UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1030

September Term, 2014

TYRONE WALKER

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: December 11, 2015

The victim in this case, Shirley Walker, was beaten with a metal bat in the parking lot of Melwood Elementary School where she was attending church services on the morning of August 11, 2013. On April 1, 2014, her estranged husband, Tyrone Walker ("Appellant"), was convicted by a jury in the Circuit Court for Prince George's County of first-degree assault, second-degree assault, theft of an item valued under $100, and malicious destruction of property. Appellant was found not guilty of the second-degree assault of Ms. Walker's sister, Tonza Gilchrist, who witnessed the beating. The trial court sentenced Appellant to twenty years of imprisonment, with all but ten years suspended.

Appellant, who admits he assaulted Shirley Walker on the morning of August 11, 2013, conceded guilt as to second degree assault in the proceedings below, and disputed only whether his actions constituted aggravated, first degree assault. On appeal he presents four questions for review, which we have reordered:

I. Did the lower court err in permitting the State to offer e-mails into evidence where the state failed to adduce proof that the e-mails were actually authored by [Appellant]?

II. Is the evidence sufficient to support [Appellant]'s conviction for first-degree assault?

III. Did the lower court err in failing to declare a mistrial in the wake of a reference to [Appellant]'s status as a probationer?

IV. Did the lower court err in propounding a flight instruction where the evidence showed, at most, unremarkable departure from the scene of a crime?

For the reasons set forth below, we affirm the judgment of the trial court.

BACKGROUND

Appellant was tried before a jury in the Circuit Court for Prince George's County on March 31 and April 1, 2014. Appellant did not testify at trial, and the following version of events presented by the victim and the State's witnesses was largely uncontested.

Appellant and Ms. Walker had been married "a little over 26 years" at the time of trial. Ms. Walker asked Appellant for a divorce in July 2012, and they separated on September 20, 2012, at which time Appellant moved out of their home. Ms. Walker alleged at trial that Appellant attempted to reconcile the marriage in a series of increasingly threatening e-mails that were sent in the period between the separation and the assault.

Sunday Morning

Ms. Walker left her house on the morning of August 11, 2013, and observed a silver van parked across the parking lot from her home. She thought Appellant was in the van. On her way to church, she was pulled over by a police officer for speeding, which delayed her arrival.

Tonza Gilchrist, Ms. Walker's sister, testified that she arrived at the Melwood Elementary School where church services were held around 7:45 in the morning. Ms. Gilchrist called Ms. Walker to warn her of a van that was the only other vehicle in the parking lot, and that she saw Appellant leave the elementary school building and enter the passenger side of the van, which then left the parking lot. When Ms. Walker arrived at the school, she parked next to Gilchrist. The van in which Appellant was a passenger followed shortly after.

Ms. Walker testified that Appellant tapped on her window and she allowed him into the passenger side of her car. He wanted to talk about their marriage. Recounting their conversation, Ms. Walker testified that when she told Appellant she had nothing further to say to him, he became threatening: "the last thing he said when he got out. He threatened to kill me. He said I was going to die." Ms. Walker described the ensuing attack:

> So, then he got out of the vehicle, and I thought he was going to leave. So, I proceeded to get out of my car. I had gotten my left side out and the next thing I knew, he had came back around with a baseball bat and started whaling the bat at me. Just started hitting me with it. And, so, so while he's hitting me, at some point he tried to pull me out of the vehicle, but I laid back and starting kicking and screaming and kicking and screaming so he couldn't pull me out of the car all the way because I know if I did that I was really—it was going to be more damage than what he had already done.
>
> And so, and then the next thing I knew, for some reason, he had stopped. I didn't know why he had stopped, but he had just stopped. And so, then I guess [Appellant] had left because my family members . . . had pulled up in their vehicle and my sister had came over out of her vehicle and I think I saw my pastor there as well. Somebody called the police.

Ms. Gilchrist, who witnessed the attack, gave the following account of the incident:

> [MS. GILCHRIST]: He starting whaling on her with a bat. I got out of my car. After I got out my car, I don't know what told him to stop, but I start—I saw rage in his face. He lifted the bat up and told me to get back in my car. Then I got back in my car.
>
> [PROSECUTOR]: Why did you get back in your car?
>
> [MS. GILCHRIST]: Because I was afraid and couldn't help her.
>
> [PROSECUTOR]: What did you observe your sister doing?
>
> [MS. GILCHRIST]: She was trying to fight him. She was just lifting her arm up just to keep the bat from hitting her.

> [PROSECUTOR]: Was she standing outside the car or was she sitting in the car?
>
> [MS. GILCHRIST]: She had first got out, but when she ducked, the bat just missed her head. Then she got back in. He just kept whaling and kept whaling and kept whaling on her. She was inside. Then he started taking the bat, jamming it, jamming it cause he couldn't hit her, so he just jabbed it, jabbed it. Just felt helpless.
>
> [PROSECUTOR]: What happened next?
>
> [MS. GILCHRIST]: When he saw my other family members come he ran.

Following the assault, Appellant took Ms. Walker's purse, which contained Ms. Walker's wallet, phone, calendars, and other information. Although Ms. Walker's purse was eventually returned, her cell phone was not returned.

The State admitted the 911 call made by Ms. Gilchrist into evidence. As the tape was being played, counsel and the court heard "has one against the daughter" which was a reference to the protective order that Ms. Walker's daughter had against Appellant. The tape was stopped, and at Appellant's request, the trial court instructed the jury to disregard the statement about the protective order.

Officer Richard Conway, with the Prince George's County Police Department, testified that he responded to the scene for a domestic violence call at approximately 8:00 a.m. He indicated that Ms. Walker had "severe bruising to the left half of her body, severe swelling, and she was holding her wrist in a weird manner." Ms. Walker was transported to Southern Maryland Hospital by ambulance, and the domestic violence unit was notified. At the hospital, Ms. Walker was x-rayed, and received a tetanus shot, a shot for pain, and medication.

The E-mails

The State admitted two e-mails that Ms. Walker testified she received from Appellant; one she received right before the attack and the other she received just after the attack.[1] Because Appellant objected to the authenticity of the e-mails, the trial judge decided the issue of authentication outside the presence of the jury. Ms. Walker testified before the trial judge that after she and Appellant separated, he sent numerous e-mails to her from TyroneWalker63@yahoo.com and TyroneWalker19@yahoo.com. She testified that she was certain that the e-mails, received on her work e-mail, were from Appellant. The e-mails referred to her as "Shirl," and related various events in Appellant and Ms. Walker's marriage. On cross examination, Ms. Walker admitted that her daughter knew of the same facts contained in the e-mails relating to family events, but protested the suggestion that her daughter would send any e-mails that threatened her in the way the e-mails from Appellant did. Moreover, the e-mails referenced certain occasions on which she would try to ignore Appellant when he confronted her. Ms. Walker explained that although she tried to avoid contact with Appellant, he would "pop up from wherever," such as one occasion where he confronted her at the park-and-ride lot. Also, the e-mail that was sent after the attack referenced the contents of the texts on Ms. Walker's phone, which Appellant took during the assault.

[1] The State provided about twenty e-mails in discovery dating from January, 2013 through August 2013, which indicated they were sent from TyroneWalker63@yahoo.com and TyroneWalker19@yahoo.com to Ms. Walker's work e-mail address.

Ms. Walker then testified before the jury to receiving State's Exhibit 26, which was an e-mail sent on July 11, 2013, just one month prior to the assault. She testified that when she received the e-mail she was scared. The e-mail, which was later published to the jury, stated:

> Hello, Mrs. Walker. I've been trying to talk to you because you don't know that since we've been separated, it's not good. At least I ask you for forgiveness, but you keep on ignoring me. Okay. I understand you are scared, but you brought this on yourself. First you turn your back on me and everything else you done to me and you hurt me. And now look at you running. You made me this way because I wanted to fix my relation and save my marriage. I'm not going to let 25 years go down the drain. Now, I'm willing to make this work. First, let me apologize to you. Whatever I did was not to hurt you. I always love you, and you know this. But yet you left me for another man. You are seeing him right after I [] left the house. And you have the nerve to have him up in the house. That's how people get killed, playing games like that.
>
> My feelings for you have not left me. In order to stop this madness, I'm willing to be a better husband and provider. You and the kids is all I have. I want my family back. And you must end your relationship with your friend or somebody is going to get hurt. And it won't be me. I have no one to turn to, so I ask you to let me be your husband, not your enemy. I'm asking for the last time, if you continue to push me, I will never ever forgive you and all the lies you told me.

Ms. Walker stated that she had received numerous e-mails from Appellant. Specifically, she testified to another e-mail that she received four days after the assault, sent on August 15, 2013, which read:

> Good morning, Mrs. Walker, I know you probably wondering why I'm sending you this message, but it's okay. I hope you are feeling better. I will be brief. What happened to you was not out of hatred. It was for respect. Something you keep on doing to me. I told you not to disrespect me and you kept right on doing it. I hope this was a valuable lesson you will not forget ever in life. I loved you and you knew this, all for what, Boo, sex and money. You chance you 25 years of marriage for a bus driver who was only lying to you because he knew you would believe him. If you cheated on me with him, how can any man have respect for you[?] You are not setting an

> example, a sample. I'm so sorry that it turned out ugly. I tried my best to love you, Shirl.

Videotapes

Portions of the videotaped police interview with Appellant were admitted and published to the jury, accompanied by the testimony of the police officer in the room at the time of the taping, Sergeant Calvin Tyson. Sergeant Tyson testified that Appelalnt confessed to striking Ms. Walker with "a bat." However, Appellant also mentioned being on probation in a portion of the video, and counsel moved for a mistrial stating, "[t]his is the second time that we've seen something that the State has put up there that included other crimes evidence," the first being the 911 call. The court instructed the jury as follows:

> "So, ladies and gentlemen, you heard the [Appellant] in the tape say something about being on probation. I want you to know that that's not relevant to anything that's going on here. Has nothing to do with these proceedings, and I'm going to ask you to totally disregard. I believe the question by the State was [Appellant] had made some statements about other things that were unrelated, and so that too is unrelated if it was in fact true, so you just totally disregard that. Do you understand? Thank you."

Finally, the State entered into evidence surveillance footage from Prince George's County Schools, and photographs taken of Ms. Walker at the hospital which depicted bruising injuries to her left wrist and arm, and her lower legs. The surveillance video displayed the school parking lot where church services were held. It showed Ms. Gilchrest's car arriving first, then the van, and then Ms. Walker arriving and being assaulted by Appellant with a baseball bat. It also recorded the car carrying Ms. Walker's mother, sister and brother pulling into the lot, at which point Appellant stopped beating Ms. Walker and left the scene.

In closing, counsel for Appellant argued that he lacked any intent to cause serious bodily injury, stating: "He intended to bruise her up, yeah. He's not proud of it. He's not a man that we're going to sit here and say we admire. But he didn't intend to commit serious bodily harm. He did not intend to kill her."

Additional facts will be presented as they pertain to the discussion.

DISCUSSION

I.

Appellant contends that the circuit court erred in permitting the State to offer e-mails into evidence because the State had not sufficiently authenticated the e-mails. The Maryland Rule that governs this issue is Rule 5-901. Subsection (a) of Rule 5-901 states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[2] Subsection (b) of Rule 5-901 provides a sample list of methods that can be used to authenticate evidence. Evidence, such as the e-mails at issue in this case, may be authenticated through the "[t]estimony of a witness with knowledge that the offered evidence is what it is claimed to be," and by "[c]ircumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other

[2] The most straightforward method of authenticating a document or writing is to ask an individual with knowledge about the document whether it is what it purports to be. *Sublet v. State*, 442 Md. 632, 658 (2015) (citing *Matthews v. J.B. Colt Co.,* 145 Md. 667, 672 (1924)). "Familiarity with the purported author's signature also has been a basis for authentication, provided that such familiarity was proven prior to authentication." *Id.* (citing *Smith v. Walton*, 8 Gill 77, 77 (Md. 1849)).

distinctive characteristics, that the offered evidence is what it is claimed to be." Md. Rule 5-901 (b)(1) and (4).

The requirement of authentication is a condition precedent to the admission of evidence. *Sublet*, 442 Md. at 665 (quoting *United States v. Vayner,* 769 F.3d 125 (2nd Cir. 2014)). Judges perform a "gatekeeper" role in authenticating evidence "because of jurors' tendency, 'when a corporal object is produced as proving something, to *assume, on sight of the object, all else that is implied in the case* about it.'" *Id*. at 656. (quoting 7. J. Wigmore, Evidence § 2129 (Chadbourn Rev. 1978)). Where e-mails are authenticated by circumstantial evidence, the moving party must provide "foundation evidence" which a judge can find is sufficient to support a finding by a reasonable trier of fact that the item is what it is purported to be. *See* 6A Lynn McLain, *Maryland Evidence—State and Federal* § 901:1 (3d ed. 2013). Ultimately, the jury is left to make the "'determination as to whether the evidence is, in fact, what its proponent claims.'" *Id.* at 666 (quoting *Vayner,* 769 F.3d at 130).

Authentication of electronically stored information, such as e-mails, and authentication of social networking communications present novel evidentiary challenges. *See Griffin v. State*, 419 Md. 343 (2011). The Court of Appeals recognized in *Griffin* that "anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password[.]" *Id.* at 352. The Court addressed the requirements for authenticating social media messages

in a recent opinion consolidating three cases. *Sublet v. State*, 442 Md. 632 (2015).[3] In the case of *Harris v. State*, 442 Md. at 645-52, Appellant Harris was charged, *inter alia,* with two counts of attempted first degree murder following a shooting at the Rockville Metro Station. *Id.* At issue were certain "direct messages" sent through a Twitter account by the profile "TheyLovingTc" which the State claimed belonged to Harris and implicated him in the crime. *Id.* Although there was no forensic evidence presented regarding the messages authored on Harris's account, and although Harris argued other individuals were aware of the fight referenced in the messages, the Court of Appeals held that the trial court did not abuse its discretion in admitting the messages. *Id.* at 674. The Court determined that, not only had the State presented a witness connecting Harris with the Twitter account, the messages presented distinctive characteristics from which a jury could have found the "direct messages" were authentic. *Id.* at 675-76. For example, the content of the messages showed that the author was responding to events unfolding on the same day and had knowledge of a felonious plan "which involved only a small pool of individuals." *Id.*

In the present case, Appellant argues that "[t]he proof offered by the State to authenticate the e-mails *sub judice* fall[s] well short of the yardsticks suggested . . . *Sublet*." However, the e-mails in the present case had distinctive characteristics in the use of Ms. Walker's nickname and references to Appellant and Ms. Walker's marriage and family. Ms. Walker testified connecting Appellant to the e-mails, specifically citing to references

[3] The Court of Appeals consolidated *Sublet v. State, Harris v. State,* and *Monge–Martinez v. State* in a single published opinion. 442 Md. 632 (2015).

of occasions on which she had ignored Appellant. An e-mail sent on August 15, 2013 references the contents of the Ms. Walker's cell phone, which Appellant took from her after the attack.

Appellant suggests that his daughter could have authored the e-mails in question, but Appellant produced no evidence that she had access to her mother's e-mail account, or had ever impersonated him in the past. Certainly, the contents of Appellant's stolen cell phone would not have been known to Ms. Walker's daughter, who was not speaking to her father. Appellant relies on the holding in *Sublet* that "when a witness denies having personal knowledge of the creation of the item to be authenticated, that denial necessarily undercuts the notion of authenticity." *Sublet,* 442 Md. at 672 (citing *Makowski v. Mayor & City Council of Baltimore,* 439 Md. 169, 197 (2014)). In *Sublet*, however, the purported author of an electronic communication denied authoring a particular writing on social media, though she admitted writing previous posts on the same account. There was testimony at trial that others had access to the account and would regularly post messages under her name. *Id.* at 673. In the present case, however, there is no denial of authorship that must be overcome by evidence, as Appellant did not testify at trial.

In *Donati v. State,* we found that the State properly authenticated e-mails as sent by the defendant upon circumstantial evidence—most notably evidence that the e-mail addresses in question were found on a piece of paper in a locked room in the defendant's home and on his computer. *Donati v. State*, 215 Md. App. 686, 713-16, *cert. denied,* 438 Md. 143 (2014). Citing to *Donati*, Appellant maintains that the State failed to authenticate by presenting a "tangible indication of a connection between [Appellant] and the emails."

This interpretation, however, attempts to subject the State to a higher standard than is required by law. In *Donati*, we also noted that additional circumstances used in authenticating e-mails "have included an e-mail reference to the author with the defendant's nickname, where the context of the e-mail revealed details that only the defendant would know, and where the defendant called soon after the receipt of the e-mail, making the same requests that were made in the e-mail." *Id.* at 713 (citing *United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000)). Although the evidence adduced by the State in the present case does not mirror the evidence presented in *Donati*, it was sufficient to support a finding by a reasonable trier of fact that the e-mails were authored by Appellant and received by Ms. Walker on her work e-mail address.

"[I]t is ordinarily within the sound discretion of the trial court to determine the admissibility of evidence. Thus, we will not disturb a trial court's evidentiary ruling absent error or a clear abuse of discretion." *Blair v. State*, 130 Md. App. 571, 592-93 (2000) (internal citations omitted). The evidence presented provides proof from which a reasonable juror could find the evidence is what proponent claims it to be. *See* Maryland Rule 5-901(a). We hold that the circuit court did not abuse its discretion in determining that the e-mails were properly authenticated by the State.

II.

Appellant's next contention is that the evidence was insufficient to support his first-degree assault conviction because the State failed to prove that he had the "requisite specific intent to cause serious physical injury." The standard for appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable

to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Smith*, 374 Md. 527, 533 (2003) (citations omitted). After reviewing the evidence "in the light most favorable to the prosecution," we conclude that there was sufficient evidence for the jury to determine that Appellant was guilty of first-degree assault.

Appellant was convicted of first-degree assault under Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CR"), § 3-202(a)(1), which provides that "[a] person may not intentionally cause or attempt to cause serious physical injury to another." "Serious physical injury" is defined in CR § 3-201(d) as an injury that: "(1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ."

The Court of Appeals defines "specific intent" in *Harris v. State* as "not simply the intent to do the immediate act but embraces the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act." 353 Md. 596, 603 (1999) (quoting *Smith v. State*, 41 Md. App. 277, 305 (1979)). In *Chilcoat v. State*, we stated:

> Although the State must prove that an individual had a specific intent to cause a serious physical injury[], a jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, whether or not the victim suffers such an injury. [] Also, the jury may "infer that 'one intends the natural and probable consequences of his act.'"

155 Md. App. 394, 403 (2004) (citations omitted).

In *Chilcoat*, the defendant was convicted of first-degree assault after hitting the victim in the head with a beer stein four or five times. *Id.* at 398-99. The jury was shown the weapon in question, and saw the victim's medical records, and photographs of his injuries. *Id.* at 404. We noted that "the statute prohibits not only causing, but attempting to cause, a serious physical injury to another," and that "the jury may infer that one intends the natural and probable consequences of his act." *Id.* at 394 (citation and internal quotation marks omitted). Accordingly, we concluded that "[t]he jury could determine whether inflicting a serious physical injury was the natural and probable consequence of hitting [the victim] with the stein." *Id.*

Likewise, in the instant case, the jury was shown Ms. Walker's medical records and pictures of her injuries. The jury was also shown surveillance footage of the parking lot that captured the entire incident. After listening to the testimony given by the victim and a witness, the jury had the necessary evidence to determine that Appellant inflicting a serious physical injury was the "natural and probable consequence" of hitting Ms. Walker with a metal bat.

Ms. Gilchrist's testimony at trial that "the bat just missed [Ms. Walker's] head" during the confrontation is contrary to Appellant's contention that blows were directed at "non-vital extremities of the body." The jury could infer from Appellant's "conduct and the surrounding circumstances" that he intended to cause serious injury. As the State noted in closing argument, Appellant left his victim's car and returned with a weapon. The evidence was sufficient for the jury to reasonably conclude that Appellant intended to inflict a serious injury upon Ms. Walker.

III.

Appellant maintains that the circuit court erred by failing to declare a mistrial after the State entered into evidence a video of Appellant's confession to Prince George's County Police, in which Appellant mentions being on probation. At the showing of the video, Appellant's counsel objected and moved for a mistrial, arguing "I don't think the bell can be unrung." The court gave a curative instruction to the jury to disregard Appellant's recorded statements about probation, as irrelevant to the proceedings. At the end of trial, Appellant's counsel reasserted his request for a mistrial despite the curative instruction given by the trial judge. In response, the court announced to the jury:

> Ladies and gentlemen, counsel has just reminded me of the instructions that I gave you before, and I'm just going to reiterate one last time[.] [W]e had some technological glitch where you heard some things and I instructed you that you were to disregard. I'm just going to reiterate that again, that you are to disregard, as I said in my instructions, anything that was stricken that was not—I told you that was not properly before you.

The determining factor as to whether a mistrial is necessary is whether "the prejudice to the defendant was so substantial that he was deprived of a fair trial." *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State,* 316 Md. 587, 594–95 (1989)). In *Guesfeird v. State*, the Court of Appeals found that the trial court had committed reversible error in denying a mistrial, where the defendant was prejudiced by the complaining witness' inadvertent reference to taking a lie detector test. 300 Md. 653 (1984). The factors considered in determining prejudice included:

> "whether the reference to a lie detector was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution

> depends; whether credibility is a crucial issue; whether a great deal of other evidence exists. . . ."

Id. at 659. The witness in question in *Guesfeird* was the principal and sole witness for the prosecution, and her credibility was a crucial issue at trial. *Id.* at 666. The Court believed that "some, if not all, of the jurors might well have turned to this inadmissible evidence as the deciding factor in determining whom to believe." *Id.* at 666-67.

Courts have since applied these factors to other kinds of "inadmissible and prejudicial testimony." *See Rainville v. State*, 328 Md. 398, 408 (1992) (reversing the defendant's conviction in a sexual assault case due to the alleged victim's mother making a statement about another sexual assault for which the defendant was charged); *Braxton v. State*, 123 Md. App. 599, 668 (1998) (finding the defendant was not entitled to a mistrial despite witness remarks about the defendant's involvement in another shooting and his arrest record).

Here, there was only one reference to Appellant's probation. The reference was inadvertent, and part of a long statement by Appellant. During trial, Ms. Walker was the complaining witness, and there was an additional eyewitness account of the attack. Here, because the statement was made by Appellant, the defendant, its potential for being prejudicial is readily apparent. However, unlike in *Rainville*, the potentially prejudicial statement did not refer to any specific prior criminal acts by Appellant. Even if the jury was unable to disregard the statement, the reference was not evidence that Appellant had previously committed any violent crime.

In addition, the State's case against Appellant was strong. Appellant conceded guilt as to the underlying assault, and a great deal of evidence existed, including surveillance footage, photographs, and medical records. Accordingly, because we perceive no prejudice to Appellant, especially where the circuit court promptly gave a curative instruction and then re-iterated that instruction prior to jury deliberations, we conclude that the court did not err in denying Appellant's motion for a mistrial.

IV.

At the close of the evidence, and prior to closing argument, an-off-the-record discussion was held regarding jury instructions. Appellant objected to the flight concealment instruction, stating that flight that occurred was not because of "consciousness of guilt, but avoiding a confrontation with family members." The court acknowledged counsel's argument regarding the flight instruction and then took a brief recess. Thirty-one minutes later, the court began instructing the jury. Despite the earlier objection, the court did instruct the jury as to flight:

> A person's flight immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but is a fact that may be considered by you as evidence of guilt. Flight 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. If you decide there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.

Notably, neither party objected to the instruction as given to the jury, either contemporaneously or within a reasonable time thereafter.

Appellant agrees that the flight instruction given by the trial court was legally accurate, but questioned the propriety of using that instruction, arguing that "the evidence merely showed Appellant's unexceptional departure from the scene."

Md. Rule 4-325 (e) provides that:

> "**No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury**, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object."[4]

(Emphasis added).

[4] *Bowman v. State* sets the standard for when there is substantial compliance with Rule 4-325(e):

> "[T]here must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless."

337 Md. 65, 69 (1994) (quoting *Gore v. State*, 309 Md. 203, 209 (1987)).

Here, the objection was made off the record, and referred to both flight and concealment. The circuit court's subsequent jury instruction was limited to flight:

> A person's flight immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but is a fact that may be considered by you as evidence of guilt. Flight 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. If you decide there is evidence of flight, you then must decide whether this flight shows a consciousness of guilt.

The circumstances are not such that a renewal of the objection after the jury was instructed would be "futile or useless."

There was no contemporaneous objection on the record, and the issue is not properly preserved for review. *See Johnson v. State*, 310 Md. 681, 689 (1987). Appellant does not request, nor will we undertake, plain error review.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED.

COSTS TO BE PAID BY APPELLANT.