Circuit Court for Prince George's County
Case No. CT170546X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 884

September Term, 2018

MARLON MARSHALL

v.

STATE OF MARYLAND

Graeff,
Leahy,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: July 29, 2019

A jury in the Circuit Court for Prince George's County convicted Marlon Marshall, appellant, of first-degree murder, second-degree murder, first-degree assault, second-degree assault, carrying a dangerous weapon with intent to injure, conspiracy to commit murder, and conspiracy to commit first-degree assault. The court sentenced appellant to a term of life imprisonment on the conviction of first-degree murder, a consecutive but suspended term of life imprisonment for conspiracy to commit first-degree murder, and a concurrent term of three years' imprisonment for carrying a dangerous weapon with intent to injure. All other convictions were merged for sentencing purposes. In this appeal, appellant presents the following questions for our review:

1. Did the circuit court abuse its discretion in giving a "flight" instruction to the jury?

2. Did the circuit court abuse its discretion in refusing defense counsel's request to instruct the jury that [appellant] had "an absolute right not to call witnesses?"

3. Did the circuit court err when, in response to a jury note asking what would happen if the jurors did "not all come to the same conclusion," the court responded by telling the jurors that their "verdict must be unanimous" and that they "must all reach the same conclusion?"

4. Did the circuit court err in denying [appellant's] motion for a new trial, which was based on an affidavit submitted by [appellant's] mother, who averred that, following trial, one of the jurors told her that the jury members "continuously discussed the case" prior to deliberations and that they "were inclined to vote not guilty after the first day of trial" but then changed their minds and became "inclined to find [appellant] guilty" after [appellant's] former girlfriend testified for the State?

For reasons to follow, we answer all four questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

On February 7, 2017, security cameras mounted on the exteriors of two commercial buildings captured two men attacking Jamal Barnes in a parking lot near Central Avenue and Addison Road in Capitol Heights, Maryland. In the video, one of the attackers, who was clad in a gray sweatshirt with the hood up, could be seen approaching Mr. Barnes and striking him in the head. A few seconds later, the second attacker, who was wearing a "bucket hat" and carrying something in his hand, approached Mr. Barnes and struck him several times in his chest area. The two attackers then walked away, while Mr. Barnes ran in the opposite direction.

Sometime later, Officer Charles Lane of the Seat Pleasant Police Department came on the scene and found Mr. Barnes lying in the grass near where the attack occurred. According to Officer Lane, Mr. Barnes' clothes were "bloody," and he had "puncture or cut wounds on his body." Mr. Barnes was then transferred to the hospital, where he was pronounced dead. Mr. Barnes died as a result of "sharp and blunt force injuries," which included a "stab wound of the left chest." The police identified appellant as the individual in the video wearing the bucket hat and striking Mr. Barnes in the chest area. A vehicle registered to appellant appeared in security footage near where the attack occurred.

On April 13, 2017, a grand jury indicted appellant for first and second-degree murder, first-degree assault, use of a handgun in the commission of a crime of violence, wearing and carrying a dangerous weapon with intent to injure, conspiracy to commit first-degree murder, and conspiracy to commit first-degree assault. On February 16, 2018, after a four-day trial, the jury found appellant guilty of all charges. As stated above, the circuit

court sentenced appellant to life imprisonment on the conviction of first-degree murder, a consecutive but suspended term of life imprisonment for conspiracy to commit first-degree murder, and a concurrent term of three years' imprisonment for carrying a dangerous weapon with intent to injure. Additional facts will be provided as necessary to address issues raised on appeal.

DISCUSSION

I.

At trial, appellant's former girlfriend, Kimberly Benjamin, testified that in February 2017, she and appellant were sharing an apartment and that on February 16, 2017, nine days after the attack on Mr. Barnes, they stayed together at a hotel. Ms. Benjamin explained that she and appellant were at a hotel because appellant "told [her] the police was looking for him." Ms. Benjamin testified that appellant had told her the police were looking for him the previous night and that "that information came from the lady at the rental office." Ms. Benjamin further testified that appellant told her he "wanted to get a chance to talk to a lawyer . . . before he turned himself in." According to Ms. Benjamin, she and appellant left the hotel on the morning of February 17, 2017. Ms. Benjamin dropped appellant off at "the store" and went to the couple's apartment. Later, Ms. Benjamin drove back to the store to pick up appellant. During that trip, the police stopped Ms. Benjamin and took her to the police station. A search of Ms. Benjamin's vehicle revealed "an overnight bag," which contained male and female clothing and shoes, and a knife, which was later determined to be "consistent with" the stab wound to Mr. Barnes' chest.

At the close of all evidence, the State asked the court to give a "flight instruction based on the testimony of Ms. Benjamin." Defense counsel objected, at which point the following colloquy ensued:

> [DEFENSE]: Ms. Benjamin didn't say that there was any flight or anybody fled. What she said was that [appellant] heard from the rental office lady that the police had come by looking for him, and he wanted to stay in a hotel that night so that he could contact a lawyer before he turned himself in.
>
> There was no flight, and we would object to a flight instruction to give the jury the impression that there was some guilty knowledge or evidence of guilt as to a result of staying in a hotel.
>
> And then the next morning, they went to Denny's and had breakfast, and they came back to the place where [appellant] and Ms. Benjamin lived. And they were arrested right there in --
>
> THE COURT: Well, that's not really what the evidence is, but okay. I'm [going] to give the flight and concealment instruction because I think it is generated by the evidence.
>
> There is evidence of flight or concealment by saying that once he had been told that the police were looking for him, he decided to go stay somewhere else to avoid being confronted by the police. That is evidence of flight or concealment. That would be evidence of – the jury could consider it as consciousness of guilt.

Following the court's decision, appellant did not object or present any further argument on that issue. Later, the court gave the following "flight" instruction to the jury:

> A person's flight on [sic] the scene immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt.

> Flight or concealment under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight or concealment. If you decide there is evidence of flight or concealment, you must then decide whether this flight or concealment shows a consciousness of guilt.

Appellant did not object at the conclusion of the court's instructions to the jury.

On appeal, appellant first contends that the circuit court abused its discretion in giving a "flight" instruction based on Ms. Benjamin's testimony that appellant stayed at a hotel after learning that the police were "looking for him" following the attack on Mr. Barnes. As a preliminary matter, appellant maintains that, although defense counsel failed to renew his objection to the flight instruction at the conclusion of the court's instructions, which, ordinarily, would render his claim unpreserved, this Court "should nevertheless address the merits of the issue because counsel substantially complied with" Maryland Rule 4-325(e). As to the merits, appellant maintains that an instruction on flight is proper only if, under the facts of the case, the circumstances of the flight suggested a consciousness of guilt that was closely related to the crime charged. Appellant asserts that such an inference could not be made in his case because, according to Ms. Benjamin, appellant "did not know why the police were looking for him" and because "the alleged flight took place more than a week after the murder[.]" Appellant also asserts that, "to the extent that one could reasonably infer that [his] decision to stay in a hotel suggested flight, that inference was negated by the fact that [he] returned from the hotel the next day." Appellant therefore argues that the court erred in giving the flight instruction because it "was not applicable under the facts of the case." We hold that the court did not err.

Maryland Rule 4-325(e) states, 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, stating distinctly the matter to which the party objects and the grounds of the objection." It is undisputed that appellant failed to object after the court instructed the jury. Accordingly, his claim that the court erred in giving the flight instruction would ordinarily be unpreserved. *Stabb v. State*, 423 Md. 454, 464-65 (2011).

However, strict compliance with Rule 4-325(e) is not always required in order to preserve a challenge to a given instruction. The renewal of an objection to an instruction after the court has finished instructing the jury is not always necessary where the objecting party has "substantially complied" with the Rule. *Bowman v. State*, 337 Md. 65, 69 (1994). To show substantial compliance, the party must object to the instruction on the record and provide "a definite statement of the ground for objection unless the ground for objection is apparent from the record[.]" *Taylor v. State*, 236 Md. App. 397, 412-13 (quoting *Gore v. State*, 309 Md. 203, 209 (1987)) (emphasis removed), *cert. dismissed*, 460 Md. 242 (2018). Additionally, "the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless." *Id.* (quoting *Gore*, 309 Md. at 209).

Here, when the State first requested the flight instruction based on Ms. Benjamin's testimony, defense counsel argued that Ms. Benjamin "didn't say that there was any flight or anybody fled" but merely that "[appellant] heard from the rental office lady that the police had come by looking for him, and he wanted to stay in a hotel that night so that he could contact a lawyer before he turned himself in." Defense counsel then stated that "there

was no flight" and that he "would object to a flight instruction to give the jury the impression that there was some guilty knowledge or evidence of guilt as to a result of staying in a hotel." The court disagreed with defense counsel's interpretation of the evidence and ruled that a flight instruction was warranted. In so doing, the court found that appellant's decision "to go stay somewhere else" after learning that the police were looking for him was "evidence of flight or concealment" from which the jury could infer a "consciousness of guilt."

We conclude that defense counsel "substantially complied" with Rule 4-325(e). Not only did defense counsel object to the flight instruction on the record, but he recited specific grounds for the objection, namely, that appellant's act of staying at a hotel did not constitute "flight" and was not indicative of a consciousness of guilt. Furthermore, the court expressly addressed that argument and found, to the contrary, that appellant's behavior could be considered "flight or concealment" from which a consciousness of guilt could be inferred. In our view, renewal of the objection at the close of the court's instructions would have been futile or useless.

The State further contends that defense counsel did not substantially comply with Rule 4-325(e) because the court's instruction included "flight *or* concealment," and defense counsel only addressed "flight" when he argued that the evidence did not warrant the instruction. We disagree. Although defense counsel did in fact omit the term "concealment" from his argument, it is clear from the record that the crux of his argument was that appellant's act of staying at a hotel did not indicate a consciousness of guilt, which, as discussed in greater detail below, is the primary focus of a flight instruction. It is equally

clear from the record that the court understood defense counsel's argument to encompass not just "flight" but also "concealment," as the court referenced both terms in its response to defense counsel's argument. *See Taylor*, 236 Md. App. at 412 (noting that substantial compliance requires "a definite statement of the ground for objection *unless the ground for objection is apparent from the record*" (quoting *Gore*, 309 Md. at 209)). Accordingly, appellant's argument was preserved for our review.

Turning to the propriety of the instruction, Maryland Rule 4-325(c) states, in relevant part, that a "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."

> Rule 4-325(c) has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.

Dickey v. State, 404 Md. 187, 197-98 (2008).

"Generally, '[w]e review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard.'" *Page v. State*, 222 Md. App. 648, 668 (2015) (alteration in original) (quoting *Thompson v. State*, 393 Md. 291, 311 (2006)). However, "[t]he threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge." *Bazzle v. State*, 426 Md. 541, 550 (2012) (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). In reviewing that determination, our task is to assess whether the requesting party "produced [the] minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." *Id.*

(quoting *Dishman*, 352 Md. at 292). "This threshold is low, in that the requesting party must only produce 'some evidence' to support the requested instruction." *Page*, 222 Md. App. at 668 (quoting *Dishman*, 352 Md. at 551). The "some evidence" test is not confined by a specific standard and "calls for no more than what it says – 'some,' as that word is understood in common, everyday usage." *Bazzle*, 426 Md. at 551 (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990)). Moreover, "[u]pon our review of whether there was 'some evidence,' we view the facts in the light most favorable to the requesting party, here being the State." *Page*, 222 Md. App. at 669.

"Under 'appropriate circumstances where the evidence supports an inference of consciousness of guilt,' a trial court may give a flight instruction to a jury in a criminal case." *Hallowell v. State*, 235 Md. App. 484, 510 (2018) (quoting *Thompson*, 393 Md. at 305 n.2). The Court of Appeals has established that a flight instruction is appropriate when four inferences may be drawn from the evidence:

> that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Thompson, 393 Md. at 312.

"As to the first inference, '[f]light is defined as an act or instance of fleeing, esp. to evade arrest or prosecution . . . [a]lso termed *flight from prosecution; flee from justice*.'" *Page*, 222 Md. App. at 669 (alterations in original) (internal quotations omitted) (quoting *Hoerauf v. State*, 178 Md. App. 292, 323 (2008)). "As to the second inference, the movement also 'must reasonably justify an inference that it was done with a consciousness

of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.'" *Id.* (quoting *Hoerauf*, 178 Md. App. at 323). For instance,

> an accused's departure from the scene of a crime, without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt, does not constitute "flight," and thus does not warrant the giving of a flight instruction.

Hoerauf, 178 Md. App. at 325-26. "At its most basic, evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion." *Id.* at 323 (quoting 22 Charles Alan Wright et al., *Federal Practice and Procedure* § 5181 (1978 & Supp. 2007)).

Here, we are persuaded that the trial court did not err in giving a flight instruction. The evidence showed that approximately nine days after the attack on Mr. Barnes, appellant knew that the police were looking for him. Upon receiving that information, appellant decided to stay at a hotel with Ms. Benjamin. After appellant and Ms. Benjamin left the hotel the next day, appellant went to "the store" rather than return to his residence. Then, when Ms. Benjamin returned to pick up appellant, the police stopped her and found an overnight bag containing male and female clothing, and a knife consistent with Mr. Barnes's wounds in her vehicle. From that evidence, a reasonable inference could be drawn that appellant tried to conceal himself from the police in an effort to avoid apprehension for the attack on Mr. Barnes. *See generally Rice v. State*, 89 Md. App. 133, 143 (1991) (holding that flight or concealment instructions may be given not only where the accused appears to have "fled to avoid arrest after accusation of a crime, but also where it may be

inferred from the evidence that at the time of flight he knew he was or would be charged with the crime[.]" (quoting David E. Aaronson, *Maryland Criminal Jury Instructions and Commentary* § 2.24 at 123 (2d ed. 1988))). In short, despite the passage of nine days between the attack and the "flight," and the lack of direct evidence indicating that appellant knew that the police were looking for him in connection with the attack on Mr. Barnes, the State produced "some evidence" that appellant's flight or concealment suggested a consciousness of guilt related to the crime charged. *See also Bazzle*, 426 Md. at 552 (noting that in evaluating whether there is "some evidence" to support an instruction, "[i]t is of no matter that the [requesting party's claim] is overwhelmed by evidence to the contrary" (quoting *Dykes*, 319 Md. at 217)); *cf. Garrett v. State*, 59 Md. App. 97, 110-11 (1984) (holding that there was sufficient evidence to warrant a flight instruction where the defendant failed to show up for work on the day of the crime and then, six weeks later, gave the police a fictitious name and address).

II.

During the parties' discussion with the court about proposed jury instructions, defense counsel asked the court to give Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") § 3:16 (2d ed. 2018), instructing the jury that "the weight of the evidence does not depend on the number of witnesses on either side." The court denied the request because appellant had not called any witnesses. Defense counsel responded that the jury was not permitted to find appellant guilty based on "the fact that the State has however many witnesses and the defense has chosen not to call any[.]" After the court again refused to give the requested instruction, defense counsel asked the court to instruct the jury "that

[appellant] has an absolute right not to call witnesses or to testify." The court agreed that it would instruct the jury that appellant had the right not to testify, but declined the requested instruction that appellant had the right not to call witnesses. According to the court, its instructions, including the instruction concerning the State's burden of proof, "adequately cover[ed] the issue that [defense counsel was] requesting." Although defense counsel stated that he did not "agree" with the court's decision, he did not present any argument as to why the court's proposed instructions did not adequately cover the issues raised in defense counsel's requested instruction.

Later, the court instructed the jury as follows:

> All right, as I told you at the beginning of the trial the defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you're convince[d] beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. This means that the State has the burden of proving beyond a reasonable doubt each and every element of the crime charged.
>
> * * *
>
> And the burden remains on the State throughout the trial. The defendant is not required to prove his innocence.
>
> * * *
>
> During your deliberations, you must decide this case based only on the evidence that you and your fellow jurors heard here together in the courtroom.
>
> * * *
>
> Now, in making your decision, you must consider the evidence in this case. As I have told you, that's testimony from the witness stand and any physical evidence or exhibits admitted into evidence.

* * *

> Now, the defendant has an absolute constitutional right not to testify. The fact that the defendant did not testify must not be held against the defendant and must not be considered by you in any way or discussed by you.

* * *

> Now, the burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the defendant was the person who committed it.

Appellant did not lodge any objections at the conclusion of the court's instructions to the jury.

On appeal, appellant argues that the circuit court abused its discretion in refusing to instruct the jury that he had an "absolute right not to call witnesses." As with his prior argument, appellant recognizes defense counsel's failure to renew his objection at the close of the court's instructions and asks that we consider the issue preserved "[f]or the same reasons that he substantially complied with Rule 4-325 with respect to the flight instruction[.]" Concerning the merits, appellant argues that the requested instruction was a correct statement of law because "it is axiomatic that a defendant has an absolute right not to call witnesses[,]" and that the instruction was applicable under the facts of the case because "he did not in fact call any witnesses." Finally, appellant asserts that the instruction was not fairly covered by other instructions because none of those instructions "explicitly told the jury that [appellant] was not required to call any witnesses, and a lay person may not have understood those instructions to mean that."

The State asserts that the issue was not preserved because, when the court stated that the requested instruction was fairly covered by other instructions, defense counsel did not object or explain why the instruction was not fairly covered. On the merits, the State contends that appellant's requested instruction was unnecessary because it was fairly covered by the other jury instructions, namely, the instruction that appellant had an absolute right not to testify, that appellant was not required to prove his innocence, and that the State had the burden of proving appellant's guilt beyond a reasonable doubt.

We agree with the State that defense counsel did not comply, substantially or otherwise, with Rule 4-325. Rule 4-325(e) requires a party to object promptly after the court instructs the jury. Absent such an objection, a claim that the court erred in giving (or not giving) an instruction is unpreserved unless the record shows that a renewed objection would have been futile or useless, and only if the objecting party provided a definite statement of the ground for objection unless one is apparent from the record. "The timing of the objection is important because it should give the trial court an opportunity to correct the instruction in light of a well-founded objection." *Stabb*, 423 Md. at 465.

Here, after the court expressed its view that the jury instructions it intended to give adequately covered appellant's concerns about his right not to call witnesses, he failed to articulate how the proposed instructions were insufficient. Appellant therefore did not give the court a meaningful opportunity to correct the instruction and, accordingly, his claim that the court erred in refusing to give the requested instruction was not preserved for our review.

Assuming, *arguendo*, that the issue were preserved, we are persuaded that the court did not abuse its discretion in refusing to instruct the jury that appellant had "an absolute right not to call witnesses." In determining whether a court abused its discretion in failing to give a requested instruction, "we are mindful that 'jury instructions must be read together[.]'" *Kazadi v. State*, 240 Md. App. 156, 190 (quoting *Fleming v. State*, 373 Md. 426, 433 (2003), *cert. granted*, No. 11, Sept. Term 2019 (Md. May 14, 2019). "[I]f, taken as a whole, [the court's instructions] 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." *Howard v. State*, 232 Md. App. 125, 163 (alterations in original) (quoting *Fleming*, 373 Md. at 433), *cert. denied*, 453 Md. 366 (2017).

Here, the trial court instructed the jury that appellant was presumed innocent and that the State had the burden of proving appellant guilty of the crimes charged beyond a reasonable doubt. The court also instructed the jury that the State retained that burden throughout the trial, that appellant was not required to prove his innocence, that appellant had an absolute right not to testify, and that his decision not to testify could not be considered or even discussed. Lastly, the court articulated what constituted "evidence" and instructed the jury to base its decision "only on the evidence heard . . . in the courtroom." Those instructions, when taken as a whole, fairly covered appellant's proposed instruction and adequately addressed the issues raised by the evidence. Thus, we cannot say that the court's refusal to include an instruction as to appellant's "absolute right not to call witnesses" was an abuse of discretion. *Cf. Gupta v. State*, 227 Md. App. 718, 738 (2016) ("Generally, trial courts 'need not instruct . . . on the presence or absence of most

evidentiary inferences[.]'") (quoting *Patterson v. State*, 356 Md. 677, 694 (1999)), *aff'd*, 452 Md. 103 (2017).

III.

During its instructions, the court also gave the following pattern instruction on jury unanimity: "Your verdict must represent the considered judgment of each juror and must be unanimous. In other words, all twelve of you must agree." MPJI-Cr 2:03. The court did not, however, give the pattern instruction on the jury's "duty to deliberate."[1]

Approximately two hours after the jury retired to deliberate, the jury submitted the following note to the court: "[W]hat if we do not all come to the same conclusion?" After reading the note to the parties, the court stated that it planned to bring the jury back into court and "remind them that their verdict needs to be unanimous[.]" Both parties indicated their agreement with the court's proposed response, with defense counsel stating, "That's fine." The court then brought the jury back into the courtroom and stated: "All right. So, I have your note. And it says, what if we all do not come to the same conclusion? And

[1] MPJI-Cr 2:01 "Jury's Duty to Deliberate" provides:

> The verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to reexamine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

again, I will remind you as my instruction said that your verdict must be unanimous. So, you must all reach the same conclusion." Appellant did not object to the court's supplemental instruction as given. The jury was then excused for the day.

The next day, the jury returned to court and resumed deliberations. A short time later, the jury returned its guilty verdicts. The jury was then polled, and each juror indicated his or her assent to the verdicts. Those verdicts were then hearkened, and the jury again indicated its assent to the verdicts.

Appellant argues that the circuit court erred when, in response to the jury's note asking what would happen if the jurors did "not all come to the same conclusion," the court responded by telling the jurors that their "verdict must be unanimous" and that they "must all reach the same conclusion." According to appellant, the jury's note "was a clear indication that it was having trouble achieving unanimity and may have been deadlocked." Appellant asserts that the court's response was "coercive" because it "strongly implied that the juror or jurors in the minority should abandon their views of the case solely for the sake of reaching a unanimous verdict." Although appellant concedes that defense counsel did not object and that, as a result, the issue was not preserved, appellant asks that we engage in "plain error" review.

Maryland Rule 4-325(e) provides, in relevant part, 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." "[T]he 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."

State v. Brady, 393 Md. 502, 507 (2006) (alteration in original) (quoting *State v. Hutchinson*, 287 Md. 198, 204 (1980)). The principle behind that general rule is that jurors are expected to follow a court's instructions when those instructions are communicated "fairly and impartially." *Id.* (quoting *Hutchinson*, 287 Md. at 204). "It follows, therefore, that when the instructions are lacking in some vital detail or convey some prejudicial or confusing message, however inadvertently, the ability of the jury to discharge its duty of returning a true verdict based on the evidence is impaired." *Id.* (quoting *Hutchinson*, 287 Md. at 204).

In order to recognize error in a court's instructions absent an objection, "the error must be plain, and material to the rights of the accused, and, even then, the exercise of [appellate] discretion to correct it should be limited to those cases in which correction is necessary to serve the ends of fundamental fairness and substantial justice." *Brown v. State*, 14 Md. App. 415, 422 (1972). The Court of Appeals has "characterized the instances when an appellate court should take cognizance of unobjected to error as 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial,' and as those 'which vitally affect a defendant's right to a fair and impartial trial[.]'" *Brady*, 393 Md. at 507 (quoting *Hutchinson*, 287 Md. at 202). However, plain error review is inappropriate "as a matter of course" or when the error is "purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* (quoting *Hutchinson*, 287 Md. at 203).

In *State v. Rich*, 415 Md. 567 (2010), the Court of Appeals adopted the following four-prong test regarding plain error review of a court's jury instructions:

> First, there must be an error or defect–some sort of deviation from a legal rule–that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial court] proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. at 578-79 (internal citations, alterations, and quotations omitted) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

We decline appellant's request to exercise "plain error" review. Under the circumstances, we cannot say that the court's supplemental instruction was erroneous or that, even if erroneous, the exercise of plain error review would be appropriate. We initially note that appellant may have "intentionally relinquished or abandoned" the perceived error because counsel, despite a previous objection, failed to object after the court gave its supplemental instructions. More importantly, however, the alleged legal error is neither clear nor obvious. We interpret the court's statement "So you must all reach the same conclusion" in context. That statement immediately followed the court's instruction that the verdict must be unanimous. In our view, the court was merely describing the meaning of "unanimity" when it stated, "So you must all reach the same conclusion." We therefore decline appellant's invitation to exercise plain error review.[2]

[2] Appellant also argues that his mother's affidavit concerning her discussion with one of the jurors after trial supports the conclusion that the court's supplemental instruction had a coercive effect on the jury and this coercion affected his substantial rights. According to the affidavit, a juror told appellant's mother that he changed his verdict from not guilty to guilty after the other jury members became angry with him for making the jury come

IV.

Appellant's final contention relates to his motion for a new trial. In that motion, appellant alleged that, following trial, one of the jurors told his mother, daughter, cousin, and trial attorney "that the jury improperly discussed the case, the witnesses and evidence presented during trial prior to jury deliberations." Appellant's motion included an affidavit from his mother, which stated that the aforementioned juror had approached her and the other members of her party at a local 7-Eleven store after trial and informed them "that the jurors were inclined to vote 'not guilty' after the first day of trial, but after Kimberly Benjamin testified, the members of the jury said they were inclined to find [appellant] guilty." The affidavit recited that the juror also stated that "the jury members continuously discussed the case despite the Judge's instructions that the jury not discuss the case prior to deliberations." Finally, the affidavit reported that the juror "had argued for 'not guilty' to the other jurors during the entire trial[,]" but that he changed his vote to guilty "because the other members of the jury were angry at him for making the entire jury [have] to come back for another day of deliberations."

At the hearing on appellant's motion, the court noted that, under Maryland Rule 5-606, testimony from jurors is not admissible "to challenge the validity of a verdict." Defense counsel responded that that Rule relates to "improper deliberations" and that appellant's motion concerned "whether or not this jury violated the [c]ourt's instructions by discussing matters related to a verdict that would be appropriately discussed during jury

back for another day of deliberations. As we will discuss, the court cannot consider this affidavit as evidence.

deliberations prior to the time that they were authorized to begin their deliberations." In denying appellant's request for a new trial, the court stated:

> I think that [Maryland] Rule 5-606 does prevent consideration of juror affidavits or testimony. We don't even have that. What we have are hearsay affidavits saying that a juror said at the 7-Eleven what a juror couldn't say in court or by affidavit. So I find that there's no evidence upon which I could find juror misconduct.
>
> Moreover, the claim is, as I'm reading the affidavit, even if it were admissible, wouldn't amount [to] cause for a new trial. We're not talking now about jurors having any communication with outside third parties. We're talking about allegedly jurors having communications amongst themselves about the evidence in the case prior to hearing all the evidence and beginning deliberations.
>
> * * *
>
> [W]e're not talking about extrinsic communication, but communication solely between two jurors. Any concern is diminished and . . . the purpose of admonishing the jury not to discuss the case among themselves during trial is to avoid having the jurors form opinions regarding the verdict before they have heard all the evidence in the case.
>
> And what the affidavit shows is . . . that there were these discussions, but the discussions took place before all the evidence and once the jurors had considered all the evidence, they changed their minds. So, if anything, the discussions weren't prejudicial to the defendant. They were to his benefit. That is that the jurors, before having heard the testimony of Kimberly Benjamin, were inclined to vote not guilty and apparently discussed it among themselves. But after they heard all of the evidence, they had changed their minds. So the danger is nonexistent even if there was evidence, which I find that there is no admissible evidence.
>
> So for all those reasons, I'm going to deny the motion for new trial[.]

Appellant contends that the circuit court erred in denying his motion for a new trial, which was based on his mother's affidavit. Appellant argues that Maryland Rule 5-606 applies only to deliberations, not to matters occurring during trial. Appellant also contends

that the court abused its discretion in ruling that the issues raised in the affidavit did not prejudice appellant or provide cause for a new trial. Finally, appellant asserts that the court erred in ruling that the jurors had "changed their minds after hearing all the evidence," because that ruling directly contradicted the affidavit.

Maryland Rule 5-606(b) provides:

> (1) In any inquiry into the validity of a verdict, a sworn juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other sworn juror's mind or emotions as influencing the sworn juror to assent or dissent from the verdict, or (C) the sworn juror's mental processes in connection with the verdict.
>
> (2) A sworn juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

"It has long been the rule in Maryland, without any deviation, that a juror may not impeach his or her verdict." *Stokes v. State*, 379 Md. 618, 637 (2004). Specifically, "Maryland Rule 5-606 strictly limits a court's ability to inquire, post-verdict, into the sworn juror's mental processes in connection with the verdict." *Barksdale v. Wilkowsky*, 419 Md. 649, 665 (2011) (quotations omitted). In fact, Maryland courts have held that jurors are precluded "from testifying as to *any* matter that may have affected the verdict." *Eades v. State*, 75 Md. App. 411, 418 (1988). The prohibition against juror impeachment extends to motions for new trial. *Genies v. State*, 426 Md. 148, 161 (2012) ("[W]e have often held that 'under no circumstances would it be admissible to impeach the juror's own verdict at the hearing of the motion for a new trial.'" (quoting *Williams v. State*, 204 Md. 55, 71 (1954))).

We hold that the statement purportedly made by a juror to appellant's mother could not be considered by the circuit court in determining whether to grant or deny appellant's motion for a new trial. When reviewing a trial court's interpretation of the Maryland Rules, we use the de novo standard. *Young v. State*, 234 Md. App. 720, 731 (2017), *aff'd*, 462 Md. 159 (2018). Both Maryland Rule 5-606(b) and the relevant caselaw make clear that evidence of statements made by a juror that relate to the juror's (or another juror's) mental processes in reaching a verdict cannot be used in any inquiry into the validity of a verdict, including inquiries made in the context of a motion for a new trial. *Cooch v. S & D River Island, LLC*, 216 Md. App. 275, 282-88 (2014) (discussing "Lord Mansfield's Rule," the predecessor to Rule 5-606(b), which provided that a juror is "absolutely prohibited" from testifying as to any matter "that bears directly on the deliberative process itself"). Because the statements at issue meet that criteria, they were properly excluded.

We next turn to the argument that Rule 5-606(b) does not apply in this case because the statements at issue concerned matters that occurred during the course of trial and not during the jury's "deliberations." We disagree. Although the term "jury deliberations" is commonly used to refer to communications occurring after the jury retires to the jury room to reach a verdict, the Rule also prohibits juror testimony as to "the effect of anything" upon a sworn juror's "mind or emotions as influencing . . . the verdict" or "the sworn juror's mental processes in connection with the verdict." Maryland Rule 5-606(b). Limiting the application of the Rule to events occurring in the jury room would contravene the plain language of the Rule. *See Dorsey v. State*, 185 Md. App. 82, 100 (2009) (noting that, when construing a Maryland Rule, we "give effect to the entire rule, neither adding,

nor deleting, words in order to give it a meaning not otherwise evident by the words actually used" (quoting *New Jersey v. Strazzella*, 331 Md. 270, 275 (1993)). Moreover, the previously cited caselaw establishes that Rule 5-606(b) applies not only to deliberations that occur in the jury room but also to "the deliberative process," *Cooch*, 216 Md. App. at 288, a juror's "mental processes in connection with the verdict," *Barksdale*, 419 Md. at 665, and "any matter that may have affected the verdict." *Eades*, 75 Md. App. at 418. Because the statements at issue pertained to matters that fell within Rule 5-606(b)'s broad scope as determined by the Rule's plain language and the relevant caselaw, they were properly excluded.

We therefore hold that the circuit court did not abuse its discretion in denying appellant's motion for a new trial. *Williams v. State*, 462 Md. 335, 344 (2019) ("[A] trial judge may order a new trial if the court finds it is in the interest of justice to do so. This decision is ordinarily reviewed under the abuse of discretion standard[.]"). In denying appellant's motion, the court properly determined that the statements contained in the affidavit concerning the jury's verdict were barred by Rule 5-606(b). The court then concluded, quite reasonably, that the other "impropriety" raised in the affidavit, namely, that the jurors discussed the case amongst themselves prior to the close of the evidence, did not amount to cause for a new trial because those extrinsic communications occurred between jurors and did not involve a third party. *See Summers v. State*, 152 Md. App. 362, 379 (2003) (noting that "[t]hird party communication with a juror raises a concern that the juror may reach a verdict on the basis of the improper extrinsic communication rather than the evidence" and that such a concern "is greatly diminished when . . . the improper

extrinsic communication occurred solely between two jurors"). Accordingly, the court did not err in denying appellant's motion for a new trial.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.