Circuit Court for Baltimore City
Case No. 116099012

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1026

September Term, 2021

IGNATIUS LAWRENCE

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: January 4, 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.

In 2016, a jury sitting in the Circuit Court for Baltimore City found Ignatius Lawrence, appellant, guilty of murder in the first degree, conspiracy to commit murder in the first degree, and related handgun offenses. The court sentenced him to life imprisonment for first-degree murder with additional sentences for the other charges. Appellant did not note an appeal at that time, but he subsequently filed a postconviction petition and was granted the right to file this belated appeal. He raises two questions for our review, which we have reordered:

> I. Whether the trial court erred in giving the jury a supplemental instruction on conspiracy; and
>
> II. Whether the trial court erred when it asked jurors to self-assess their ability to remain impartial, thus depriving [appellant] his right to a fair trial and impartial jury.

As we explain below, the trial court neither erred nor abused its discretion in giving a supplemental jury instruction on conspiracy, and the second issue is not preserved for our review. Therefore, we will affirm the judgments.

BACKGROUND[1]

Shortly before 9:00 p.m. in the evening of March 15, 2016, Kenneth Lamont Collins was shot while working at Rod's Barber Shop on East Monument Street in Baltimore City. At that time, Collins's "best friend," Emmitt Edwards, was outside the barber shop waiting

[1] Because appellant does not challenge the sufficiency of the evidence, we provide only a summary of the facts. *See, e.g.*, *Teixeira v. State*, 213 Md. App. 664, 666-67 (2013) (reciting the underlying facts in "summary fashion because for the most part" they are irrelevant to the issues raised on appeal). The underlying facts are set forth in greater detail in our unreported opinion in the direct appeal of appellant's co-conspirator, Andre Mosby. *Mosby v. State*, No. 1842, Sept. Term, 2017 (filed Oct. 1, 2018).

to give Collins a ride home after he finished work. Edwards had his back to the barber shop talking to a friend named "Travis" and was not aware of the shooting until Travis exclaimed, "look, he's shooting at Kenneth." When Edwards turned and looked inside the barber shop, he observed a man wearing a teal hat, "shooting at" Collins, who was "struggling to get away from him." When Travis saw the shooter "getting ready to come out[,]" he and Edwards walked briskly up the street to JJ Carry Out, a carry-out restaurant a few doors from the barber shop, for safety. While inside the restaurant, Edwards observed the shooter walk by, accompanied by Andre Mosby, whom he recognized.[2] Edwards then returned to the barber shop and attempted to render assistance to Collins. Edwards called "911," and emergency responders arrived shortly thereafter. Collins was transported to Johns Hopkins Hospital, where he died from his wounds.

Edwards was interviewed by police detectives within hours of the shooting. Edwards selected Mosby's photograph from a photographic array and identified him as the "mastermind[.]" Edwards did not know the shooter but identified him by the teal hat he was wearing and the fact that, as he walked past JJ Carry Out, "he was trying to shield his head."

At the crime scene, evidence technicians recovered two 9 mm Remington Peters cartridge casings and, near the front entrance, a pair of glasses. Appellant's DNA was subsequently detected on the glasses. The firearm was never recovered.

[2] According to Edwards, Collins previously had introduced Mosby to him.

Mosby and Collins were acquainted. Mosby, who was previously employed by Baltimore Gas and Electric Company ("BG&E"), carried on an illicit "side" business of "bridging," whereby, for a fee, the BG&E electric meters could be by-passed, permitting electricity to be used without charge. Mosby had done that for Collins at his home. When BG&E fraud investigators discovered Mosby's scheme, his employment was terminated.[3] There was evidence that Collins still "owed" Mosby several hundred dollars and that, prior to the shooting, Collins had feared for his safety.

In addition to information obtained from Edwards, police detectives recovered surveillance videos from the Panda Chinese & American Food restaurant (a few doors up the street from Rod's Barber Shop) and from a nearby camera operated by the "CCTV/CityWatch" system, which corroborated Edwards's version of events. The State argued at trial that the surveillance video advanced its claim that appellant and Mosby were acting in concert.

Police identified the Ford Expedition Mosby had been driving when he and the shooter left the area and, two days later, located that vehicle outside a residence in west Baltimore. When the occupant of that residence, Rodney Dixon, was observed driving the Expedition, he was detained and questioned by police officers.

According to Dixon, he regarded Mosby as a "stepson." On the night of the murder, Mosby and his friend, known to Dixon only as "Junior" but who was later identified as

[3] Mosby's mother, who had worked for a BG&E contractor, was implicated in the scheme, and she was also terminated.

appellant,[4] came to his home and asked to swap vehicles. Dixon gave Mosby the keys to his Chevrolet Corvette, and he took in exchange the keys to the Expedition. When police officers searched the Expedition, they recovered a 9 mm Remington Peters cartridge on the rear floor, as well as a BG&E hard-hat and a BG&E "smart" meter in the back. When Dixon was shown the surveillance video, he identified the man Edwards had identified as wearing the teal hat as "Junior." After Dixon provided information that led to where Mosby and appellant were then employed, they were arrested.[5]

Appellant waived his *Miranda* rights and gave a statement to police detectives. He told police that, on the night of the murder, he and Mosby had gone to a Texas Roadhouse restaurant in White Marsh, where they had dinner and drinks and watched a magician. Appellant denied having been at the crime scene, even after detectives confronted him with the surveillance video that showed him leaving the barber shop. He adamantly denied shooting Collins.

The Grand Jury for Baltimore City returned indictments, charging appellant and Mosby with first-degree premeditated murder; conspiracy to commit first-degree murder; use of a firearm in the commission of a felony or crime of violence; and wearing, carrying, and transporting a handgun on or about the person. Appellant was also charged with

[4] When appellant was interrogated by police detectives, he acknowledged that his nickname was "Junior."

[5] The lead detective claimed, at appellant's trial, that he was not "arrested" and that, "[a]t any time," he "could have asked [whether] he want[ed] an attorney or he wanted to leave." The officer from the Warrant Apprehension Task Force, however, stated that "both" appellant and Mosby were taken "in[to] custody."

possession of a regulated firearm after having previously been convicted of a disqualifying offense.[6] A motion to sever was granted, and separate trials were held for appellant and Mosby.[7]

Following a five-day jury trial, appellant was found guilty of all charges. He was sentenced to a term of life imprisonment for first-degree murder; a concurrent term of life imprisonment for conspiracy to commit first-degree murder; a consecutive term of twenty years' imprisonment, the first five years without possibility of parole, for use of a firearm in the commission of a felony or crime of violence; and a concurrent term of fifteen years for possession of a regulated firearm after having previously been convicted of a disqualifying offense.[8]

Although appellant's trial counsel had indicated that he would file an appeal within a day of sentencing, no appeal was filed. In 2020, appellant filed a postconviction petition, raising claims of ineffective assistance of trial counsel for, among other things, neglecting to file a notice of appeal and failing to ensure appellant a fair and impartial jury. Following a hearing, the postconviction court granted appellant's petition in part and allowed a belated appeal. It held the claim regarding failure to ensure a fair and impartial jury sub

[6] *Mosby v. State*, No. 1842, Sept. Term, 2017, slip op. at 10-11.

[7] Mosby was acquitted of first-degree premeditated murder and conspiracy to commit first-degree murder. He was found guilty of second-degree murder; use of a firearm in the commission of a felony or crime of violence; and wearing, carrying, and transporting a handgun on or about the person. *Mosby*, slip op. at 12-13.

[8] The court merged the conviction for wearing, carrying, and transporting a handgun on or about the person into the conviction for use of a firearm in the commission of a felony or crime of violence for sentencing purposes.

curia. This appeal followed. Additional facts may be included in the discussion of the issues.

DISCUSSION

I.

Appellant contends that the trial court erred or abused its discretion in giving a supplemental jury instruction on conspiracy. Relying primarily upon *Cruz v. State*, 407 Md. 202 (2009), he asserts that he suffered unfair prejudice as a result because his closing argument had been tailored to the original instruction, which was undermined by the supplemental instruction. He asserts that the supplemental instruction was "confusing" and "did not give a complete instruction of the law." We do not agree.

Facts Pertaining to this Claim

After the close of the State's case-in-chief, the defense made a motion for judgment of acquittal. The following discussion took place:

> [DEFENSE COUNSEL]: Now on a conspiracy count, I'll make a motion for judg[]ment of acquittal and **I will argue that there is nothing in evidence at all to show that Mr. Mosby and Mr. Lawrence were working together or, in fact, that Mr. Lawrence was working in contact with anyone.** In order to prove conspiracy, the State would have to show that these two men, or Mr. Lawrence and someone, were working in concert in order to commit this crime.
>
> **Other than proximity they're barely even together in any of the videos that the State has presented, they're just in the same area. The fact that they went and had dinner and drinks earlier does not equal them working in concert.** The fact that they are on the same city block together, very seldomly together, but on the same, you know --
>
> THE COURT: Did we see them arriving together? I thought I remembered that.

[DEFENSE COUNSEL]: I'll defer to the State. I don't believe that we do see them arriving together.

* * *

And they arrived together [at the Texas Roadhouse in White Marsh[9]]. We saw -- we did see that, but not on the scene. And so we see them very briefly together, barely interacting together at all. There's nothing to indicate that Mr. Lawrence went into the barbershop at the direction of Mr. Mosby. There's nothing to indicate that he went in there to do anything for Mr. Mosby or on Mr. Mosby's behalf.

There's nothing to indicate that entering the barbershop had anything to do with Mr. Mosby, and if the State can't show that then they can't show that they were acting in concert and so they can't show conspiracy. And so I'll make [a] motion for judgment of acquittal on -- which is actually Count II. I was incorrect when I said second degree murder.

THE COURT: I understand.

[DEFENSE COUNSEL]: It was Count II.

[PROSECUTOR]: **Your Honor, I don't think the -- it could be said any better as to why they conspired together, [o]ther than what the Court said when it was rendering its decision on Count I [first-degree premeditated murder]. The State believes that the reasonable inferences that are drawn, the behavior that is displayed by both individuals**, the fact that Mr. Mosby is the one who has the beef, Mr. Lawrence admits that he knows that the victim is the late night barber, that he did not have a beef, **I think it could be reasonably inferred that he went up to settle the dispute of Andre Mosby because the victim would not have let Andre Mosby into the barbershop, but would have no reason not to let the Defendant into the barbershop.**

I think Defense counsel made statements that the State hasn't shown that there was a -- and I can't remember if this is when we were going over jury instructions in chambers or just now, **that the State hasn't shown that Mr. Mosby and Mr. Lawrence talked about this. But that's not**

[9] The Texas Roadhouse, where appellant and Mosby had dinner earlier on the night of the murder, is approximately ten miles from Rod's Barber Shop. Md. Rule 5-201(b) ("judicially noticed fact must be one not subject to reasonable dispute").

what [is] required. <u>The State doesn't have to prove a verbal agreement, but rather an agreement based on the behavior.</u> And when you watch them position themselves, come around the barbershop to some extent it's as if they're casing this barbershop and the victim.

I do disagree with Defense counsel when he says they are barely next to each other because they do stand next to each other for some period of time at the Panda carry-out. It's just that Mr. Mosby is in a position where he's looking to his left down the strip mall to see the victim, and Mr. Lawrence is standing at the other side of the corner on the business waiting.

And it should not -- I'm sorry. The fact that the minute the victim -- again, the minute the victim goes into the store, Mr. Mosby positions himself to see inside the store and Mr. Lawrence makes his way presumably because he is in the store, into that -- into the barbershop and then they leave together. So, we do believe that there is sufficient evidence reasonable inferences from those -- that evidence to send this count to the jury.

[DEFENSE COUNSEL]: In response, Your Honor, I would just say that the -- what he's charged with specifically is did conspire with Andre Mosby to murder the aforesaid complainant. That means having the understanding next each other at the Panda carry-out means they may have conspired together to get some cashew chicken, but not to do anything else. **They're not seen conspiring to do anything other than to get some food. Proximity doesn't do it.** It can't be.

And the State said it -- I think the State said it very well when he said that he went in -- a reasonable inference can be made that Mr. Lawrence went into the barbershop to -- didn't say murder, but to -- I believe the State simply implied something like to address the -- basically to address the issue of the $200. That is not to go in and murder. And I don't want to be -- I'm not Mr. Mosby's lawyer here, but in order to prove conspiracy it would have to be that he went in to murder this guy because that's what he's charged with and the State has not -- has done nothing to show that.

I'd also point out, Your Honor, that this idea, at least in my recollection, and know Mr. [Prosecutor] will correct me if I'm wrong, is this idea that he would only let Mr. Lawrence in but not Mr. Mosby in. That has -- that's not in testimony. That's the State's speculation. There's been no testimony as to that. **The State may argue that in closing, that the jury can infer that, but that's not in evidence, that's not in testimony that's just simply their theory that is not supported by anything.** And so I don't think the State can make --

THE COURT: Well could the jury infer that?

[DEFENSE COUNSEL]: I'm sorry?

THE COURT: **Could the jury infer that?**

[DEFENSE COUNSEL]: **I think the State could probably argue it. I don't want to object during someone's closing.**

THE COURT: Right.

[DEFENSE COUNSEL]: I can object now. I mean --

THE COURT: **But if [t]he jury could infer that, then don't I have to infer that --**

[DEFENSE COUNSEL]: No, I'm saying that --

THE COURT: **-- for the purposes of this motion?**

[DEFENSE COUNSEL]: I'm saying -- I misspoke. **What I'm saying is the State will probably argue that in their closing.** I shouldn't say that the jury -- I think what I meant to say was that the State would infer to the jury that they should that they should view it in that light. **But there's nothing to support that and the State specifically charged my client with conspiring with Andre Mosby to murder. Not to go in and talk about a debt, not to go in and try to settle things up, not even to go in and** -- Your Honor, if it had been to go in **and beat the tar out of somebody.**

He's not charged with felony -- you know, common law felony murder. He's charged with first degree murder, and so the State would have to show that he conspired to do that and they have not done anything to make that -- to get into evidence anything that had occurred. So I'll make a motion for judgment of acquittal on that count.

THE COURT: **As both counsel know, during our charge conference in chambers, I ruled off the record because it was just a charge conference. I said I would not give the conspiracy instruction. I was swayed by Defense counsel's arguments. However, upon reflections for the reason that I stated regarding Murder I, I'm going to have to**

> **reverse myself.**[10] I may not be the last one to do it, but reverse myself, and deny the motion.

(Emphasis added.)

The trial court thereafter denied the motion for judgment of acquittal as to the remaining counts of the indictment. Appellant waived his right to testify, and the proceedings concluded for the day.

When the court reconvened the following morning, defense counsel renewed his motion for judgment of acquittal:

> [DEFENSE COUNSEL]: Yes. So, Your Honor, yesterday we were at MJOA, of course, in the light most favorable to the State. So this morning I would renew my motions and incorporate by reference now that the Defense has rested, I would renew my motions and ask the Court to reconsider the arguments. I'll incorporate by reference the arguments that I made yesterday, and just point out a couple of the highlights.
>
> So, and I'm going to put you on the spot, Judge, if it was a close call yesterday, and we went back and forth with the conspiracy, then that was in the light most favorable to the State. But now, in the place where we are now, now we're in a whole different -- the Court is looking at these facts now and the elements of the offenses in a whole different light. **And so now in this different light, I'd ask the Court to reconsider, especially the conspiracy charge and the first-degree murder charge.**

[10] In denying appellant's motion for judgment of acquittal on the count charging first-degree murder, the court concluded that the joint actions of appellant and Mosby were sufficient circumstantial evidence of premeditation:

> There's a claim, and, again, I have to assume, that the witness [sees] Mr. Lawrence shooting Mr. Mosby. Mr. Lawrence comes out, Mr. Lawrence and Mr. Mosby leave together. **The fact that Mr. Lawrence may not have an affiliation with the victim, still leaves, I think, an inference in circumstantial evidence that a jury could draw that putting all of that together that there is indeed premeditation.** So I'm going to have [to] deny the motion and let it go to the jury.

(Emphasis added.)

* * *

As to the conspiracy Count, I know we were a very close call yesterday, but now I think in this new light --

THE COURT: What is the new light?

[DEFENSE COUNSEL]: Well, yesterday we were in the light most favorable to the State --

THE COURT: Right.

[DEFENSE COUNSEL]: -- now we're at reasonable doubt, or whether a reasonable trier/ finder of fact could make those inferences. And then -- and I don't think that there's been anything -- **well, there certainly has been anything to show a conspiracy other than that they were in proximity to each other.**

The State made some statements about what they see in the video, but there isn't anything in the video that -- that's their interpretation of the video, but there certainly isn't anything in the video that shows them conspiring. Just merely being together is not enough to show them conspiring, merely being in the same street corner is not enough to show they're conspiring. Only one of them, even if we believe the State's case in its entirety, only one of them goes into the store and we don't know for what purpose. And the specific charge is they conspired to murder Mr. Collins.

And even if there was them standing on the corner and the State is implying -- is saying, "Well, you can infer from that that that's why he went into the store," we still don't know for what. Let's say that -- let's pretend for a moment that that's true, that you can make those -- that you can make that leap to, "Well, he went into the store because Mr. Mosby told him to." Even if you could do that, you still couldn't say for what. He could've said, it could've been that -- the State's case actually supports, it could've been Mr. Mosby said, "Go in there and get that money from that guy." That's not conspiracy to commit murder. "Go in there and rough that guy up." That's not conspiracy to commit murder. And the charge is specifically they conspired to murder. And there isn't any evidence that that's what happened. And so I'll incorporate by reference the rest of my arguments from yesterday and I'll submit on that.

(Emphasis added.)

The court denied the motion for judgment of acquittal and then delivered jury instructions. The court delivered the following instruction on conspiracy:

> In order to convict the Defendant of conspiracy, the State must have proven beyond a reasonable doubt: one, that the Defendant agreed with at least one other person to commit the crime of first-degree murder; and two, that the Defendant entered into that agreement with the intent that the crime be committed.

The court immediately thereafter instructed the jury on deliberate, premeditated first-degree murder and specific-intent second-degree murder.

During closing argument, the prosecutor stated to the jury:

> And you heard the Judge go over the instructions. And I'm not going to go over every element of every crime, just as I'm not going to go over every piece of evidence that was submitted to you during the three days of testimony. You all were taking notes, very detailed notes, you were paying attention to the physical evidence and the witnesses, and I have no doubt when the 12 jurors who go back to deliberate on this case, that **you will collectively determine that the mission of the person with the teal hat [who] went into that barbershop was a first-degree murder. And that mission was done in conjunction with Andre Mosby.**

(Emphasis added.)

The prosecutor continued:

> And the other charges, **conspiracy. The Judge said that you have to find that the Defendant, in concert and agreement with one other person, decided to do this. That agreement doesn't have to be what we all can see** on TV when the police intercept the telephone call from person A to person B, "We're going to kill person C." Though that is pretty good that they're **conspiring together, but it doesn't have to be spoken words. It can be actions.** And **we're going to watch the videos,** especially the CCTV video on Monument Street, and **you're going to see how both the person in the teal hat and Andre Mosby conspired together** to ensure that when the person in the teal hat went into that business, there was no one else, and that mission of a first-degree murder was going to be accomplished with the gun.

(Emphasis added.)

The prosecutor showed CCTV video recorded near the scene of the murder and commented on what he wanted the jury to infer from it:

> Who's on the corner right there (indicating)? That's Mr. Lawrence and Mr. Mosby. Mr. Mosby's still on his phone, and so if you think about it, in conjunction with the Panda Carryout, **that's when they joined together** at the corner. And there's the victim, and there's Mr. Edwards, and I believe he referenced that guy as, "Bull." And at this point, no one else is in that barbershop, no one.
>
> * * *
>
> There he is, right there. That's Mr. Mosby on his phone directly across the street and looking toward the barbershop. **And that, I would suggest to you, is because Mr. Lawrence is inside that barbershop accomplishing the mission that they both set off to accomplish this night.**
>
> There's Mr. Mosby going back to where he started, where he watched the victim go into the barbershop. He's looking at the barbershop again. **And literally within the next minute and a half, Mr. Lawrence shoots Mr. Collins twice.**

(Emphasis added.)

Defense counsel told the jury in relevant part:

> So which is it? Does he care about Mr. Mosby, or does he not care about Mr. Mosby? Because he certainly didn't have any -- he didn't have any skin in this game. **He didn't have anything against Mr. Collins, and Mr. Collins didn't have any thing against him. The State wants you to believe he took that man's life because Mosby told him to?**
>
> And that's what they're saying. Make no mistake, because he's charged with conspiracy. **So the State is trying to say they conspired together to kill this man over a little bit of money and that my client wasn't owed that money. He killed this man because he cared so much about doing the bidding of Mr. Mosby.** So he's either Mr. Mosby's boy or he's not. But if he's Mr. Mosby's boy, why is he pointing him out in a video about 20 minutes into an interview? **That doesn't make any sense.** He's either with him or he's not. It can't be both. And in order for you to

> believe the State's version of this case, it has to be both, and it simply cannot be.

(Emphasis added.)

After deliberating a little more than two hours, the jury submitted a note that read:

> "How must [t]he two, or more, parties agree," the word "agree," underlined, "on the conspiracy, i.e., what nature must the, 'agreement' take? (Written, verbal or implied by action.)"

Defense counsel argued that the court should instruct the jury to rely upon the instruction that it was previously given because any additional instruction "could confuse the jury even more than they might already be." Defense counsel[11] further explained that he "might have argued something different had [he] known . . . how it was going to be worded when it went to the jury."

The State suggested that the court search for an annotation in the jury instruction "that defines agreement, or references the fact that it doesn't have to be a written agreement, it can be oral." After hearing argument by the parties, the court, over defense objection, sent a written note to the jury stating:[12]

> It is not necessary that a formal agreement be shown, nor that it be manifested by formal words, either written or spoken. An agreement exists if the parties to a conspiracy tacitly come to an understanding with regard to an unlawful act or purpose.

[11] We infer from the context that the transcript is in error here. It shows the comment in question, beginning at line 8, page 156, as having been made by the prosecutor. However, it is clear that the comment in question is a continuation of the previous remarks by defense counsel, who briefly had been interrupted by the court.

[12] The supplemental instruction was an excerpt taken almost verbatim from the Comment to the pattern jury instruction for conspiracy, Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 4:08, at 549 (Maryland State Bar Association 2d ed. 2012, 2021 Repl.).

> Mere knowledge of a conspiracy does not make an individual a member of the conspiracy, nor does mere association with conspirators make one a conspirator.

A little more than a half-hour later, the jury reached a verdict. It found appellant guilty of first-degree murder of Kenneth Collins; conspiracy to commit first-degree murder of Kenneth Collins; use of a firearm in the commission of a felony or crime of violence; wearing, carrying, and transporting a handgun on his person; and possession of a regulated firearm by a person previously convicted of a disqualifying offense.

Analysis

Maryland Rule 4-325[13] governs jury instructions and states in relevant part:

> **(a) When Given.** The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate.
>
> * * *
>
> **(c) How Given.** The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Part (a) of the rule confers discretion on the trial court to give supplemental instructions "at a later time when appropriate." Part (c) of the rule provides that the trial court "may . . . instruct the jury as to the applicable law and the extent to which the

[13] This rule was amended effective July 1, 2021, but the portions quoted were unaffected by the amendment. 206th Rules Order, filed Mar. 30, 2021, available at https://www.mdcourts.gov/sites/default/files/rules/order/ro206.pdf (last visited Jul. 19, 2022).

instructions are binding." Accordingly, we review a trial court's decision to give a supplemental jury instruction for abuse of discretion. *Appraicio v. State*, 431 Md. 42, 51 (2013). "Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *Atkins v. State*, 421 Md. 434, 447 (2011)).

"Supplemental instructions can include an instruction given in response to a jury question." *Id.* "When a jury question involves an issue central to the case, 'a trial court **must** respond . . . in a way that clarifies the confusion evidenced by the query.'" *Sweeney v. State*, 242 Md. App. 160, 173 (2019) (emphasis added) (quoting *State v. Baby*, 404 Md. 220, 263 (2008)). "But not all jury questions require an answer—it may also be appropriate for the trial judge simply to tell the jury to rely on the instructions given prior to closing arguments." *Id.* (citing *Brogden v. State*, 384 Md. 631, 651 (2005)). But if an answer is required, "trial courts have **a duty to answer, as directly as possible**, the questions posed by jurors[,]" *Appraicio*, 431 Md. at 53 (emphasis added), and they "must avoid giving answers that are 'ambiguous, misleading, or confusing.'" *Id.* at 51 (quoting *Battle v. State*, 287 Md. 675, 685 (1980)).

As a general proposition, a trial court must give a requested jury instruction, whether "general or supplemental," when "the following three requirements are satisfied: *first*, it must be a correct statement of the law; *second*, the instruction must apply to the facts of the case; and *third*, it must not be 'fairly covered elsewhere' in the jury instructions as a whole." *Sweeney*, 242 Md. App. at 173-74 (emphasis in original) (quoting *Dickey v. State*,

404 Md. 187, 198 (2008)); *see also Manuel v. State*, 252 Md. App. 241, 258 (2021) (quoting *Sweeney*).[14] There may be, however, narrow circumstances where a trial court abuses its discretion by giving a requested supplemental jury instruction that satisfies the three-part test. According to appellant, this is such a case.

There is no dispute that the jury note presented "a question involving an issue central to the case[.]" *Cruz*, *supra*, 407 Md. at 211. That would ordinarily require the trial court to "respond with a clarifying instruction[.]" *Id.* Nor does appellant dispute that the supplemental instruction given was a correct statement of the law or that it was not applicable to the facts of the case.[15] The claim before us is that the trial court abused its discretion in giving the supplemental instruction because defense counsel's closing argument had been tailored to the original instruction and that, as a result, appellant was unfairly prejudiced. We are not persuaded.

We have quoted extensively from the parties' arguments on the motion for judgment of acquittal to emphasize that the trial judge, the prosecutor, and the defense counsel were

[14] In *Sweeney* and *Manuel*, the proposition was stated without qualification because neither of those cases involved a claim that the instruction, although satisfying the three-part test, should not have been given because it injected into the case, at the last minute, a new theory of culpability and was unfairly prejudicial.

[15] Appellant asserts that the supplemental instruction was "confusing" because it "did not give a complete instruction of the law[,]" and it "presumed that the jury was looking for a way *other* than a formal agreement to find a conspiracy existed." He ignores both the content and the context of the question posed by the jury, which was focused on what kind of evidence could indicate a conspiracy. The only evidence of a conspiracy in this case was the coordinated actions of the conspirators, which is precisely what the State argued.

all well aware that the prosecution was relying on the coordinated actions of the alleged conspirators to prove the charged conspiracy.

This case is different than *Cruz*, on which appellant relies. In *Cruz*, the defendant was charged with first- and second-degree assault of two juveniles, Meza and Martinez. *Cruz*, 407 Md. at 205. During Cruz's jury trial on those charges, Meza testified that Cruz swung at him with a baseball bat and missed. *Id.* Meza fled, with Cruz giving chase. *Id.* According to Meza, Cruz swung at him again and missed, but when Meza fell, Cruz struck him in the head with the baseball bat. *Id.* According to Martinez, after Cruz struck Meza, he "turned his attention to" him. *Id.* When Cruz swung the bat at Martinez, and Martinez "blocked [it] with his arm," Cruz retreated to a vehicle and left. *Id.*

During a bench conference on jury instructions held after the close of evidence, the parties discussed how the jury should be instructed on second-degree assault. When the State elected to proceed only on a theory of battery, the trial court instructed the jury only on that modality of assault. *Id.* at 206-07. In closing argument, Cruz's counsel, relying upon that limited instruction, which had omitted any mention of the attempted battery modality of assault, conceded that Cruz "'went after' Meza with the bat, thinking that attempted battery was off the table." *Id.* at 209.

During jury deliberations, a note was sent to the trial court, asking the following question: "[I]s Y falling on a sidewalk & hitting head while being chased by a bat by X, an assault by X on Y?" *Id.* at 207. In response to that note, the trial court, over defense objection, gave a supplemental instruction on attempted battery. *Id.* at 207-08.

The jury found Cruz guilty of second-degree assault of Meza but acquitted him of the remaining charges. *Id.* at 208; *id.* at 226 (Battaglia and Murphy, JJ., dissenting). The trial court sentenced him to ten years' imprisonment, with all but three years suspended, followed by two years' probation. *Id.* at 208.

On appeal, we affirmed in an unreported opinion, holding that the trial court did not abuse its discretion in giving the supplemental instruction because it was supported by the evidence, and Cruz was not prejudiced by the timing of that instruction. *Id.* The Court of Appeals[16] reversed and remanded with directions to reverse the conviction and order a new trial. *Id.* at 222. That Court rejected the State's contention that the prejudice to Cruz could have been cured by permitting him to reopen closing argument,[17] because defense counsel, proceeding under the initial battery instruction, had already "conceded and emphasized the first two of three elements of attempted battery, an offense counsel thought had been withdrawn from consideration." *Id.* at 216.

Here, unlike *Cruz*, the State proceeded and relied at all times upon settled law that conspiracy "may be proved by circumstances giving rise to an inference of common design." *Birchead v. State*, 317 Md. 691, 707 (1989) (quoting *Gardner v. State*, 286 Md. 520, 524 (1979)). And neither did the supplemental instruction here introduce a new theory of culpability, nor did defense counsel concede anything in closing argument in reliance upon a seemingly foreclosed theory of culpability. The jury's question demonstrates the

[16] On December 14, 2022, the name of the Court of Appeals was changed to the Supreme Court of Maryland.

[17] Cruz did not ask for supplemental closing argument. *Cruz*, 407 Md. at 216.

appropriateness of giving the supplemental instruction because the matter of concern was not "fairly covered elsewhere in the jury instructions as a whole." *Sweeney*, 242 Md. App. at 173-74 (citation and quotation marks omitted). In short, the supplemental instruction fulfilled the court's obligation to "clarif[y] the confusion evidenced by" the jury's question, which "involve[d] an issue central to the case." *Baby*, 404 Md. at 263.

Even if it would have been better to have included the language of the Comment to the pattern instruction when the original conspiracy instruction was given,[18] we are not persuaded that appellant was in any way blindsided or unfairly prejudiced by the supplemental instruction. We hold that the trial court did not abuse its discretion in giving, over defense objection, the supplemental instruction.

II.

Appellant contends that the trial court, in violation of *Dingle v. State*, 361 Md. 1 (2000), and its progeny, erred in propounding compound questions during voir dire. He argues that these questions created the possibility that jurors would "self-assess their ability to remain impartial," which, in turn, led to an intolerable risk of juror bias and violated his fundamental right to a fair trial. He further contends that if this claim has not been preserved, we should exercise discretion and find plain error or, alternatively, find ineffective assistance of counsel for failing to object to the voir dire questions and accepting the jury without qualification.

[18] Any proposed written instructions submitted by the parties are not included in the record before us, and the parties' discussion about the text of the instruction occurred off the record. We therefore do not know whether the State requested anything beyond the original conspiracy instruction during the off-the-record charge conference.

Facts Pertaining to Preservation of the Self-Assessment-of-Impartiality Claim

Following what is the usual practice in the circuit courts, the court asked a number of questions to the assembled venire, noting which jurors answered to one or more questions so that later they could be examined individually. By our count, 32 potential jurors responded to one or more of the disputed questions and, of those, only one was included in the jury. After the court had concluded with those questions but prior to individual examination of the jurors, it convened a bench conference:

> THE COURT: I don't know if we're going to make it.
>
> **Any objections, exceptions, request for further instructions?**
>
> [DEFENSE COUNSEL]: **No, Your Honor.**

(Emphasis added.)

When a jury had been selected, the court asked whether it was acceptable to the parties. The defense accepted the empaneled jury without qualification.

Preservation

Maryland Rule 4-323(c) governs "objections to rulings or orders other than those on the admission of evidence," *Foster v. State*, 247 Md. App. 642, 648 (2020), *cert. denied*, 475 Md. 687 (2021), including "the manner of objections during jury selection." *Id.* (quoting *Marquardt v. State*, 164 Md. App. 95, 142 (2005), *overruled in part on other grounds by Kazadi v. State*, 467 Md. 1, 27, 35-36 (2020)). Rule 4-323(c) provides:

> **(c) Objections to Other Rulings or Orders.** For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these

> rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Simply put, preservation of a jury-selection claim for appeal ordinarily requires a party to object at the time the trial court decides to propound (or refuses to propound) a question to the venire, strikes (or refuses to strike) a juror for cause, or such other action. There are, however, two types of voir dire objections. *Foster*, 247 Md. App. at 647-50. If the objection "goes 'to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire[,]'" *State v. Ablonczy*, 474 Md. 149, 162 (2021) (quoting *State v. Stringfellow*, 425 Md. 461, 469 (2012)), an "unqualified acceptance of the jury panel waives any prior objections." *Id.* (citing *Stringfellow*, 425 Md. at 469). But objections that "are 'incidental to the inclusion or exclusion of a prospective juror or the venire'" are "not waived by accepting a jury panel at the conclusion of the jury-selection process." *Id.* (quoting *Stringfellow*, 425 Md. at 469) (cleaned up).

Within the first type of voir dire objections—those that are "directly related to [the exclusion or inclusion of] a prospective juror or jurors[,]" *id.* at 164—is "an objection to a *propounded*, purportedly prejudicial, *voir dire* question." *Id.* at 165 (quoting *Stringfellow*, 425 Md. at 472) (emphasis added in *Ablonczy*) (cleaned up). Within the second type of voir dire objections—those that are "only incidentally" related to "the inclusion or exclusion of prospective jurors"—is an objection to a judge's refusal to ask a proposed voir dire question. *Id.* at 162-63.

In *Foster*, we summarized the preservation rules concerning objections to voir dire questions as follows:

> To preserve any claim involving a trial court's decision about whether to propound a voir dire question, a defendant must object to the court's ruling. In addition, if the claim involves the court's decision to ask a voir dire question over a defense objection, the defendant must renew the objection upon the completion of jury selection.

247 Md. App. at 647-48.

Appellant contends that the propounded voir dire questions presented a risk that prospective jurors, rather than the court, would determine their impartiality. Although the distinction between the two types of voir dire objections is slight, that contention, in our view, would be within the first type of voir dire objections. But here, the propounded questions were never objected to, and the empaneled jury was accepted without qualification. In short, the claim of voir dire error being raised was not preserved for appellate review.

Plain Error/Ineffective Assistance of Counsel

Appellant's arguments regarding plain error and ineffective assistance of counsel are intertwined with his contention that counsel failed to ensure him an impartial jury by not objecting to voir dire questions and then accepting the empaneled jury without qualification. And success on either claim rests on a finding of a "reasonable probability that, but for the error claimed, the result of the proceeding would have been different" and that counsel's error negatively affected appellant's "substantial rights[.]" *United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (citations and quotation marks omitted) (cleaned up). Both, in our view and on this record, involve fact finding that would be best

addressed first in a postconviction proceeding.[19] *See Mosley v. State*, 378 Md. 548, 562 (2003) (observing that a postconviction proceeding "is the preferable method in order to evaluate counsel's performance, as it reveals facts, evidence, and testimony that may be unavailable to an appellate court using only the original trial record"). Because the postconviction court has held appellant's fair and impartial jury claim sub curia, we are not persuaded to consider plain error or ineffective assistance of counsel in this appeal. We will instead remand to the postconviction court for further proceedings in accordance with this opinion.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. CASE REMANDED TO THE POSTCONVICTION COURT FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS ASSESSED TO APPELLANT.

[19] We note that under *United States v. Olano*, 507 U.S. 725 (1993), if there has been an "intentional relinquishment or abandonment of a known right" by a defendant, then there cannot have been "error." *Id.* at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). In other words, forfeited rights, that is, rights that are inadvertently abandoned by "the failure to make [a] timely assertion of" them, may be reviewed for plain error. *Id.* at 731 (citation and quotation marks omitted). But waived rights may not. *Yates v. State*, 202 Md. App. 700, 722 (2011), *aff'd*, 429 Md. 112 (2012)

As our Supreme Court has recognized, "waiver" is an amorphous concept that can range from a knowing and intentional relinquishment of rights to an inadvertent failure to lodge a timely objection. *See, e.g.*, *Curtis v. State*, 284 Md. 132, 141-42 (1978) (observing that "waiver" is an "ambiguous" term, whose meaning depends upon the context in which it is used).