Circuit Court for Anne Arundel County
Case No. C-02-CR-20-001518

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 651

September Term, 2021

OLUSOGA OLUMIDE OLOPADE

v.

STATE OF MARYLAND

Wells, C.J.,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: April 18, 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 sitting in the Circuit Court for Anne Arundel County found appellant, Olusoga Olumide Olopade, guilty of driving under the influence of alcohol per se, driving under the influence of alcohol, and driving while impaired by alcohol. After appellant declined probation before judgment, the court sentenced him to 90 days' incarceration, suspended, followed by 18 months' probation. He then noted an appeal, raising eight issues, which we have rephrased for brevity:

> 1. Whether appellant's due process rights were violated because a police officer perjured himself in his trial testimony;
>
> 2. Whether the prosecutor withheld exculpatory evidence from the defense, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny;
>
> 3. Whether the arresting police officer illegally searched appellant, in violation of the Fourth Amendment;
>
> 4. Whether the circuit court erred in admitting the DR-15 Advice of Rights form "that failed to advise the defendant of his rights and the Intoxilyzer result which did not comply with statutory protocols";
>
> 5. Whether trial counsel rendered ineffective assistance, in violation of the Sixth Amendment;
>
> 6. Whether the circuit court erred in excluding an affidavit offered by the defense;
>
> 7. Whether the circuit court erred in holding trial while failing to "consider sudden medical emergency and unintended medication interaction defenses that were generated in [appellant's] testimony"; and
>
> 8. Whether the circuit court gave erroneous instructions to the jury.

Finding no error (and, in several instances, lack of preservation), we affirm.

BACKGROUND

On February 4, 2020, at about 1:47 a.m., Detective Cory Heathcote of the Anne Arundel County Police Department was on "routine patrol" in the Laurel section of Anne Arundel County when he "observed a vehicle stopped" in the exit lane from eastbound Laurel Fort Meade Road (Maryland Route 198) to southbound Brock Bridge Road. Its lights were off, its engine was off, and there was no indication, such as the use of four-way flashers, that the vehicle was disabled. Detective Heathcote "pulled behind the vehicle" and waited "approximately a minute[.]" Because the "vehicle did not move," nor did its lights or flashers come on, Detective Heathcote "approached the vehicle and spoke with" its driver.

Appellant, "the driver and sole occupant of" the vehicle, was awake at the time of Detective Heathcote's initial encounter with him. Appellant explained to the detective that his vehicle was disabled. As appellant spoke, Detective Heathcote noticed a "very strong" odor of "an alcoholic beverage coming from [appellant's] breath." Appellant's speech was "slurred," and he had a red "wet stain on the front of his shirt." In response to Detective Heathcote's query, "Have you drank?," appellant replied that "he had about two hours prior to his vehicle becoming disabled." When asked what he had drunk, appellant stated that "he drank from the bottle" but did not further elaborate.

Detective Heathcote called for backup. When another police officer arrived at the scene, Detective Heathcote asked appellant to step out of his vehicle. Appellant complied with that request but with difficulty. According to Detective Heathcote, appellant had "to

use the doorframe of the vehicle to assist himself in getting out of the vehicle[,]" and when he walked, he had "a difficult time maintaining his balance[.]"

Detective Heathcote then administered field sobriety tests to appellant.[1] Prior to administering the walk-and-turn test, Detective Heathcote asked appellant whether he suffered from any health conditions that might negatively affect his ability to perform the test. Appellant replied that he had high blood pressure as well as "a medical condition with his hands[.]"

When appellant took the walk-and-turn test, he was unable to complete it because, after taking several steps,[2] he became "unstable, to the point where he almost fell[,]" and police officers "ended the test" because of concern for his safety. "At that point[,]" which was 2:11 a.m., Detective Heathcote placed appellant under arrest and transported him to a nearby police station "to be processed and booked."

After arriving at the police station, Detective Heathcote handed appellant a DR-15 (Advice of Rights) form. The detective read the form "in its entirety" to appellant, and afterward, both the detective and appellant signed it.[3] Then, Detective Heathcote obtained

[1] The first test Detective Heathcote gave appellant was the horizontal gaze nystagmus test, but no testimony about the results of that test was admitted because Detective Heathcote had not been qualified as an expert.

[2] To complete the test, a person must take nine heel-to-toe steps out, turn around, and take nine heel-to-toe steps back to the starting point.

[3] Appellant indicated that he signed the DR-15 on February 1 (assuming the international standard DD/MM/YY) at 2143 hours, which would have been impossible. The prosecutor asked Detective Heathcote about this discrepancy, and he replied that, to the best of his recollection, the DR-15 was read to appellant sometime between 2:30 and (continued…)

appellant's consent to take a breath test, and Corporal Cody Rhodes, who was trained to administer such tests, was summoned to do so. While appellant was waiting for the breath test to be administered, Detective Heathcote kept him under observation to ensure that he did not eat, drink, smoke, or put anything in his mouth, so that the test would be reliable. The test indicated that appellant's blood alcohol concentration was 0.23 per cent, nearly three times the statutory limit.[4]

Appellant was charged, in the District Court of Maryland for Anne Arundel County, with stopping, standing, or parking a vehicle in an intersection; failure to display a driver's license on demand; failure to display a vehicle registration on demand; negligent driving; reckless driving; driving while under the influence of alcohol; driving while under the influence of alcohol per se; driving while impaired by alcohol; and dumping refuse on a highway.[5] He prayed for a jury trial, and the case was transferred to the Circuit Court for Anne Arundel County.

The case proceeded to a jury trial. After jury selection but prior to opening argument, the State entered nolle prosequi to all charges except stopping, standing, or

3:00 a.m. (no one mentioned the date), but that it could not have been when appellant indicated.

[4] Md. Code (1973, 2020 Repl. Vol.), Courts & Judicial Proceedings Article ("CJ"), § 10-307(g); Md. Code (1977, 2020 Repl. Vol.), Transportation Article ("TR"), § 16-205.1(b)(1).

[5] When Detective Heathcote encountered appellant, the detective observed "fast food trash" on the ground near the driver's side door of his vehicle, "[o]utside on the roadway."

parking a vehicle in an intersection; driving while under the influence of alcohol; driving while under the influence of alcohol per se; and driving while impaired by alcohol.

After the State's case (which we have summarized above) concluded, appellant testified on his own behalf. Appellant previously had been a law professor in Nigeria but after emigrating to the United States, he found difficulty obtaining suitable employment. At the time of trial, he worked as an interpreter. In his version of events, appellant suffered from various illnesses, and, as a result, he asked his sister in Nigeria to send him an herbal remedy, which was described as a "tincture" containing "many things[,]" such as leaves, tree bark, and various herbs. Because he felt ill the night of February 3rd, appellant drank the tincture and then left his residence to get something to eat. He claimed that his car cut out on the trip home, and it drifted to a stop in the exit lane from Route 198 to Brock Bridge Road, just a few minutes from his residence. The basis of his defense was that he did not knowingly drink an alcoholic beverage on the night in question.

The jury found appellant guilty of driving while under the influence of alcohol, driving while under the influence of alcohol per se, and driving while impaired by alcohol, and it acquitted him of stopping, standing, or parking in an intersection. After appellant rejected probation before judgment, the court sentenced him to 90 days' incarceration, all suspended, and 18 months' supervised probation. This timely appeal followed. Additional facts will be set forth where pertinent to the discussion of the issues.

DISCUSSION

Standard of Review

"Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). We review a circuit court's legal determinations without deference. *See, e.g.*, *Parker v. State*, 408 Md. 428, 437 (2009). We review a circuit court's discretionary rulings for abuse of discretion, which occurs "where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to guiding rules or principles." *State v. Robertson*, 463 Md. 342, 364 (2019) (citation and quotation marks omitted) (cleaned up). "In a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." *Hunter v. State*, 397 Md. 580, 588 (2007) (citations and quotation marks omitted).

I.

Appellant contends that Detective Heathcote perjured himself during the State's case-in-chief, thereby violating his right to due process. This claim is meritless.

The gravamen of this claim is a purported discrepancy between Detective Heathcote's statement of probable cause and his testimony at trial that appellant had drunk an alcoholic beverage. In the statement of probable cause, Detective Heathcote wrote that appellant "would not state what he drank, only replying 'From the bottle', but he would not elaborate on this." At trial, on direct examination, the prosecutor asked Detective Heathcote whether he had "any further conversation" with appellant during the traffic stop,

and the detective replied, "I just recall [appellant] stating that his vehicle was disabled. And then I also asked if he had consumed any alcoholic beverages, and he said he had about two hours prior to his vehicle becoming disabled." The defense objected, but the court overruled that objection, and the prosecutor then asked a clarifying question, "Did [appellant] indicate what he drank?" Detective Heathcote replied, "He only told me that he drank from the bottle." Subsequently, during cross-examination, counsel asked Detective Heathcote "specifically" what he had asked appellant. The detective replied that he had asked, "Have you drank?" without specifying whether he meant an alcoholic beverage, and that appellant replied that he drank "from the bottle."

A "conviction obtained through use of false evidence, known to be such by representatives of the State," is a violation of the Due Process Clause of the Fourteenth Amendment, applicable to the States. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). That same principle still applies even if the falsity of that testimony was unknown to the prosecution. *Kulbicki v. State*, 207 Md. App. 412, 443-46 (2012), *rev'd on other grounds*, 440 Md. 33 (2014), *rev'd on other grounds sub nom, Maryland v. Kulbicki*, 577 U.S. 1 (2015) (per curiam).

Here, however, there was no showing that Detective Heathcote testified falsely. To the extent that his trial testimony initially may have led to the mistaken impression that appellant had admitted to drinking an alcoholic beverage on the night in question, further questioning by both the prosecutor and defense counsel clarified that appellant had made no such admission. Twice, Detective Heathcote explained that appellant had merely said

that he "drank from the bottle" without further elaboration. There is no basis to conclude that Detective Heathcote testified falsely.[6]

II.

Appellant contends that the prosecution withheld exculpatory evidence from the defense, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, "despite repeated demands, thus forcing him to testify in his self-defense which the jurors regarded as incredible and used to convict him."[7] That allegedly exculpatory evidence included "unredacted" footage from the "CCTV camera at the police station/jail" as well as appellant's "previous statements" to the police.[8] According to appellant, this purportedly withheld evidence "negated" his guilt, "negated the credibility" of Detective Heathcote and Corporal Rhodes, "would have led to dismissal of the case[,]" or, "at least," would have reduced appellant's potential sentence. The State counters that this claim is waived because it was not raised at trial.[9]

[6] Moreover, given that Detective Heathcote clarified his answer twice, there is no '"reasonable likelihood that the [purportedly] false testimony could have affected the judgment of the jury[,]"' *Wilson v. State*, 363 Md. 333, 347 (2001) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)), or in other words, the purportedly false testimony in this case was not material even under the heightened standard applicable to claims of perjured testimony.

[7] We cannot help but observe that appellant voluntarily decided to testify on his own behalf.

[8] Appellant appears to claim that the withheld "CCTV camera" also included dash cam video from Detective Heathcote's patrol car.

[9] The State's contention is mistaken. The essence of a *Brady* violation is the prosecution's failure to disclose exculpatory evidence to the defense. There are cases (continued…)

There are three components of a *Brady* violation:

> "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."

Yearby v. State, 414 Md. 708, 717 (2010) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Regarding suppression of exculpatory evidence by the State, the Court of Appeals has noted that "the *Brady* rule does not relieve the defendant from the obligation to investigate the case and prepare for trial." *Ware v. State*, 348 Md. 19, 39 (1997). Thus, the "prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly suppressed was available to the defendant through reasonable and diligent investigation." *Id.* (citation omitted). As for prejudice (also known as "materiality"), the defendant must demonstrate "'a reasonable probability that the

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where prosecutors successfully concealed exculpatory evidence that was not discovered until after trial and sentencing. *See, e.g.*, *Conyers v. State*, 367 Md. 571, 595-96 (2002) ("factual predicate underlying" Conyers's *Brady* claims "did not arise until" his postconviction hearing); *Ware v. State*, 348 Md. 19, 34-35 (1997) (exculpatory evidence concerning favorable treatment of a State's witness not discovered by the defense until after sentencing). Obviously, in such cases, the failure to object at trial cannot operate as a waiver. It is true, however, that a *Brady* claim will fail where the defendant failed to exercise due diligence in pursuing information that he knew or reasonably should have known, because the evidence in such a case is deemed not to have been withheld by the prosecution. *See, e.g.*, *Yearby v. State*, 414 Md. 708, 723 (2010) (noting "the defendant's independent duty to investigate, especially in a situation where the defense 'was aware of the potentially exculpatory nature of the evidence as well as its existence'") (quoting 6 Wayne R. LaFave, et al., *Criminal Procedure* § 24.3(b), at 362 (3d ed. 2007)); *Ware*, 348 Md. at 39 (noting that the "prosecution cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly suppressed was available to the defendant through reasonable and diligent investigation"). Because the purportedly withheld evidence here was not material, however, we do not further consider whether it was withheld by the prosecution.

suppressed evidence would have produced a different verdict."' *Yearby*, 414 Md. at 718 (quoting *Strickler*, 527 U.S. at 281).

Although we see no indication that the prosecution suppressed evidence in this case, even if it had, we can be certain that the purportedly undisclosed evidence was not material. Appellant claims that the video could have assisted his defense of involuntary intoxication. He presents no basis for reaching that conclusion, nor do we see any in our own examination of the record. The evidence included Detective Heathcote's testimony about appellant's impaired condition, in a vehicle that was stopped, with its lights off, on a turn lane of a highway, and, in addition, the results of a blood alcohol test, showing that appellant's blood alcohol concentration was 0.23 per cent, nearly three times the legal limit. Regardless of what any video recording in the police station would have depicted, there is no reasonable probability that, had it been available to the defense, the result in this case would have been different. That is especially true given appellant's defense, which was that he had been unaware that the herbal tincture he claimed to have consumed contained alcohol. Appellant does not explain how the purportedly withheld video (or his statements to police) would have shed any light on this claim whatsoever. In any event, appellant testified, at trial, that he was unaware that he had drunk alcohol, but the jury obviously did not find his testimony persuasive.

Appellant raises additional claims in this section of his brief that were not raised below and therefore are not properly before us. For example, he now claims, on appeal,

that the signature on the DR-15 form was not his, but he never raised that claim at trial.[10] He further claims that he was subject to custodial interrogation but had never been given *Miranda*[11] advisements, a claim he likewise did not raise at trial. Because these claims were neither raised in nor decided by the trial court, we shall not address them. Md. Rule 8-131(a).

III.

Appellant contends that Detective Heathcote unlawfully prolonged the traffic stop and that any evidence obtained as a result should have been suppressed. This issue is not properly before us.

Because this case was prayed from the District Court, Maryland Rule 4-251 governs pretrial motions. Md. Rule 4-301(b)(2). Rule 4-251(b)(2) provides that a suppression motion "shall be determined at trial." Although appellant filed boilerplate suppression motions in District Court and circuit court, at trial, he failed to request that the circuit court rule on his suppression motion, nor did he otherwise raise the issue he now raises on appeal. Accordingly, the circuit court did not conduct a suppression hearing (it was never asked to do so), and there is nothing for us to review. This claim is therefore waived. Md. Rule 8-131(a).

[10] At trial, appellant claimed not to remember having signed the form.

[11] *Miranda v. Arizona*, 384 U.S. 436 (1966).

IV.

Appellant contends that he was "wrongfully convicted when the court admitted perjured testimony of OFC Heathcote, [the] Advice of Rights (DR-15) form that failed to advise the defendant of his rights and the Intoxilyzer result which did not comply with statutory protocols." This claim is without merit.

First, as we previously explained in Part I, there is no basis for the accusation against Detective Heathcote that he perjured himself at appellant's trial. Second, any objection appellant now raises to the admission of the DR-15 form is waived because he did not object when it was admitted at trial. Md. Rule 4-323(a).

To the extent appellant claims that he was not properly advised of his rights under the Maryland implied consent law, Detective Heathcote testified that he read the entire DR-15 form to appellant to ensure that he understood what it said, and then obtained appellant's signature to confirm that he understood it. *See Motor Vehicle Admin. v. Barrett*, 467 Md. 61, 70 (2020) (declaring that "due process is satisfied when the motorist reads or is read the DR-15 because the DR-15 accurately and adequately conveys to the driver the rights granted by the statute and the consequences of a test refusal") (citation and quotation marks omitted). We may safely infer that the jury found that testimony credible.

Regarding appellant's contention that Detective Heathcote failed to scrupulously adhere to "statutory protocols" during the 20-minute observation period immediately preceding appellant's breath test, we must draw a distinction between the relevant statute, Md. Code (1973, 2020 Repl. Vol.), Courts & Judicial Proceedings Article ("CJ") §

10-309(a)(1)(ii),[12] governing admissibility of breath test results, and the Code of Maryland Regulations ("COMAR") 10.35.02.08(G), prescribing the 20-minute observation period, which appellant claims was violated. In *Dejarnette v. State*, 251 Md. App. 467, 471-75 (2021), *aff'd*, __ Md. __, No. 41, Sept. Term, 2021 (filed Mar. 25, 2022), we held that non-compliance with the regulation does not render the result of a breath test inadmissible under the statute, but merely goes to the weight of the evidence. Therefore, even had there been non-compliance with the regulation in this case, the breath test result was properly admitted into evidence based on Corporal Rhodes's testimony that he had correctly administered the test and that the test instrument was properly calibrated. But in any event, the combined testimony of Detective Heathcote and Corporal Rhodes constituted sufficient evidence to conclude that there was no violation of the 20-minute observation period.

V.

Appellant contends that trial counsel rendered ineffective assistance, in violation of his Sixth Amendment right to effective assistance of counsel. The short answer to this contention is that we decline to address it on direct appeal, as this case does not fit into the narrow exception to the general rule that ineffective assistance claims generally should be raised in a postconviction proceeding, which affords the defendant an opportunity for a

[12] Section 10-309(a)(1)(ii) of the Courts & Judicial Proceedings Article provides that "[e]vidence of a test or analysis provided for in this subtitle is not admissible in a prosecution for a violation of . . . § 21-902 of the Transportation Article . . . if obtained contrary to the provisions of this subtitle."

hearing in which he may create a factual record sufficient to resolve such a claim. *See, e.g.*, *Mosley v. State*, 378 Md. 548, 558-61 (2003).

VI.

Appellant contends that the circuit court erred in excluding two affidavits, one from Fausat Ajayi, an "herbal medicine practitioner" in Nigeria, and the second from appellant's sister, Bukola Babatunde, also a citizen and resident of Nigeria. Ms. Ajayi averred that she sold Ms. Babatunde two herbal mixtures without disclosing that one of them contained alcohol. Ms. Babatunde averred that she bought an herbal mixture in Nigeria and sent it to appellant for medicinal purposes, but that she did not know that the mixture contained alcohol, only to discover, after appellant's arrest in this case, that it contained gin. Both affidavits were executed before a "commissioner for oaths" in Nigeria on the same date in March 2020.

Before opening statements, the State moved in limine to exclude the affidavits on the ground of hearsay. Defense counsel countered that they were admissible, asserting that the affiants were unable to come to the United States to testify.[13] In support, counsel claimed that they were admissible under the residual hearsay exception, Md. Rule 5-803(b)(24); that Ajayi's affidavit was a statement against interest; and that due process required that they be admitted. The circuit court deferred its ruling but asked that defense counsel refrain from mentioning the affidavits during opening statement.

[13] International travel was greatly restricted during much of the time from appellant's arrest until trial because of the COVID-19 pandemic.

During appellant's testimony, when asked whether he had requested that Ms. Ajayi and Ms. Babatunde testify on his behalf, he replied that he had but that they had declined his request "because they live in Nigeria, and they don't have a United States visa." Following the conclusion of appellant's testimony, the defense moved to admit the affidavits into evidence. The court held that they were inadmissible under each ground asserted by the defense. Moreover, the court observed that a process was available to the defense, under Maryland Rule 4-261, to conduct videotaped depositions of the witnesses, which would have afforded the State an opportunity to cross-examine them, but that the defense had not invoked that process.

The circuit court did not err in excluding the affidavits. As it aptly observed, the defense failed to avail itself of the process available to it under Rule 4-261 and thus cannot be heard to complain about a denial of due process. As for admissibility under the residual exception as set forth in Md. Rule 5-803, the Committee Note to that subsection states:

> The residual exception provided by Rule 5-803 (b)(24) does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.
>
> It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804 (b). The residual exception is not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under this subsection, the trial judge will exercise no less care, reflection, and

> caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

The circuit court faithfully adhered to the intention of the rule in finding that the affidavits "scream of classic hearsay" and did not fit within the narrow confines of the residual exception. Moreover, the court correctly concluded that Ms. Ajayi's affidavit did not qualify as a statement against interest. In sum, the circuit court did not err in excluding the affidavits.

VII.

Appellant contends that the circuit court erred in failing to "consider sudden medical emergency and unintended medication interaction defenses that were generated in [appellant's] testimony." He further maintains that "[n]one of the charges was read to" him either in the District Court or the circuit court and that, therefore, the circuit court improperly entered his plea of not guilty.

The short answer to appellant's first contention is that this claim was not raised at trial and is therefore not preserved. Md. Rule 8-131(a). Moreover, appellant appears to suggest that the circuit court had a duty, on its own, to consider defenses that may have been generated by his testimony. The court had no such duty. The question of which defenses to assert (and, concomitantly, which ones not to assert) was a decision entrusted to defense counsel, because such questions are quintessentially matters of trial tactics. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (recognizing the "wide latitude counsel must have in making tactical decisions" and the presumption that defense counsel's action "might be considered sound trial strategy") (citation and quotation marks omitted).

Appellant's contention that the charges were not read to him is belied by the record. Included in the record is a copy of the Initial Appearance Report, signed and dated by appellant on February 4, 2020, indicating that he had "read … the offense(s) for which [he is] charged, the conditions of release, the penalty for violation of the conditions of release, [and] the Notice of Advice of Right to Counsel."

As for appellant's assertion that his plea of not guilty was entered improperly, we turn to Maryland Rule 4-242, which states in relevant part that a "defendant may plead not guilty personally or by counsel on the record in open court or in writing[,]" *id.* § (b)(1), and that in "District Court the defendant shall initially plead at or before the time the action is called for trial."[14] *Id.* § (b)(2). When defense counsel entered her appearance, she entered, in writing, a plea of not guilty on appellant's behalf, thereby satisfying Rule 4-242(b)(1) and (2).

VIII.

A.

Finally, appellant contends that the circuit court erred in instructing the jury on involuntary intoxication rather than on mistake of fact, which, he contends, "are two separate defenses that should have been considered by the court." Consequently, he maintains, the jury "failed to properly apply facts in the record that showed that" he "was not in actual physical control of his car, having used it as a shelter before his arrest."

[14] Because this case was transferred to the circuit court following a demand for a jury trial, District Court rules apply, with exceptions not relevant here. Md. Rule 4-301(b)(2).

The State counters that appellant waived his claim of instructional error because he participated in the drafting of the instruction actually used, and he did not object to the instruction after it was given to the jury.

After the close of all the evidence, the parties discussed proposed jury instructions. The following occurred:

> THE COURT: Driving offense are fine. Mistake of fact. Yes or no, Ms. [defense counsel]?
>
> [DEFENSE COUNSEL]: Yes, please.
>
> THE COURT: Okay.
>
> [PROSECUTOR]: Your Honor, I don't think this is a mistake of facts. I would object to that one because he didn't know? I think that is different. Not knowing what is in there doesn't mean that -- it is different than if somebody had told him there is no alcohol in there. He just didn't know. So I don't think [there] is a mistake of fact.
>
> THE COURT: Okay. We will talk about it. I will think about it overnight.
>
> Involuntary intoxication?
>
> [DEFENSE COUNSEL]: **I mean, if involuntary intoxication can come in, then we can take out mistake of fact.**
>
> THE COURT: I think that is really the truth. I mean, why don't the two of you work together to see if you can come up -- one of those is coming in. Something to that effect has to come in in this case. He clearly has generated the issue of he didn't [know] the tincture had alcohol, and he drank it. Whether it is credible or not is a different story. It is not my job to judge that. It is not my job to decide that.
>
> But one of those comes in. And which one comes in? I don't think they both come in. One of them comes in. So the two of you can work together to do that. See what you can do as far as that is considered because I think that -- if we don't do involuntary intoxication, we have to do a mistake of fact, and it may be that involuntary intoxication is the better instruction than mistake of fact.

> So I would ask, when we leave here today, see if you two could work on something. If you come up with something, email it to [my clerk] . . . at md.courts.gov. Get that [to] him tonight, and we will look at it tomorrow morning.

(Emphasis added.)

The following day, the parties conferred and came to a mutual agreement as to the text of an instruction on involuntary intoxication as a defense. The court subsequently instructed the jury on involuntary intoxication. Defense counsel did not object.[15]

Maryland Rule 4-325 governs jury instructions in criminal trials. Regarding preservation, part (f) of the rule provides:

> **(f) 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.

Although substantial, not strict, compliance with Rule 4-325(f) is sufficient to preserve a claim of instructional error, *see, e.g.*, *Hallowell v. State*, 235 Md. App. 484, 503 (2018), the facts of this case do not meet even the relaxed standard of substantial compliance. Here, there was no objection at all. Indeed, the defense participation in crafting the non-pattern instruction that was given on involuntary intoxication could even be construed as an affirmative waiver. But even if we assume there was merely a forfeiture,

[15] The only objection the defense made to the instructions was to the court's decision not to instruct the jury concerning identification of the defendant.

we conclude that, under Rule 4-325(f), appellant's claim of instructional error is not preserved. Moreover, he does not ask us to review for plain error, but even if he had done so, we would decline under these circumstances.

B.

Almost as an afterthought, appellant claims that jury selection was "unfair, unrepresentative and skewed toward servicemen."[16] The State counters that this argument was not raised below and is therefore not preserved.

Maryland Rule 4-312, which governs jury selection, states in relevant part:

> **(a) Jury Size and Challenge to the Array.**
>
> * * *
>
> (3) *Challenge to the Array.* A party may challenge the array on the ground that its members were not selected or summoned according to law, or on any other ground that would disqualify the array as a whole. A challenge to the array shall be made and determined before any individual member of the array is examined, except that the trial judge for good cause may permit the challenge to be made after the jury is sworn but before any evidence is received.

Appellant raised no challenge to the array at any time during trial, let alone within the time required under Rule 4-312(a)(3). This contention is not preserved, and we decline to consider it.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[16] The State suggests that by "servicemen," appellant appears to mean "law enforcement employees[.]"