Circuit Court for Baltimore City
Case No. 121300032

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND*

No. 1183

September Term, 2022

DEONTA TURNER

v.

STATE OF MARYLAND

Arthur,
Albright,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: September 7, 2023

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In the Circuit Court for Baltimore City, the State indicted appellant Deonta Turner on four counts of illegal gun possession. Before trial, the State dismissed one of those counts.

A jury found Turner guilty of wearing, carrying, or transporting a handgun on or about the person. The jury acquitted Turner of transporting a handgun in a vehicle. It did not reach a verdict on a charge of possessing a regulated firearm after having been convicted of a disqualifying crime.

The court sentenced Turner to three years of incarceration. This timely appeal followed.

QUESTIONS PRESENTED

Turner presents the following questions, which we have reworded slightly for clarity and concision:

I. Did the circuit court err in refusing to dismiss the case because of the State's failure to preserve closed-circuit television video?

II. Did the circuit court commit plain error in instructing the jurors that they could not reconsider their decision as to one count while deliberations were ongoing?[1]

For the reasons set forth below, we shall affirm.

[1] Turner formulated the questions as follows:

I. Did the trial court err in refusing to dismiss the case because of the State's failure to preserve essential evidence, namely, the CCTV video?

II. Did the trial court plainly err in instructing the jurors that they could not reconsider their decision as to one count while deliberations were ongoing?

BACKGROUND

At the Baltimore City Intelligence Center ("BCIC") in the Eastern District on Edison Highway, police officers monitor a network of closed-circuit television ("CCTV") surveillance cameras. That network is known as CitiWatch. The BCIC in the Eastern District is one of four such centers in Baltimore City.

On June 23, 2021, Officer Eric Reedy of the Baltimore Police Department was working at BCIC when he observed live CitiWatch video of what appeared to be an armed person on the 1400 block of East Preston Street. Officer Reedy called Officer Cody Hastings and showed him a recording of the video. While reviewing the recording, Officer Hastings and Officer Reedy observed that a man, who was later identified as Rashawn Smith, appeared to have something resembling the magazine of a handgun hidden in his waistband. The officers observed Smith pulling up his shirt and showing something to another man, who was later identified as Turner.

Believing that Smith was armed, the officers notified the members of the District Action Team, which focuses on gun violence, drug distribution, and similar crimes. The officers also notified "Foxtrot," a police helicopter that has a camera that transmits and records live video.

While the District Action Team was on its way to stop Smith, Foxtrot informed the team members that Smith had gotten into an argument and had driven away in an Acura. The Acura was traveling with a Chrysler minivan. Shortly thereafter, however, Smith (in the Acura) and the van returned to the 1400 block of East Preston Street. The

officers apprehended Smith, searched him, and recovered an extended magazine loaded with .40 caliber rounds.

Around that time, Officer Reedy was still watching live CitiWatch video from around the 1400 block of East Preston Street. According to Officer Reedy, the CitiWatch video showed that Turner got out of the driver's seat of the minivan, dropped an object that appeared to be a handgun, placed the object back into the van, and walked away.

On the live Foxtrot video, Officer Reedy saw Turner return to the minivan. According to Officer Reedy, the Foxtrot video showed Turner placing his hand on the van, looking in the window, stepping away, coming back, opening the door, shutting the door, opening the door a second time, and then reaching into the minivan.

Officer Hastings, who had gone to the scene at East Preston Street, looked through the van window and saw two vials of what he suspected to be marijuana. Officer Hastings told Turner "that there was CDS in plain view" in the minivan. Turner responded that anything in the minivan "was his." Turner added "that his ID was in the vehicle as well."

The police did not arrest Turner that day. Instead, they had the minivan towed, obtained a search warrant two days later, and then executed the search warrant. In the console of the minivan, they recovered a Glock 19 semiautomatic pistol and Turner's identification. DNA swabs of the firearm confirmed that Turner's DNA matched an

inferred genotype[2] and that the match was "2.07 billion times more probable than a coincidental match to an unrelated individual" of Turner's race.

We shall include additional facts as relevant to our discussion.

DISCUSSION

I.

Recordings of CitiWatch video are ordinarily preserved for 30 days and then overwritten unless someone in the police department receives and acts upon a request to preserve a recording for a longer period. The video from the Foxtrot helicopter is preserved automatically, without a request.

Officer Hastings made a written request that the police department preserve the CitiWatch video that purportedly showed Turner getting out the minivan, dropping something that resembled a gun, picking up what he had dropped, and putting it back into the minivan. He testified that, to get CitiWatch video recording, he must fill out a paper form and send the form to police headquarters in downtown Baltimore. According to Officer Hastings, the department "lost" and "misplaced" "a lot of" preservation requests,

[2] "Inferred genotype" refers to the genotype profile that is developed based on a DNA sample. An inferred genotype can be developed from a single DNA sample from a known depositor, but usually arises when there is a mixed source or low quality biological sample. When there are multiple contributors, the genotype profiles are developed and compared to (1) samples of a known contributor or suspect and (2) a general genotype of the population. These figures are then used to determine the likelihood ratio, or probability that the DNA contribution that resulted in the inferred genotype is from the particular suspect rather than a random member of the population. Mark W. Perlin, Jennifer M. Hornyak, Garett Sugimoto, & Kevin W. P. Miller, *TrueAllele® Genotype Identification on DNA Mixtures Containing up to Five Unknown Contributors*, 60 J. of Forensic Sciences 857, 857 (2015) (available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/1556-4029.12788).

because of the high volume and because of disruptions resulting from the COVID-19 pandemic.[3]

The department did not comply with Officer Hastings's request to preserve the CitiWatch video of Turner. Hence, the State could not and did not produce the video to Turner in discovery.

Before trial, defense counsel filed a motion to compel discovery, seeking the CitiWatch footage that depicted Turner's possession of a something resembling a gun. Turner relied on Maryland Rule 4-263, which spells out a party's discovery obligations in a criminal proceeding, and *Brady v. Maryland*, 373 U.S. 83 (1963), which held that a criminal defendant has a due process right to receive material, exculpatory evidence in the State's possession.

At the hearing on Turner's motion to compel, Turner's trial counsel argued that the search of Turner's car was predicated on Officer Reedy's assertion that, while he was watching the video, he saw Turner drop something that looked like a gun, pick it up, and put it in the car. The prosecutor reportedly told him that the footage "was missing" or that the police "didn't save it." Counsel asserted that the footage "could be exculpatory." He asked the court to dismiss the case because of the State's "discovery violation" in failing to preserve and produce the footage.

[3] The record does not disclose why the Baltimore City Police Department did not have a more technologically advanced method of preserving CitiWatch video than requiring a police officer to fill out and deliver a piece of paper to someone at police headquarters.

The prosecutor responded that the State had produced the video footage from Foxtrot, the police helicopter. He confirmed, however, that the police department did not preserve the CitiWatch video even though Detective Hastings had filed a preservation request for it. He asserted that the State had produced everything that remained in existence and that the defense could cross-examine the State's witnesses and argue to the jury about implications of the State's failure to preserve the CitiWatch footage.

The court denied defense counsel's motion. The court reasoned that no discovery violation had occurred, because the State had produced everything that it had. The court added that the defense could use the failure to preserve the footage in arguing that the State had not proved Turner's guilt beyond a reasonable doubt.

The next day, a jury trial began before another judge. Defense counsel renewed his motion to dismiss based on the alleged discovery violation. The trial judge declined to revisit the earlier ruling.

Before the State rested, the court heard arguments about jury instructions. In response to a defense request, the court agreed to instruct the jury about the inferences that it could draw from the failure to preserve the video. The court reasoned that the video was highly relevant and that its relevance was not diminished merely because the officers had testified about what they saw on it. The court recognized that, had the police preserved a recording of the video, it would either have confirmed or refuted the officers' testimony. The court added that the City or the police department should have procedures in place to ensure the preservation of evidence like the video.

At the close of evidence, the court gave the following instruction:

> [Y]ou have heard testimony that the Baltimore City Police Department has destroyed or lost evidence in this case by failing to preserve or retain CCTV footage that allegedly captures the Defendant in possession of a handgun. If this evidence was [peculiarly] within the control of the State, but was not produced, and the absence was not sufficiently accounted for or explained, you may then decide that the evidence would have been favorable to the defense.

This instruction was adapted from the Maryland Criminal Pattern Jury Instruction (MPJI-Cr 3:29), which concerns missing witnesses.[4]

On appeal from his conviction of one count of wearing, carrying, or transporting a handgun, Turner argues, first, that the court erred in concluding that the State had not committed a discovery violation and in not dismissing the case as a sanction. The State responds that the court did not err and, in any event, that any error would have been harmless.

Maryland Rule 4-263 governs discovery in criminal cases in the circuit courts. Rule 4-263(d)(5) requires the State's Attorney, "[w]ithout the necessity of a request," to provide the defense with "[a]ll material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged[.]" Similarly, Rule 4-263(d)(7) requires the

[4] MPJI-Cr 3:29 reads as follows:

> You have heard testimony about (name), who was not called as a witness in this case. If a witness could have given important testimony on an issue in this case and if the witness was peculiarly within the power of the [State] [defendant] to produce, but was not called as a witness by the [State] [defendant] and the absence of that witness was not sufficiently accounted for or explained, then you may decide that the testimony of that witness would have been unfavorable to the [State] [defendant].

State's Attorney, "[w]ithout the necessity of a request," to provide "[a]ll relevant material or information regarding: (A) specific searches and seizures . . . and electronic surveillance[.]" Rule 4-263(c)(1) also requires the State's Attorney to "exercise due diligence to identify all of the material and information that must be disclosed under" Rule 4-263. Rule 4-263(c)(2) specifies that the State's Attorney's obligations "extend to material and information" in the "possession or control" of any "person who either reports regularly to the attorney's office or has reported to the attorney's office in regard to the particular case[,]" a category of persons that obviously includes the police detective investigating the case.

This Court conducts a *de novo* review of whether a discovery violation has occurred. *See Cole v. State*, 378 Md. 42, 56 (2003); *Thomas v. State*, 213 Md. App. 388, 402 (2013). "We review any discovery violation for harmless error." *Alarcon-Ozoria v. State*, 477 Md. 75, 91 (2021); *see also Williams v. State*, 364 Md. 160, 169 (2001) (stating that, if the State violated its discovery obligations, the appellate court should "consider the prejudice to the defendant in evaluating whether such error was harmless").

Although the grand jury did not indict Turner until October 27, 2021, a district court commissioner issued a statement of charges against him on June 27, 2021, only four days after the events that were recorded on the CitiWatch footage. The record does not disclose precisely when Officer Hastings submitted the preservation request, but he clearly submitted it long before the CitiWatch video would have been overwritten in the normal course.

CitiWatch is under the command of the Baltimore City Police Department, which regularly reports to the State's Attorney. Consequently, the State had "possession or control" of the CitiWatch footage, within the meaning of Rule 4-263(c)(2), before the footage was destroyed and at a time when the statement of charges was pending.[5]

The CitiWatch footage may have "tend[ed] to exculpate the defendant or negate or mitigate the defendant's guilt," within the meaning of Rule 4-263(d)(5), but because it was destroyed, we cannot say for certain whether it did or did not. The footage, however, was certainly "relevant material or information regarding: (A) specific searches and seizures . . . and electronic surveillance[,]" which the State must provide in discovery without a request from the defense. Md. Rule 4-263(d)(7).

In the circumstances of this case, it is unnecessary to decide whether the State had an obligation to preserve the CitiWatch footage and to produce it in discovery or whether the circuit court erred in finding no discovery violation. For even if the court erred, Turner would not be automatically entitled to the reversal of his conviction.

Maryland's appellate courts have "applied harmless error review when assessing the impact of a discovery violation." *Alarcon-Ozoria v. State*, 477 Md. at 107 (citing *Green v. State*, 456 Md. 97, 165 (2017)). The purpose of the harmless error rule is to

[5] The State argues that the CCTV footage was never in the possession of the State's Attorney's Office because it was never in the possession of the individual police officers who were involved in Turner's arrest and who testified in the case. The State's argument fails to recognize that the footage was still in the possession of the employees of the Baltimore City Police Department who are responsible for handling preservation requests.

prevent a small error from setting aside a conviction when that error would not have changed the result at trial. *Id.* at 108.

Had the circuit court found that the State committed a discovery violation, the court would have had discretion to devise an appropriate sanction. *Thomas v. State*, 397 Md. 557, 570 (2007). Maryland Rule 4-263(n) addresses the sanctions that a circuit court may impose when it finds that a party has committed a discovery violation. Among other things, that rule permits a court to "order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances." The rule "does not require the court to take any action; it merely authorizes the court to act." *Thomas v. State*, 397 Md. at 570.

"[I]n fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas v. State*, 397 Md. at 571. "'[T]he sanction of dismissal should be used sparingly, if at all[.]'" *State v. Graham*, 233 Md. App. 439, 459 (2017) (quoting *Thompson v. State*, 395 Md. 240, 261 (2006)); *accord Steck v. State*, 239 Md. App. 440, 466 (2018).

Here, had the court found a discovery violation, it could have addressed the violation through an instruction, like the one it ultimately gave, in which it informed the jury that it could draw an adverse inference against the State because of its failure to preserve the CitiWatch footage. "'[A] statement or instruction by the trial judge carries with it the imprimatur of a judge learned in the law[.]'" *Cost v. State*, 417 Md. 360, 381

(2010) (quoting *Hardison v. State*, 226 Md. 53, 62 (1961)). Thus, "argument by counsel to the jury will naturally be imbued with a greater gravitas when it is supported by a[n] instruction on the same point issued from the bench." *Id.* Under these circumstances, we are satisfied that the court's missing-evidence instruction cured any potential prejudice from a discovery violation. *Thomas v. State*, 397 Md. at 574.

In support of his contention that the State committed a discovery violation by not obtaining and disclosing the CCTV footage, Turner cites two out-of-state cases: *State v. Richardson*, 171 A.3d 1270 (N.J. Super. Ct. App. Div. 2017); and *Koonce v. Dist. of Columbia*, 111 A.3d 1009, 1019-20 (D.C. 2015). Although both of those cases hold that the prosecution committed a discovery violation (under the rules applicable in those jurisdictions) when it failed to preserve certain video-recordings, neither case supports Turner's request for the dismissal of the charges against him.

In *State v. Richardson*, 171 A.3d at 1272, the police failed to preserve a video-recording of a search in which they allegedly found drugs in Richardson's possession while he was being booked on other charges. The New Jersey court held that the trial court erred in declining to give a missing-evidence instruction that would have permitted "the jury to draw an adverse inference from the destruction of the booking room recording." *Id.* at 1281. The court's decision implies that the conviction would have been upheld had the trial court given such an instruction, as the circuit court did in Turner's case.

In *Koonce v. State*, 111 A.3d at 1012-13, the police failed to preserve a video-recording that would have corroborated their testimony that Koonce was intoxicated

when he refused to consent to a blood-alcohol test after his arrest for driving under the influence of alcohol. The trial court declined to instruct the jury that the destruction of the video supported Koonce's defense that he was not intoxicated. *Id.* at 1019. The court instructed the jury, instead, that a video-recording had been made; that defense counsel had promptly asked that the video be preserved; that, despite the request, the video had been overwritten after 30 days, in accordance with the local practice; and that the jury could consider these facts and give them whatever significance it deemed appropriate in determining whether the prosecution had proved its case beyond a reasonable doubt. *Id.* at 1019 & n.15. The District of Columbia's highest court held that "the trial court did not abuse discretion in its choice of sanction." *Id.* at 1019. Thus, the court affirmed an instruction that was even less pointed than the one in this case, which told the jurors that, if the absence of the evidence "was not sufficiently accounted for or explained, [they] may then decide that the evidence would have been favorable to the defense."

For all these reasons, we conclude that, even if the court erred in finding no discovery violation, that error was harmless. Turner was not entitled to the dismissal of the charges against him. The missing-evidence instruction was an adequate remedy for any discovery violation.

Turner goes on to claim that his right to due process was violated because, he says, the State acted in bad faith by failing to preserve the CitiWatch footage. Turner contends that the court should have dismissed the charges because of the alleged due process

violation. His contention fails because he did not demonstrate that the State or its agents acted in bad faith.[6]

"[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Bad faith is "a high standard for an individual to satisfy, typically found only in the most egregious of cases." *Steck v. State*, 239 Md. App. at 466. "[N]egligence alone is not enough to meet the requirements of *Youngblood*'s bad faith standard." *Patterson v. State,* 356 Md. 677, 697 (1999).

Thus, for example, in *Patterson v. State*, 356 Md. at 699, the Court found no violation of the defendant's due process rights when there was "no evidence" that the police "intentionally destroyed" the jacket that he was wearing at the time of his arrest. Similarly, in *Steck v. State*, 239 Md. App. at 466, this Court rejected the claim of a due process violation because the trial court had "found that there was 'no willful destruction of the evidence by the State's Attorney's Office or any of the underlying police agencies."

[6] The State contends that Turner failed to preserve his due process claim, because he did not specifically argue it below. Turner responds by citing *Smith v. State*, 176 Md. App. 64, 70 n.3 (2007), where this Court stated that "[p]reservation for appellate review relates to the issue advanced by a party, not to every legal argument supporting a party's position on such issue." In moving to dismiss the charges against him, Turner cited *Brady v. Maryland*, 373 U.S. 83 (1963), the leading case concerning a criminal defendant's due process right to exculpatory evidence in the State's possession. In these circumstances, we shall assume for the sake of argument that Turner adequately preserved his due process argument.

Here, there is no dispute that the Baltimore City Police Department failed to preserve footage of the CitiWatch video because it had a defective or poorly-implemented evidence-retention policy. The police department's conduct certainly appears to have been negligent, but there is no support in the record for a contention anyone in the department knowingly, intentionally, or willfully destroyed important evidence. Turner, therefore, did not establish a violation of due process.[7]

II.

After 59 minutes of deliberations, the jury sent a note, which read:

> If the jury does not unanimously come to a decision on all three counts, what happens next? We, the jury, have unanimously come to a decision about one count. However, it is unlikely that we will reach a decision about the other two, even with additional time.

The court decided to release the jurors for the evening and to instruct them on the duty to deliberate in the morning. Defense counsel moved for a mistrial and proposed that the court take a partial verdict. The court denied the motion for a mistrial, ruling that

[7] This case does not require us to decide whether a criminal defendant could show "bad faith," within the meaning of Youngblood, if the police department continued to operate a defective or poorly-implemented evidence-retention policy despite actual knowledge that the policy "often" resulted in the failure to preserve important evidence. *See State v. Durnwald*, 837 N.E.2d 1234, 1241-42 (Ohio Ct. App. 2005) (holding that "a continuing cavalier attitude toward the preservation of DUI videotape evidence rises to the level of bad faith"); *cf. Koonce v. District of Columbia*, 111 A.3d at 1019 (stating that, "once the government is on notice of its obligations with respect to foreseeably discoverable items of evidence in DUI/OWI [operating while under the influence] cases that are likely be in its possession, and aware of the negative impact that current practices have on its ability to satisfy those obligations, lack of 'willfulness' ceases to be a defense to sanction for failure to preserve discoverable evidence").

it was appropriate to instruct the jury on its duty to deliberate before taking a partial verdict or granting a mistrial on the two undecided counts.

The next morning, the court welcomed the jurors back and made some prefatory comments about their crucial role in the criminal justice system. Then the court read MPJI-Cr 2:01, the so-called modified *Allen* charge,[8] concerning the jury's duty to deliberate:

> [Y]our 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 own 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 re-examine your own views. You should change your opinion if convinced you are wrong, but not—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.

The court then gave a supplemental instruction:

> [THE COURT:] Now, yesterday on your note you indicated that you had reached unanimity on one of the questions and not on the other two. I'll ask the foreperson, . . . is the unanimity on the one count the final decision of this jury?
>
> (No audible response.)
>
> THE COURT: Is that a yes? Do any of you disagree with that? Okay. I'm seeing that as a reflection of the jury note, the unanimity on one count is the final decision of the jury.
>
> So I'll instruct you, when you resume your deliberations, do not reconsider that one count if it indeed -- if it is, in fact, your final decision. You should focus on the two other counts. And with respect to those two

[8] *See generally Nash v. State*, 439 Md. 53, 90-92 (2014).

> counts, the law with respect to each count, and the evidence pertinent to those two counts.

Turner did not object to the supplemental instruction.

Turner argues that the supplemental instruction erroneously modified the pattern jury instruction on the duty to deliberate. He acknowledges the lack of an objection, but argues that the trial court committed plain error by giving this supplemental instruction.

"Ordinarily," a Maryland appellate court will not decide an issue, other than subject matter jurisdiction or personal jurisdiction, "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). The courts, however, have devised a limited and tightly circumscribed exception for "plain error."

"'Appellate invocation of the "plain error doctrine" 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Winston v. State*, 235 Md. App. 540, 567 (2018) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)). Before an appellate court will reverse for plain error, four conditions must be met:

> 1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.
>
> 2. The error must be clear or obvious, and not subject to reasonable dispute.
>
> 3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.
>
> 4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Winston v. State, 235 Md. App. at 567.

"Meeting all four conditions is, and should be, difficult." *Id*. at 568. "[T]he appellate court may not review the unpreserved error if any one of the four [conditions] has not been met." *Id*.

Maryland Rule 4-325(f) provides that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record, stating distinctly the matter to which the party objects and the grounds for the objection." It further provides that "[a]n 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." *Id.* Thus, this Court has "plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court." *Danna v. State*, 91 Md. App. 443, 450 (1992); *accord Peterson v. State*, 196 Md. App. 563, 589 (2010); *Brown v. State*, 169 Md. App. 442, 457 (2006).

"In the context of erroneous jury instructions, however, the plain error doctrine has been noticed sparingly." *Peterson v. State*, 196 Md. App. at 589. "'[T]he plain error hurdle, high in all events, nowhere looms larger than in the context of *alleged instructional errors*.'" *Martin v. State*, 165 Md. App. 189, 198 (2005) (quoting *United States v. Sabetta*, 373 F.3d 75, 80 (1st Cir. 2004)) (further citation omitted) (emphasis added in *Martin v. State*); *accord Peterson v. State*, 196 Md. App. at 589. "Where the judge could easily have corrected the error if it had been drawn to [the judge's] attention," as is the case with a defective instruction, "the Court generally will not consider the contention." *Austin v. State*, 90 Md. App. 254, 265 (1992).

Turner argues that the court's supplemental instruction "conflicted with" MPJI-Cr 2:01, because the supplemental instruction told the jurors not to examine their views as to one count and not to change their opinions even if they believed them to be wrong. He argues that "the court's legal error was plain," because, he says, Maryland courts have long held that judges must take care to ensure that their responses to jury questions are not coercive (*Holmes v. State*, 209 Md. App. 427, 451 (2013)) and that the "safest course of action when using the *Allen*-type charge is to adhere to the MPJI-Cr 2:01[,]" the pattern jury instruction. *Butler v. State*, 392 Md. 169, 186 (2006).

The State responds, correctly, that, even if Turner had objected to the supplemental instruction, an appellate court would reverse only upon "'a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Appraicio v. State*, 431 Md. 42, 51 (2013) (quoting *Atkins v. State*, 421 Md. 434, 447 (2011)).

Even on direct appeal from a timely objection, it would have been debatable whether the court abused its discretion when it advised the jurors that, if they had "in fact" reached a "final decision" as to one count, they should not reconsider their decision on that count. In the related context of the judicial inquiry that is generally required when a court must decide whether to accept a partial verdict if a jury is deadlocked on some counts but may have reached a decision on others, "the trial judge 'treads a fine line.'" *State v. Fennell*, 431 Md. 500, 523 (2013) (quoting *United States v. Heriot*, 496 F.3d 601, 608 (6th Cir. 2007)) (further citation omitted). The judge "'must neither pressure the jury to reconsider what it had actually decided nor force the jury to turn a

tentative decision into a final one.'" *Id.* at 524 (quoting *United States v. Heriot*, 496 F.3d at 608) (further citation omitted). Moreover, "the trial judge may not accept a verdict that is tentative, and thus, in determining whether to accept a partial verdict, 'must guard against the danger of transforming a provisional decision into a final verdict.'" *Id*. (quoting *Caldwell v. State*, 164 Md. App. 612, 643 (2005)). The court "'should,'" among other things, "'inquire into the jury's intention *vel non* that the verdict be final, if such inquiry can be done non-coercively[.]'" *Id.* (quoting *Caldwell v. State*, 164 Md. App. at 643).

In this case, the trial court recognized the "fine line" that it was required to tread. The jurors had told the court that they had come to a unanimous decision on one count, but it was unclear whether that was their final decision. The court asked the jurors whether it was their final decision. On the basis of their nonverbal reaction, the court seems to have concluded that it was. Still, the court cautiously instructed the jurors not to reconsider their decision on that count if it was, "in fact," their final decision. Thus, the instruction informed the jurors that they could reconsider the decision on that count if, "in fact," they had not yet reached a final decision.

In these circumstances, the court's error, if any, was not plain. Consequently, we decline to exercise plain error review.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.