were “the sole judge of whether a witness should be believed.”



**JUDGMENT OF THE CIRCUIT COURT  
FOR ALLEGANY COUNTY AFFIRMED.  
COSTS TO BE PAID BY APPELLANT.**