Circuit Court for Cecil County
Case No. C-07-CR-21-000695

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 792

September Term, 2022

KEVIN LEE PIERCE, JR.

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: May 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.

** 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.

In 2021, the State charged Kevin Lee Pierce, Jr. with one count of possession of contraband in a place of confinement and one count of possession of a weapon in a place of confinement after a shank was recovered from Mr. Pierce's prison mattress. He was tried before a jury in the Circuit Court for Cecil County in May 2022 and convicted of both charges. Mr. Pierce asks us to reverse his convictions, claiming *first* that the trial judge erred in instructing the jury on possession of contraband in a place of confinement, *second* that the trial judge's instruction on possession of a weapon in a place of confinement warrants plain error review, and *third* that counsel's failure to object to the allegedly erroneous instruction on possession of a weapon in a place of confinement constituted ineffective assistance of counsel. We affirm.

I. BACKGROUND

On May 13, 2021, Mr. Pierce was detained at Cecil County Detention Center. Upon entry, the facility provided Mr. Pierce with clothing, a sheet, a blanket, and a mattress before placing him in a holding cell with at least fourteen other inmates. After six days, the Correctional Response Team ("CRT") conducted a raid on the holding cell that housed Mr. Pierce. During the course of this raid, the CRT recovered jail-made knives, known as shanks, from mattresses inside the cell. Mr. Pierce's mattress contained a shank, and he was charged with possession of contraband in a place of confinement under Maryland Code

(2002, 2021 Repl. Vol.), § 9-412(a)(3) of the Criminal Law Article ("CR") and possession of a weapon in a place of confinement under CR § 9-414(a)(4).[1]

Over the course of May 24–25, 2022, Mr. Pierce was tried before a jury. During the trial, the State called four witnesses, three of whom were Detention Center correctional officers at the time of the alleged offense. The State's first witness, Officer Thomas Lee, was a member of the CRT dispatched to search the holding cell. Officer Lee testified that he was the first one to enter the cell on the day of the search. When he entered the cell, he approached Mr. Pierce's bunk. Mr. Pierce's bunk had three beds, and his bed was the lowest. As Officer Lee approached Mr. Pierce, Mr. Pierce stood up from where he was lying on his bunk, and Officer Lee cuffed him and led him out of the cell. The holding cell is under twenty-four-hour surveillance, and surveillance video revealed that once all of the inmates were cleared from the cell, Officer Lee searched Mr. Pierce's mattress. While examining the mattress, Officer Lee found a hole in it. After ripping the hole open further, he recovered a metal shank.

Lieutenant Michael Rae, the operations commander at the Detention Center, also testified. He explained that inmates are not permitted to swap mattresses with other inmates. He also testified about surveillance videos taken during the twenty-four hours preceding the raid. In one of the videos, Brandon Riley, another inmate housed in the same holding cell as Mr. Pierce, can be seen entering the shower and toilet area of the cell with

[1] CR § 9-412(a)(3) provides: "A person may not . . . knowingly possess contraband in a place of confinement." CR § 9-414(a)(4) provides: "A person detained or confined in a place of confinement may not knowingly possess or receive a weapon."

a push broom, where he remained for approximately forty minutes. According to Lieutenant Rae, the broom was rigid when Mr. Riley entered that area, but when he left it appeared "loose." The broom was recovered during the raid and metal was missing from it.

Another video showed Mr. Pierce walking to the toilet area after Mr. Riley had left it. Once there, Mr. Pierce sat down but made no effort to remove his pants. After "kind of look[ing] into the mirror area," Mr. Pierce returned to his bunk with his left "hand clenched around an object." Lieutenant Rae testified that with his "training, knowledge, and experience as a correctional officer," he "could determine there was an object in his hand" and that the object "looked like a[n] improvised shank." The shank was recovered from Mr. Pierce's mattress less than twenty-four hours later.

Detective John Lines, who was called to assist with the investigation after the shanks were found in the holding cell, testified that after "piecing the [broom] back together," he concluded that all the metal pieces that formed the shanks came from the broom.

Toward the end of the trial, the court held a bench conference with the attorneys during which the prosecutor acknowledged that there were no pattern jury instructions on either of the charged offenses. The State then proposed instructions that had been used in a case with the same charges arising from the same search against another inmate inside the booking cell. Defense counsel was provided with the opportunity to "[c]orrect[] or clarify[]" the instructions and verdict sheet, and both attorneys indicated that they had no objections. The court then instructed the jury using the State's proposed instructions:

> Defendant is charged with the following charges. He's charged with knowingly possessing contraband in a place of confinement. In order to convict the Defendant, the State must prove the Defendant possessed contraband in a place of confinement. The contraband means any item, material, substance, or other thing that is not authorized for inmate possession by the managing official or is brought into the correctional facility in a manner prohibited by the managing official. "Place of confinement" means a correctional facility.
>
> Possession of a weapon in a place of confinement. Defendant is also charged with knowingly possessing or receiving a weapon while in a place of confinement. "Weapon" means a gun, knife, club, explosive, or other article that can be used to kill or inflict bodily injury. "Possession" means having control over something, whether actual or indirect. The Defendant does not have to be the only person in possession of the contraband or weapon. More than one person may have possession of the same contraband or weapon at the same time.
>
> A person has actual possession of contraband or weapon when the person has both direct control over the weapon and the intention to exercise that control. A person not in actual possession who has both the power and intention to exercise control over something, either personally or through another person, has indirect possession.
>
> In determining whether defendant had indirect possession of the contraband or weapon, consider all the surrounding circumstances. These circumstances include the distance between a defendant and the contraband or weapon, whether defendant had some ownership or possessory interest where the contraband or weapon was found, and any indication that the Defendant was participating alone or with others in the use of the contraband or weapon.

After giving these instructions aloud, the court asked counsel to approach the bench for a sidebar to discuss the written jury instructions, during which the following exchange occurred:

> [COUNSEL FOR MR. PIERCE]: I've got one [objection].
>
> THE COURT: You got one.

> [COUNSEL FOR MR. PIERCE]: In the possession of contraband on the next to the last page. Under number 1, it says—the event where it says 1, okay. I'd like it to say defendant—it says it above, but it doesn't say it there: "Defendant knowingly possessed contraband." Because it—it skips it there, even though it's in the statute as such. And if you think that's sufficient, then—
>
> [PROSECUTOR]: I don't believe it's in the pattern instruction, and it's already been addressed by the Court in the prior paragraph. Do you want it in the instruction?
>
> THE COURT: Well, I think it's—I think it is addressed here, and you could argue that. I'm going to give [the jury] a copy of it—
>
> [COUNSEL FOR MR. PIERCE]: Okay. I mean, when they're looking at it—
>
> THE COURT:—because it is—it is one whole paragraph.
>
> [COUNSEL FOR MR. PIERCE]: Okay. I don't know why you even have to say the one and two then if you—anyway.
>
> THE COURT: I don't know either.
>
> [COUNSEL FOR MR. PIERCE]: I just, you know, it says it twice, except for that word, that's all. That's all I'm saying.
>
> THE COURT: Okay. But it is spelled out there.
>
> [COUNSEL FOR MR. PIERCE]: Yep, it is.
>
> THE COURT: So you can argue that.
>
> [COUNSEL FOR MR. PIERCE]: Okay.
>
> THE COURT: Okay. Any other questions?
>
> [PROSECUTOR]: I have no exceptions.
>
> THE COURT: All right.
>
> [COUNSEL FOR MR. PIERCE]: No other exceptions, Your Honor.
>
> THE COURT: All right. Thank you, sir.

After the sidebar, the jury retired to deliberate, taking the following written jury

instructions into the jury room with them:

POSSESSION OF CONTRABAND

Defendant is charged with knowingly possessing contraband in a place of confinement. In order to convict the Defendant, state must prove:

1) Defendant possessed contraband;

2) in a place of confinement.

Contraband means any item, material, substance, or other thing that: (1) is not authorized for inmate possession by the managing official; or (2) is brought into the correctional facility in a manner prohibited by the managing official.

Place of confinement means a correctional facility.

POSSESSION OF WEAPON IN PLACE OF CONFINEMENT

Defendant is also charged with knowingly possessing or receiving a weapon while in a place of confinement.

Weapon means a gun, knife, club, explosive, or other article that can be used to kill or inflict bodily injury.

POSSESSION

Possession means having control over something, whether actual or indirect. The defendant does not have to be the only person in possession of the contraband or weapon. More than one person may have possession of the same of contraband or weapon at the same time.

A person has actual possession of contraband or weapon when the person has both direct control over the weapon and the intention to exercise that control.

A person not in actual possession, who has both the power and intention to exercise control over something, either personally or through another person, has indirect possession. In determining whether the defendant had indirect possession of the contraband or weapon, consider all of the surrounding circumstance. These circumstances include the distance between the defendant and the contraband or weapon, whether the defendant had some ownership or possessory interest where the contraband or weapon was found, and any indication

> that the defendant was participating, alone, or with others in the use of the contraband or weapon.

The jury ultimately convicted Mr. Pierce of both counts. Mr. Pierce timely appealed.

II. DISCUSSION

Mr. Pierce presents three questions on appeal, which we have reworded:[2] *first*, whether the trial court erred when it instructed the jury on the elements of possession of contraband in a place of confinement; *second*, whether the trial court erred when it instructed the jury on the elements of possession of a weapon in a place of confinement; and *third*, whether Mr. Pierce's counsel rendered ineffective assistance by failing to object to the possession of a weapon instruction.

A. The Circuit Court Did Not Err In Instructing The Jury On Possession Of Contraband In A Place Of Confinement.

Mr. Pierce argues *first* that the circuit court did not instruct the jury properly on the elements of possession of contraband in a place of confinement. As discussed above, the

[2] In his brief, Mr. Pierce phrased the Questions Presented as follows:

> 1. Did the trial court err when it incorrectly instructed the jury on the elements of the offenses?
> 2. Did defense counsel render ineffective assistance of counsel when he failed to object to the possession of a weapon instruction?

In its brief, the State phrased the Questions Presented as follows:

> 1. If not waived, did the trial court soundly exercise its discretion in instructing the jury on the elements of the charged offenses?
> 2. Should this Court decline to address Pierce's claim that he received ineffective assistance of counsel on direct appeal?

instructions provided to the jury for this charge included the word "knowingly" in the initial definition of the crime, but didn't repeat the term in describing the individual elements of the charge:

> **POSSESSION OF CONTRABAND**
>
> Defendant is charged with knowingly possessing contraband in a place of confinement. In order to convict the Defendant, state must prove:
>
> 1) Defendant possessed contraband;
>
> 2) In a place of confinement
>
> Contraband means any item, material, substance, or other thing that: (1) is not authorized for inmate possession by the managing official; or (2) is brought into the correctional facility in a manner prohibited by the managing official.
>
> Place of confinement means a correctional facility.
>
> * * *
>
> **POSSESSION**
>
> Possession means having control over something, whether actual or indirect. The defendant does not have to be the only person in possession of the contraband or weapon. More than one person may have possession of the same of contraband or weapon at the same time.
>
> A person has actual possession of contraband or weapon when the person has both direct control over the weapon and the intention to exercise that control.
>
> A person not in actual possession, who has both the power and intention to exercise control over something, either personally or through another person, has indirect possession.

Mr. Pierce argues that the word "knowingly" should have been repeated in the first numbered element, so that the instruction would have read that "(1) Defendant *knowingly* possessed contraband," and that the absence of the second "knowingly" was reversible error.

We consider first whether this argument is preserved. The State contends that Mr. Pierce waived this issue by agreeing with the judge that the knowledge requirement was "spelled out there" and acknowledging that repetition of the element was unnecessary. We read the record differently.

Maryland Rule 4-325(f)[3] requires defense counsel to object promptly to any perceived error in a jury instruction:

> 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.

"The purpose of the rule is to give the trial court an opportunity to correct its charge to the jury if it believes a correction is necessary in light of the objection." *Taylor v. State*, 473 Md. 205, 227 (2021) (*citing Gore v. State*, 309 Md. 203, 208–09 (1987)). Although strict compliance with Rule 4-325 is preferred, the Supreme Court of Maryland[4] has recognized that "an objection that falls short of that mark may survive nonetheless if it substantially complies with Rule 4-325([f])." *Watts v. State*, 457 Md. 419, 427 (2018) (*citing Bennett v.*

[3] As of July 1, 2021, former Maryland Rule 4-325(e) became Maryland Rule 4-325(f). The current rule is substantively identical to the former.

[4] At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

State, 230 Md. 562, 569 (1963)). "If the record reflects that the trial court understands the objection and, upon understanding the objection, rejects it, this Court will deem the issue preserved for appellate review." *Id.* at 428.

That's what happened here. Immediately after the judge read the instructions to the jury, counsel for Mr. Pierce came forward and noted an exception to the instructions. Mr. Pierce stated his objection to the "possession of contraband" instruction and told the court that he wanted the first numbered element to say "[d]efendant knowingly possessed contraband" rather than just "[d]efendant possessed contraband." At the end of the discussion, the court stated, "I think it is addressed," and said that counsel could argue it. He lost, and any further objection would have been futile, so the issue is preserved, and we will address the merits.

"We review the decision of the circuit court to give [(or refuse to give)] a jury instruction for abuse of discretion." *Rainey v. State*, 480 Md. 230, 255 (2022) (*citing Thompson v. State*, 393 Md. 291, 311 (2006)). "[S]o long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them." *Sail Zambezi, Ltd. v. Md. State Highway Admin.*, 217 Md. App. 138, 149 (2014). Under Maryland Rule 4-325(c), "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given." On appellate review, "jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate." *Cost v. State*, 417 Md. 360, 369 (2010) (cleaned up).

Mr. Pierce argues that the trial court's instruction on the possession of contraband charge omitted an essential element of the possession offense—the *scienter* element, which here is knowledge. Reviewing the instructions together as a whole, we disagree. It's true that the word "knowingly" was not included in the first numbered element of the possession of contraband in a place of confinement charge. It was, however, included in the initial definition of the charge preceding the numerical listing of the elements. It also was incorporated into the element of possession—as the instructions stated, "possession," whether actual or indirect, required not merely knowledge, but *intent*:

> Possession means having control over something, whether actual or indirect. . . .
>
> A person has actual possession of contraband or weapon when the person has both direct control over the weapon and the *intention* to exercise that control.
>
> A person not in actual possession, who has both the power and *intention* to exercise control over something, either personally or through another person, has indirect possession.

(Emphasis added.)

To find that Mr. Pierce possessed the contraband, the jury first was required to find that he *intended* to exercise control over it—a finding they hardly could have made without first concluding that he *knew* he had it. *See Dawkins v. State*, 313 Md. 638, 649 (1988) ("An individual can hardly intend to use an object in his possession if he is unaware that he possesses it."). Indeed, Mr. Pierce concedes, citing *Dawkins*, that "[a] person's exercise of dominion or control of an item requires that the person have knowledge of its presence," and "[k]nowledge of the presence of an object is . . . a prerequisite to exercising dominion and control." *Id.*

Mr. Pierce's reliance on *Dawkins* is misplaced. In that case, our Supreme Court reversed convictions for several possession offenses and remanded the case for a new trial because the trial judge had ruled that knowledge was not an element of the offenses charged and omitted *any* reference to knowledge in the jury instructions. *Id.* at 641, 652. Here, on the other hand, the instructions stated explicitly (albeit only once) that Mr. Pierce was "charged with *knowingly* possessing contraband in a place of confinement." (Emphasis added.)

Moreover, at the time *Dawkins* was decided, the statutes that defined "possession" for purposes of the crimes charged in that case did not "contain language indicating whether *scienter* [was] an element of the . . . offenses." *Id.* at 645. They defined "possession" merely as "the exercise of actual or constructive dominion or control over a thing by one or more persons." *Id.* at 645 n.5 (citation omitted). Not so here, where the definition of "possession" in the jury instructions included the "*intention* to exercise control" explicitly. Taken together, the instructions stated the law correctly, and the trial court acted within its discretion in refusing to grant Mr. Pierce's requested jury instruction.

B. We Decline To Exercise Plain Error Review Of The Court's Instructions To The Jury On The Elements Of Possession Of A Weapon In A Place Of Confinement.

The *second* issue Mr. Pierce raises is whether the trial court committed plain error when instructing the jury on the charge of possession of a weapon in a place of confinement. Mr. Pierce argues that "[t]he elements of the offense are that the person 1) was detained or confined 2) in a place of confinement and that the person 3) knowingly

possessed or received 4) a weapon," and that the court was required to state the elements as such. Instead, the court instructed the jury that Mr. Pierce was "charged with knowingly possessing or receiving a weapon while in a place of confinement."

Mr. Pierce acknowledges that defense counsel did not object to the court's failure to instruct the jury as he now claims it should have and that the issue is not preserved for appellate review. All the same, Mr. Pierce asks us to employ the plain error doctrine to review the unpreserved issue. Maryland Rule 8-131(a) affords us the discretion to review issues not preserved in the trial court, but we decline to exercise that discretion in this case.

Appellate courts only exercise plain error review in circumstances "that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Robinson v. State*, 410 Md. 91, 111 (2009) (cleaned up). Even if the appellant has identified an obvious error that could have affected the outcome of the case, we *may* review the issue and are not compelled to do so. *Squire v. State*, 32 Md. App. 307, 309 (1976) ("[E]ven if an error . . . is plain, its consideration on appeal is not a matter of right; the rule is couched in permissive terms and necessarily leaves its exercise to the discretion of the appellate court." (citation omitted)), *rev'd on other grounds*, 280 Md. 132 (1977). Indeed, the decision to exercise plain error review lies completely within our "unfettered" discretion. *Morris v. State*, 153 Md. App. 480, 507 (2003). For these reasons, "appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Id.*

This is not such a case. The instructions advised the jury that the "Defendant is also charged with knowingly possessing or receiving a weapon while in a place of confinement." The instructions mentioned every element and defined the terms "possession," "weapon," and "place of confinement." It is not plain, therefore, that the court committed error by refusing to number the elements or to list them exactly as Mr. Pierce now argues, or that this alleged "failure" affected the outcome of the case.

C. Defense Counsel's Failure To Object To The Instructions For Possession Of A Weapon In A Place Of Confinement Was Not Ineffective Assistance Of Counsel.

Mr. Pierce's *last* argument is that his counsel's failure to object to the jury instructions on possession of a weapon in a place of confinement amounted to ineffective assistance of counsel. "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 guarantee criminal defendants the right to the assistance of counsel at critical stages of the proceedings." *Mosley v. State*, 378 Md. 548, 556 (2003) (footnotes omitted) (citations omitted). "Integral to this right is the right to *effective* assistance of counsel." *Id.* at 557 (emphasis added) (citations omitted). Proving constitutional ineffectiveness is difficult—as the U.S. Supreme Court established in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must prove both "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.

Normally, a post-conviction proceeding is the most appropriate procedural opportunity for raising ineffective assistance claims. *Id.* at 559. Review on direct appeal for such a claim may be appropriate when the trial record itself reveals "'blatant and egregious'" ineffectiveness on the part of trial counsel. *Id.* at 562 (*quoting Johnson v. State*, 292 Md. 405, 435 n.15 (1982)). But this is highly unusual. We evaluate ineffective assistance claims on direct review "in the rare instance where the critical facts are undisputed, the record is sufficiently developed, and/or the legal representation is so egregiously ineffective that it is obvious from the trial record that a defendant was denied his Sixth Amendment right to counsel." *Id.* at 564. And this is not such an instance.

We have "emphasize[d] that, if the trial record does not reveal why counsel made certain decisions and only suggests he may have provided ineffective assistance, we prefer post-conviction proceedings because they provide counsel with the opportunity to explain his actions." *Id.* at 567 (*citing Johnson*, 292 Md. at 435). And the record here doesn't reveal why counsel did not object to the instruction at issue. On the contrary, defense counsel's initial discussion with the prosecutor and the court regarding the jury instructions, during which defense counsel "[c]orrect[ed]" and "clarif[ied]" the instructions, were alluded to but not included in the record. For this reason, a post-conviction proceeding, at which the record of counsel's conduct and decisions can be augmented, is the proper venue for this claim. Additionally, the claimed error, if an error at all, is not the sort of "blatant and egregious" error that could justify an ineffective assistance finding on direct appeal.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. APPELLANT TO PAY COSTS.