Circuit Court for Baltimore City
Case No. 821287006

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 393

September Term, 2022

DANIEL JOHNSON

v.

STATE OF MARYLAND

Leahy,
Friedman,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: February 10, 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.

A jury, in the Circuit Court for Baltimore City, convicted Daniel Johnson, appellant, of second-degree assault. The Court sentenced Johnson to a term of two years' imprisonment, with all but time served suspended, and ordered him to pay $2,100.00 in restitution.

In this appeal, Johnson presents two questions for our review:

1. Did the trial court commit plain error in instructing the jury on the elements of self-defense?

2. Did the trial court err in ordering Johnson to pay $2,100.00 in restitution?

For reasons to follow, we hold that the trial court erred in ordering Johnson to pay $2,100.00 in restitution. We therefore vacate that order and remand the case for a new restitution hearing. Otherwise, we affirm.

BACKGROUND

Johnson was arrested and charged with second-degree assault following an altercation that occurred at a Shop Rite grocery store in Baltimore. At trial, Steven Hooper testified that he and Johnson were involved in a verbal argument in the store's parking lot after Johnson nearly hit Hooper with his vehicle while Hooper was walking through the parking lot toward the store's entrance. Hooper testified that the two continued to exchange words after Johnson had exited his vehicle and walked toward the store's entrance. Hooper testified that he followed Johnson into the store, at which point Johnson turned around and hit him multiple times. Hooper testified that he suffered a fractured nose, a laceration on his face requiring stitches, and a broken rib.

Video surveillance from inside the store, which captured the altercation, was played for the jury. In that video, Johnson and Hooper can be seen entering the store, with Johnson in the lead and Hooper walking close behind. Johnson can then be seen turning and hitting Hooper multiple times in the face and head.

Johnson also testified, admitting that he struck Hooper but claiming that he did so in self-defense. Johnson testified that, during their verbal altercation in the parking lot, Hooper had threatened to kill him. Johnson testified that Hooper then followed him into the store and continued to threaten his life. Johnson testified that he hit Hooper because he felt threatened.

Later, at Johnson's request, the trial court instructed the jury on self-defense. The jury ultimately convicted Johnson of second-degree assault. At sentencing, the court imposed a suspended sentence and ordered Johnson to pay $2,100.00 in restitution to Hooper.

This timely appeal followed. Additional facts will be supplied below.

DISCUSSION

I.

Johnson's first claim of error concerns the trial court's self-defense instruction. Pursuant to the Maryland Criminal Pattern Jury Instructions ("MPJI-Cr"), the court's self-defense instruction should have read:

> You have heard evidence that the defendant acted in self-defense. Self-defense is a complete defense and **you are required** to find the defendant not guilty if all of the following four factors are present: (1) the defendant was not the aggressor or, although the defendant was the initial aggressor, he did not raise the fight to the deadly force level; (2) the defendant actually

> believed that he was in immediate or imminent danger of bodily harm; (3) the defendant's belief was reasonable; and (4) the defendant used no more force than was reasonably necessary to defend himself in light of the threatened or actual harm.

MPJI-Cr 5:07 (emphasis added).

At trial, however, the trial court gave the following instruction:

> You have heard evidence that the Defendant acted in self-defense. Self-defense is a complete defense and **you are not required** to find the Defendant not guilty if all of the following four factors are present. The Defendant was not the aggressor or although the Defendant was the initial aggressor, he did not raise the fight to a deadly force level. Two, the Defendant actually believed that he was in immediate or imminent danger of bodily harm. Three, that the Defendant's belief was reasonable and the Defendant used no more force than was reasonably necessary to defend himself in light of the threatened or actual harm.

Immediately after giving that instruction, the trial court convened a bench conference and asked counsel if they wanted any of the bracketed language contained in the pattern instruction read to the jury. After counsel declined, the court instructed the jury further:

> In order to convict the Defendant, the State must prove that the self-defense does not apply in this case. This means that **you are required** to find the Defendant not guilty unless the State has persuaded you beyond a reasonable doubt that at least one of the four factors of complete self-defense was absent.

Immediately following that instruction, the trial court asked defense counsel if he had any objections to the instructions as read. Counsel responded: "No, Your Honor."

Later, during deliberations, the jury submitted a note to the trial court. The note read: "[C]an we have the written definition of assault and self-defense, what the judge read to the jury? Can we also have the legal definition of aggressor and for conviction, can you confirm that all four points of self-defense must be in place for it to be applied?"

After sharing that note with the parties, the trial court indicated that it was "going to read [the instructions] again."[1] The State agreed with that course of action, but defense counsel did not, stating that he "would just leave it the way it is." The court then stated that it was inclined to reread the instructions, and the court asked defense counsel if he had any objections. Defense counsel responded: "I'm worried that they're looking for something more than the instruction. That they might be looking for somebody's attitude or something like that. That's what I have an issue with about re-reading the instructions." The court ultimately accepted defense counsel's request and responded to the note by telling the jurors to rely on their memory of the instructions as read.

Parties' contentions

Johnson now claims that the trial court erred in instructing the jury that it was *not* required to find him not guilty if all four factors set forth in the self-defense instruction were present. Johnson notes that the court's instruction was an incorrect statement of law because the jury *was* required to find him not guilty if all of the factors were present. Recognizing that he did not object at trial, Johnson asks that we review the court's actions for plain error.

The State argues that we should decline Johnson's request for plain error review. The State insists that plain error review is inappropriate because, not only did Johnson affirmatively waived his objection when the instruction was initially read to the jury, but he also expressly declined the court's offer to reread the instruction during deliberations.

[1] It does not appear from the record that the jury was given a written copy of the instructions.

The State also notes that, while the court's initial instruction regarding self-defense was an incorrect statement of law, the court's final instruction, in which the court stated that the jury was required to find Johnson not guilty unless at least one of the four factors of complete self-defense was absent, was a correct statement of law. Finally, the State insists that there is no compelling reason for this Court to overlook Johnson's failure to preserve the issue.

Analysis

Maryland Rule 4-325(f) provides, in relevant part, that "[n]o 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[.]" The Rule also provides that an appellate court may "take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." *Id.* "'The appellate courts of this State have often recognized error in the trial judge's instructions, even when there has been no objection, if the error was likely to unduly influence the jury and thereby deprive the defendant of a fair trial.'" *Campbell v. State*, 243 Md. App. 507, 537-38 (2019) (quoting *State v. Brady*, 393 Md. 502, 507 (2006)). "There are, however, limitations upon the consideration of plain error review: (1) there must be error (that the defendant did not affirmatively waive); (2) the error must be 'clear and obvious,' *i.e.*, not subject to reasonable dispute; and (3) the error must be material, meaning that it affected the outcome of the trial." *Steward v. State*, 218 Md. App. 550, 566 (2014).

"Even if an appellant is able to satisfy the threshold burden of proving a plain and material error, the Court need not recognize the error." *Id.* Generally, we reserve plain

error relief "for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Pietruszewski v. State*, 245 Md. App. 292, 323 (quoting *Yates v. State*, 429 Md. 112, 130-31 (2012)), *cert. denied*, 471 Md. 127 (2020). In deciding whether to exercise plain error review, we consider: "the opportunity to use an unpreserved contention as a vehicle for illuminating an area of law; the egregiousness of the trial court's error; the impact of the error on the defendant; and the degree of lawyerly diligence or dereliction." *Steward*, 218 Md. App. at 566. "In that regard, we review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* (quotation marks and citation omitted). Even so, "we will [recognize plain error] only when the error was so material to the rights of the accused as to amount to the kind of prejudice [that] precluded an impartial trial." *Newton v. State*, 455 Md. 341, 364 (2017) (quotation marks and citation omitted). Moreover, "[b]ecause of the difficulty of demonstrating facts that are sufficiently compelling to invoke plain error review, it remains 'a rare, rare, phenomenon,' especially when the alleged error involves a missing or erroneous jury instruction." *Steward*, 218 Md. App. at 566-67 (citation omitted). In fact, "our unfettered discretion in not taking notice of plain error [in a trial court's instructions] requires neither justification nor explanation." *Morris v. State*, 153 Md. App. 480, 507 (2003).

Turning back to the instant case, we decline to take notice of any plain error. To be sure, the trial court should have instructed the jurors that they *were* required to find Johnson not guilty if all four self-defense factors were present. The court therefore erred when it

mistakenly instructed the jurors that they were *not* required to find Johnson not guilty if all four self-defense factors were present.

Nevertheless, the trial court's error does not, under the circumstances, warrant plain error review. First, the court's addition of the word "not" to its instruction was, at most, a slip of the tongue. It did not constitute an error so egregious that it precluded an impartial trial. Moreover, immediately after giving the erroneous instruction, the trial court corrected itself by instructing the jurors that they *were* required to find Johnson not guilty unless the State had persuaded them beyond a reasonable doubt that at least one of the four self-defense factors was absent. Thus, while the court may have misspoken in its initial instruction, it ultimately conveyed the proper message regarding the juror's duties in applying the self-defense factors.

Finally, and perhaps most importantly, Johnson had several clear chances to correct the trial court's mistake, yet, for whatever reason, he refused. The first chance came immediately after the court gave its self-defense instruction, when the trial court asked Johnson if he had any objections to the instructions as read. Johnson, through counsel, responded without equivocation that he had no objections to the instructions as read. Given that the court had just read the erroneous instruction, the court's follow-up question provided Johnson with the perfect opportunity to have the court remedy its mistake.

Johnson was given a second, more salient opportunity to have the trial court correct its mistake when, during deliberations, the jurors submitted a note expressing some confusion regarding the self-defense instruction. Following the submission of that note, the court suggested that the self-defense instruction be reread to the jurors, thereby

providing a clear avenue for the court to correct its earlier mistake. Had the court done so, that is, had the court given the correct instruction, then any error the court may have made in its earlier instruction would have been cured. If, on the other hand, the court gave the erroneous instruction again, Johnson could have brought the mistake to the court's attention, and the court most certainly would have corrected it. But, instead of accepting the court's reasonable course of action, which would have alleviated the juror's confusion, Johnson, through counsel, stated emphatically that he did not want the instruction reread to the jury. The court ultimately acquiesced, and, at Johnson's request, the instruction was not reread. Johnson cannot now claim plain error for an erroneous instruction that would have been cured but for his request not to have the instruction reread.

II.

Johnson's next claim of error concerns the trial court's order of restitution. At sentencing, the parties engaged in the following colloquy regarding restitution:

> THE COURT: All right. … Madam State, I'll hear you on sentencing.
>
> [STATE]: Yes, Your Honor. The State is recommending … restitution upon release in the amount – or with a restitution hearing to be scheduled at a later date.
>
> * * *
>
> THE COURT: Do you have a position as to restitution, [defense counsel]?
>
> [DEFENSE]: Your Honor, the amount of restitution is exorbitant in defense's view. We would be asking at least [for] a restitution hearing –
>
> THE COURT: Do you have any receipts or anything?
>
> [STATE]: I do, Your Honor.

THE COURT: They're medical bills?

[STATE]: Yes.

THE COURT: Did he have coverage?

[STATE]: It covered some of it, not all of it and his deductible was $1,000.00 so that's included in it.

THE COURT: So the $2,100.00 is for what, the entire bill or just what wasn't covered and the deductible?

[STATE]: That is correct.

THE COURT: Mm-hmm. Do you want to be heard in allocution since we are moving forward to sentencing, [defense counsel]?

[DEFENSE]: Yes, Your Honor.

* * *

THE COURT: So before you allocute, Mr. Johnson, do you have the ability to pay the $2,100.00 in restitution?

* * *

[DEFENDANT]: I don't. I mean, if it can be broke down in payment plans, yes.

THE COURT: Yeah. It wouldn't be a lump sum.

[DEFENDANT]: Yes.

The trial court did not receive any other testimony or evidence regarding restitution. The court subsequently sentenced Johnson to a term of two years' imprisonment, with all but time served suspended, and ordered him to pay $2,100.00 in restitution.

Parties' contentions

Johnson now claims that the trial court erred in ordering him to pay $2,100.00 in restitution. Johnson argues that the court's order was not supported by the evidence because the court did not actually receive any evidence regarding the amount of restitution. Johnson asserts that the State's proffer as to the amount of restitution was insufficient.

The State contends that Johnson's claim is unpreserved because he did not object to the trial court's sentence and because he later signed the court's restitution order. The State concedes that, if the claim were preserved, reversal is warranted. The State argues that, in that case, the proper remedy would be to remand the case for the limited purpose of holding a restitution hearing.

We disagree with the State's preservation argument. Defense counsel plainly objected to the amount of restitution requested by the State. Defense counsel then requested a restitution hearing. The trial court disregarded both the objection and the request and proceeded to sentencing. At that point, the issue had been raised in and decided by the court. *See* Md. Rule 8-131(a). No further action was necessary on Johnson's part to preserve the issue. *See* Md. Rule 4-323(c) ("For purposes of review … of any [non-evidentiary] ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court."). That Johnson later signed the restitution order is irrelevant.

On the merits, we agree that the trial court erred in setting the restitution amount. A victim's entitlement to restitution and the amount of the award must be established by a

preponderance of the evidence. *Juliano v. State*, 166 Md. App. 531, 540 (2006). That standard can only be met by the introduction of competent evidence at the sentencing or restitution hearing. *Id.* at 543-44. Here, no evidence was presented to support the court's order that Johnson pay $2,100.00 in restitution. Thus, we shall vacate that order and remand the case to the circuit court for a restitution hearing, at which the State must present competent evidence to show the appropriate restitution amount. *Id.*

ORDER OF RESTITUTION VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR A NEW RESTITUTION HEARING; JUDGMENT OF CONVICTION AND SENTENCE OTHERWISE AFFIRMED; COSTS TO BE PAID ½ BY APPELLANT AND ½ BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.