Circuit Court for Somerset County
Case No.: C-19-CR-21-0093

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1434

September Term, 2021

ALEXANDER DEJARNETTE

v.

STATE OF MARYLAND

Zic,
Tang,
Woodward, Patrick L.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: September 22, 2022

Appellant, Alexander DeJarnette, was originally charged with numerous traffic-related offenses, as well as, *inter alia*, two counts of second degree assault and one count of resisting arrest, in the District Court of Maryland for Somerset County, Maryland. After requesting a jury trial, appellant was tried by a jury in the Circuit Court for Somerset County. The jury acquitted him of both counts of second degree assault, driving in excess of a reasonable and prudent speed, negligent driving, reckless driving, driving while under the influence, driving while impaired, aggressive driving, causing a vehicle to obstruct a roadway, and leaving an unattended vehicle without stopping the engine. Appellant was convicted of resisting arrest, six counts of fleeing and eluding, failure to display a license on demand, and failure to display a registration card on demand. The jury was unable to reach a verdict on the counts charging disorderly conduct and disturbing the peace. Appellant was sentenced to three years' incarceration, with all but twelve months suspended, for resisting arrest, along with a concurrent sentence of six months for one of the fleeing and eluding counts, with the remaining counts merged for purposes of sentencing, as well as three years of supervised probation upon release. In this timely appeal, appellant asks us to address the following questions:

> 1. Must [appellant]'s convictions be reversed in light of the fact that the venire was not sworn at any point during the voir dire process?
>
> 2. Did [appellant]'s trial attorney provide ineffective assistance of counsel when she failed to object to the jury's legally inconsistent verdicts?

For the following reasons, we shall affirm.

BACKGROUND

On the evening of Thursday, April 22, 2021, Sergeant Mark Hoover, of the Crisfield Police Department, was on patrol on Richardson Avenue in Crisfield when he observed a motorcycle that was traveling at a "high rate of speed" with the operator, identified later as appellant, dragging his feet and legs off the foot pegs. When Sergeant Hoover activated his emergency lights to perform a traffic stop, appellant looked briefly at the officer's marked police vehicle, and then continued on at speeds approaching 60 miles per hour in a 30 mile per hour zone. Appellant was driving erratically, swerving and passing vehicles in traffic, and driving on the shoulder and median area. Eventually, appellant pulled over in the area of Lawson Barnes Road and Route 413, also known as Crisfield Highway.

At that point, Sergeant Hoover got out of his vehicle and noticed that the motorcycle had some apparent mechanical issue and appellant was attempting to restart the engine. Appellant was also talking on his cell phone. The officer told appellant that he was under arrest and asked him to place his kick stand down and put his phone away, but appellant did not comply.[1]

[1] On cross-examination, Sergeant Hoover testified that he was going to arrest appellant for fleeing and eluding. Sergeant Hoover also stated that, as he approached the motorcycle, his gun was unholstered, but pointed at the ground, because appellant was "driving and fleeing from the traffic stop." Sergeant Hoover put his gun back in his holster at or around the same time appellant asked him to do so.

Sergeant Hoover testified that as he got closer, appellant "pushed me out of the way and started to run northbound 413 in the middle of the road."[2] Sergeant Hoover explained: "I don't recall if it was a pushing movement or he ran his shoulder into me. However, he did knock me out of—out of his way when he started running northbound." On cross-examination, Sergeant Hoover agreed that he had taken appellant's cell phone prior to attempting to place him in handcuffs, and that he could not recall if appellant "snatched his phone" back and bumped into him when he ran away on foot. One of the charges against appellant alleged that he assaulted Sergeant Hoover.

After appellant fled north on the southbound lane of Crisfield Highway, passing approximately five or six cars in the process, Sergeant Hoover pursued him on foot. Soon, other officers arrived in their vehicles, and appellant was stopped and taken into custody.

Captain Lonnie Luedtke, of the Crisfield Police Department, provided further detail. He testified that he heard Sergeant Hoover call for assistance in this case and then drove his marked police vehicle to a church parking lot. There, he saw appellant in a wooded area. Captain Luedtke used the vehicle P.A. system and told appellant several times that he was under arrest and to get on the ground. Appellant did not comply and ran away.

As he backed his vehicle out of the parking lot, Captain Luedtke heard Sergeant Hoover radio that appellant was getting into a Nissan Altima proceeding northbound on Route 413. Captain Luedtke spotted the Altima, activated his emergency lights, and

[2] A recording of the video from Sergeant Hoover's body worn camera was played in court for the jury.

effected a traffic stop. At that point, appellant got out of the passenger seat and ran across Route 413. Captain Luedtke caught up to appellant in his vehicle, got out, and told him to stop and "give up." Appellant continued to try to "dodge" around him and run northbound, but two Somerset County deputies arrived, apprehended appellant, and placed him under arrest. Captain Luedtke testified that appellant was "very angry, combative and very uncooperative." In fact, one of the deputies, Deputy Kayla Corbin, testified that appellant refused to walk and that the officers had to grab his legs and arms and carry him to a police vehicle. Appellant kicked Deputy Corbin in the leg while she was carrying him, and that conduct formed the basis for the other assault charge.

We may include additional facts in the following discussion.

DISCUSSION

I.

Appellant contends that reversal and remand for a new trial is required because the venire, *i.e.*, the prospective or potential jurors, were not sworn prior to voir dire, as required by Maryland Rule 4-312(e)(1). Appellant recognizes that there was no objection by defense counsel and requests that we consider his claim as either a structural error or as plain error. The State responds that appellant affirmatively waived this claim by accepting the jury at the end of jury selection. The State also disagrees with appellant's claim that the venire was not sworn and argues that plain error review is not warranted in this case. In reply, appellant disputes the State's reading of the record as to whether the venire was sworn, arguing that this Court may recognize plain error despite his acceptance of the jury panel selected, and that plain error review is required in this case.

Maryland Rule 4-312(e)(1) provides:

> (1) *Examination*. The trial judge may permit the parties to conduct an examination of qualified jurors or may conduct the examination after considering questions proposed by the parties. If the judge conducts the examination, the judge may permit the parties to supplement the examination by further inquiry or may submit to the jurors additional questions proposed by the parties. **The jurors' responses to any examination shall be under oath.** On request of any party, the judge shall direct the clerk to call the roll of the array and to request each qualified juror to stand and be identified when called.

(Emphasis added.)[3]

Initially, the parties dispute whether the record shows that the venire was or was not sworn prior to *voir dire*. Appellant asserts that the transcript and the recording of the proceedings do not show that the venire was ever sworn. *See Savoy v. State*, 336 Md. 355, 360 n. 6 (1994) ("Ordinarily, when there is a conflict between the transcript and the docket entries, unless it is shown to be in error, it is the transcript that prevails."). The State does not dispute that the record does not show whether the venire was sworn, but suggests that, based on the presumption of regularity accorded to normal trial proceedings, *see Harris v. State*, 406 Md. 115, 122 (2008), as well as its reading of marks on the scanned copy of the trial minutes in the record, it is likely that the venire was, in fact, sworn during an

[3] The requirement that prospective jurors are to be sworn before voir dire was added in 1984 with the enactment of then Maryland Rule 4-312(d). *See Booze v. State*, 347 Md. 51, 68 (1997) (citing the Eighty–Seventh Report of the Rules Committee Standing Committee on Rules of Practice and Procedure). As noted by the State, we have reviewed the minutes of the pertinent meetings and agree there is no indication why this language was added to former Rule 752 and 754 b.

unrecorded recess. Appellant disputes the State's interpretation of these marks and maintains that the presumption of regularity has been rebutted.[4]

It appears that appellant was not present in court when the case was first called for trial on the morning of October 27, 2021. After a brief recess, and after appellant arrived, the trial court proceeded to address the venire as follows:

> We'll now proceed to what we call voir dire. I don't know if any of you have ever sat on a jury trial before, but I'm going to ask certain questions to determine if you're impartial, unbiased and prepared to sit today as a juror. It's a one-day case. It's a criminal case. There are certain questions that have to be asked. We want to get an unbiased group.
>
> So if you have any affirmative answers, meaning yes, or you're not sure of your answer, please raise your hand. I think someone is going to take your number, and then we'll talk to you later in private out of the courtroom.
>
> So this is a criminal case. The Defendant is charged with -- and he's Alexander DeJarnette. He's charged with a second degree assault, as well as a number of traffic violations that arose out of the assault or occurred -- allegedly occurred at the same time as the assault.
>
> If you'll stand and pull down your mask and face the panel. That's Alexander DeJarnette. Does anyone know him? If you do, please raise your hand.
>
> * * *

[4] On April 5, 2022, this Court granted appellant's Unopposed Motion to Correct the Record and to Place the Audio Recording of the October 27, 2021, trial under seal. Appellant avers that the audio recording "does not reflect that the venire was sworn." The State appears to concede that the recording itself does not show that the venire was sworn, but suggests that the venire was sworn during an unrecorded recess. In preparing this opinion, and despite enlisting the help of our Clerk's Office and the Maryland State Law Library, we were unable to play the recording. Because of the duty owed to the tribunal by the parties' attorneys, and because of our familiarity with both appellate counsel, we shall accept their averments as to the contents of the audio recording. *See* Maryland Lawyer's Rules of Professional Conduct 3.3 ("Candor Toward the Tribunal").

The trial court proceeded with the rest of voir dire. The parties then discussed strikes for cause and selected a jury. At the end of selection of the jury, defense counsel stated that "the jury is acceptable to the defense." The parties proceeded to select one alternate juror, and the selected jury with alternate were sworn to their oath by the court clerk.

The transcript does not show that the venire was sworn, as required by Maryland Rule 4-312(e)(1). The State concedes as much, but asserts that, under the presumption of regularity, we should conclude that the venire was, in fact, sworn. The Court of Appeals explained the presumption of regularity thusly:

> There is a presumption of regularity which normally attaches to trial court proceedings, although its applicability may sometimes depend upon the nature of the issue before the reviewing court. *See, e.g., United States v. Morgan*, 346 U.S. 502, 512 (1954) ("It is presumed the [trial court] proceedings were correct and the burden rests on the [challenger] to show otherwise."); *Skok v. State*, 361 Md. 52, 78 (2000) ("[A] presumption of regularity attaches to the criminal case."); *Beales v. State*, 329 Md. 263, 273 (1993); *Schowgurow* [v. State], 240 Md. [121,] 126 [(2008)]. Nonetheless, the presumption of regularity is rebuttable. *Beales*, 329 Md. at 274. ("[W]hen viewed as a whole," the "record thus demonstrates" that the presumption of regularity was rebutted.).

Harris, 406 Md. at 122; *see Montgomery v. State*, 206 Md. App. 357, 374-75 (2012), *cert. denied*, 429 Md. 83 (2012).

The State also directs our attention to the trial minutes in the electronic record. Although the trial minutes do not show that the venire was sworn, they do demonstrate that someone with access to the minutes crossed out, and maybe even whited-out, the pertinent part of that record regarding whether the venire was sworn before voir dire. The parties dispute the meaning of these markings, and we are similarly perplexed. Nevertheless, what is clear is that that portion of the trial minutes was altered for some unstated reason. Under

these circumstances, we are persuaded that the pertinent portion of the trial minutes, where the clerk would indicate that the venire was sworn, was either whited-out, pasted-over, or crossed-out, thus supporting appellant's argument that the venire was not sworn. Accordingly, we conclude that (1) the presumption of regularity has been rebutted in this case; and (2) the venire was not sworn prior to voir dire.

Recognizing that there was no objection by defense counsel to the trial court's failure to swear the venire panel on oath, appellant asks us to review his claim either as a matter of structural error, or alternatively, as plain error. First, as to structural error, we recognize that automatic reversal may be required when an error is deemed "structural," *i.e.*, a systemic error that erodes the integrity of the judicial process and undermines the fairness of the trial. *See Arizona v. Fulminante*, 499 U.S. 279, 306-10 (1991). The Supreme Court, however, has recognized errors as "'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). As explained by the Court of Appeals:

> [T]here are three broad categories of structural error. The first category includes errors in which "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as when a defendant is denied the ability to conduct his own defense. [*Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017)] (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984)). These errors are deemed structural because their impact on the outcome of the trial is irrelevant to the right violated. *Id.* The second category includes errors for which the effects "are simply too hard to measure," such as a denial of the defendant's counsel of choice. *Id.* (citing *United States v. Gonzalez–Lopez*, 548 U.S. 140, 149 n.4 (2006)). These errors are structural because it would be "almost impossible" for the State to show that they were harmless beyond a reasonable doubt. *Id.* Lastly, the third category encompasses errors that

> "always result[ ] in fundamental unfairness." *Id.* These errors include denying an indigent criminal defendant counsel and failing to give a reasonable-doubt jury instruction. *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963); *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). Because these errors always result in a fundamentally unfair trial, it would be pointless for the State to attempt to show that such an error was harmless. *Id.*

Newton v. State, 455 Md. 341, 353-54 (2017), *cert. denied*, 138 S. Ct. 665 (2018).

Pertinent to this case, the Court of Appeals decided in *Harris* that a failure to swear the jury selected in a criminal case amounts to structural error, requiring the defendant's conviction be reversed and a new trial ordered. *Harris*, 406 Md. at 130-32 (reversing where trial occurred before an unsworn jury); *see Savoy*, 420 Md. at 254 (reversing for a defective reasonable doubt instruction because the error was structural). *Cf. Alston v. State*, 414 Md. 92, 109 (2010) (discussing *Harris* and concluding that failure to administer oath to the jury before trial, but later, prior to deliberations, amounted to harmless error).

Neither party has cited a Maryland case, nor have we found one, holding that a failure to swear the venire amounts to structural error. We need not decide such issue because, even were we to conclude that the error was structural, there still is a requirement that the error be preserved. *See Newton*, 455 Md. at 353-54 (observing that a structural error claim must be preserved). As the Court of Appeals has explained, "[t]he overwhelming majority of courts that have considered this issue have held, as we do here, that un-preserved structural errors are not automatically reversible, but, instead, are subject to plain error review." *Savoy*, 420 Md. at 243 n. 4; *see Montgomery*, 206 Md. App. at 381

n. 17.[5] Here, defense counsel never objected to the trial court's failure to swear the venire panel prior to engaging in the voir dire process. Accordingly, we shall consider whether the plain error doctrine applies to this issue.

"'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)), *cert. denied*, 461 Md. 509 (2018). Review for plain error is reserved for error that is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy*, 420 Md. at 243. 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.

[5] We note that in both of the cases relied upon by appellant in which other courts have found structural error for failing to swear the venire, the issue was preserved. *See People v. Hoffler*, 860 N.Y.S.2d 266, 270 (N.Y. App. Div. 2008) (holding that despite giving the jury pool an oath by the jury commissioner prior to entering the courtroom, statute required an additional oath, and that, following defense counsel's objection received during voir dire, failure to administer that oath to venire was fundamental error), *leave to appeal denied*, 860 N.Y.S.2d 266 (N.Y. 2008); *Barral v. State*, 353 P.3d 1197, 1197-1200 (Nev. 2015) (concluding that trial court committed structural error by denying defense counsel's objection that venire not sworn in prior to voir dire), *cert. denied*, 579 U.S. 941 (2016). We further note that other courts have held that the failure to swear the venire, when the issue is not preserved, is subject to plain error review. *People v. Young*, 2016 WL 1045631, at *6 (Mich. Ct. App. Mar. 15, 2016) (unpublished) (citing *People v. Cain*, 869 N.W.2d 829 (Mich. 2015)). *See also Gambrill v. Board of Education of Dorchester County*, 252 Md. App. 342, 352 n. 6 (2021) (permitting citation to certain unreported opinions), *rev'd on other grounds*, __ Md. __, No. 34, Sept. Term, 2021 (filed Aug. 26, 2022).

> 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, 235 Md. App. at 567 (citing *Newton*, 455 Md. at 364) (additional citations omitted). "Meeting all four conditions is, and should be, difficult." *Winston*, 235 Md. App. at 568 (citing *Givens v. State*, 449 Md. 433, 469 (2016)). "The appellate court may not review the unpreserved error if any one of the four [conditions] has not been met." *Id.* at 568.

Applying the first part of this test, appellant expressly accepted the jury that was ultimately selected and sworn to their oath by the court clerk. This presents an issue of waiver. "Maryland Rule 4-323(c) governs the 'manner of objections during jury selection,' including objections made during voir dire." *Smith v. State*, 218 Md. App. 689, 700 (2014). Rule 4-323(c) provides:

> 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.

The Court of Appeals has stated that any objection to the jury selection process "must be expressed for the record before the jury is sworn." *State v. Tejada*, 419 Md. 149, 161-62 (2011). Further:

> "**When a party** complains about the exclusion of someone from or the inclusion of someone in a particular jury, and thereafter **states without qualification that the same jury as ultimately chosen is satisfactory or acceptable, the party is clearly waiving or abandoning the earlier complaint about that jury.** The party's final position is directly inconsistent with his or her earlier complaint."

Tejada, 419 Md. at 169 (quoting *Gilchrist v. State*, 340 Md. 606, 618 (1995)) (emphasis added).

The State compares the situation in the instant case to that addressed in *State v. Ablonczy*, 474 Md. 149 (2021). There, the issue concerned acceptance of a jury panel after the trial court declined to ask a requested question of the venire during voir dire. *Ablonczy*, 474 Md. at 152-53. The Court of Appeals held that by accepting the panel, Ablonczy did not waive the argument concerning the trial court's decision not to ask the requested voir dire question. *Id.* at 153. Relying on its prior decision in *State v. Stringfellow*, 425 Md. 461 (2012), as well as prior related cases, the *Ablonczy* Court observed that objections during voir dire are divided into two categories:

> The first group of objections goes "to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire[.]" In that case, unqualified acceptance of the jury panel waives any prior objections. The second group of objections, on the other hand, which 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[.]"

Ablonczy, 474 Md. at 162 (cleaned up). The Court explained:

> "Objections related to the inclusion/exclusion of prospective jurors are treated differently for preservation purposes because accepting the empaneled jury, without qualification or reservation, is directly inconsistent with the earlier complaint about the jury, which the party is clearly waiving or abandoning. Objections related indirectly to the inclusion/exclusion of prospective jurors are not deemed likewise inconsistent and are deemed preserved for appellate review. Although the difference between the two

> categories of objections may appear slight, it is important in light of the waiver implications."

Id. (quoting *Stringfellow*, 425 Md. at 469-70) (emphasis omitted).

In addition, the State in this case directs our attention to the following further explanation:

> Put another way, "an objection to a propounded, purportedly prejudicial, [voir dire] question relates directly to the composition of the jury[ ]" because a "prejudicial [voir dire] question, when propounded, may inject the very prejudice that [voir dire] attempts to filter out." By contrast, an "unpropounded [voir dire] question, like a defused bomb, cannot likewise prejudice the venire." Thus, there is a critical difference between objections to voir dire questions proffered by opposing counsel (or the circuit court *sua sponte*) that the circuit court ultimately asks the jury -- which are categorized as "direct" and waived -- and objections based on the trial court's decision not to ask a party's own proffered voir dire questions -- which are categorized as "indirect" and not waived. Counsel need not raise a prior objection when there is no one in the jury box that the objecting party specifically objected to. Rather, it is enough to simply note the exception in accordance with Md. Rule 4-323.

Ablonczy, 474 Md. at 165 (emphasis and citations omitted).

The focus of appellant's argument on this issue is that the failure to swear the venire, requiring them to answer the questions asked during voir dire "honestly and openly," left "no assurance that the jury that was ultimately impaneled" for his case was fair and impartial. The State responds that, because failure to swear the jury went directly to the composition of the jury, appellant's subsequent acceptance of the jury that was selected, "without qualification or reservation . . . contradicts the claim on appeal that the venire was an unexplored minefield from which the defense was forced to choose jurors at random." We concur with the State and conclude that appellant abandoned this claim when he accepted the jury panel at the end of the jury selection process. *See State v. Rich*, 415 Md.

567, 580 (2010) ("Forfeited rights are reviewable for plain error, while waived rights are not.").

Turning briefly to the second plain error factor, whether the claimed error was clear or obvious, and not subject to reasonable dispute, there is no dispute that a failure to swear the venire violates Maryland Rule 4-312(e)(1).

Moving on to the third factor, whether the error affected appellant's substantial rights or the outcome of the proceedings, the State reminds us that, prior to their arrival in the courthouse, prospective jurors are required to complete a Juror Qualification Form under penalty of perjury. *See* Md. Code Ann., Cts. & Jud. Proc. § 8-302(a). The process of voir dire is then overseen by a judge. *See* Md. Rule 4-312(e). And that the judge, in this case, instructed the jury prior to voir dire about what was expected from them during the process:

> We'll now proceed to what we call voir dire. I don't know if any of you have ever sat on a jury trial before, but **I'm going to ask certain questions to determine if you're impartial, unbiased and prepared to sit today as a juror.** It's a one-day case. It's a criminal case. **There are certain questions that have to be asked. We want to get an unbiased group.**
>
> So if you have any affirmative answers, meaning yes, or you're not sure of your answer, please raise your hand. I think someone is going to take your number, and then we'll talk to you later in private out of the courtroom.

(Emphasis added.)

With the above admonition to avoid bias and partiality in the voir dire process and the general presumption that jurors follow a judge's instructions, *see e.g.*, *Newton*, 455 Md. at 360, we further observe that there is no claim here that any specific prospective member

of appellant's venire answered any question untruthfully. *Cf. Williams v. State*, 394 Md. 98, 113-15 (2006) (ordering a new trial when it was revealed that a sworn juror failed to reveal a relationship with someone who worked in law enforcement); *Jenkins v. State*, 375 Md. 284, 291, 298 (2003) (concluding trial court abused its discretion in denying motion for new trial when it learned that one of the State's witnesses, a detective, and one of the jurors had "extensive non-incidental, improper contact" at a religious retreat). There is also no claim that appellant was denied adequate opportunity to challenge any prospective juror for cause or fairly exercise his peremptory challenges. It is also arguable that the failure to swear the venire could have been readily corrected by a belated administration of the oath, at least prior to the first dismissal for cause. *See Montgomery*, 206 Md. App. at 381 n. 17 (declining to recognize plain error "if the alleged error was one that might have been readily corrected if it had been called to the [circuit court]'s attention . . . .") (citing *Morris*, 153 Md. App. at 510).[6] It appears, therefore, that appellant's contention is akin to an appellate afterthought. *See Peterson v. State*, 444 Md. 105, 126 (2015) ("An appeal is not an opportunity for parties to argue the issues they forgot to raise in a timely manner at trial.").

Having determined that two of the first three factors weigh against plain error in this case, it is unnecessary to consider the fourth factor. *Winston*, 235 Md. App. at 567. Even were we to do so, we would not exercise our discretion to recognize plain error under the circumstances of the instant case. We are guided by the principle, under the Sixth

[6] The trial court in this case did not strike any prospective jurors for cause until after the completion of voir dire.

Amendment to the U.S. Constitution and Article 21 of the Maryland Declaration of Rights, that the "'overarching purpose of *voir dire* in a criminal case is to ensure a fair and impartial jury.'" *Wright v. State*, 411 Md. 503, 508 (2009) (quoting *Dingle v. State*, 361 Md. 1, 9 (2000)). While voir dire no doubt informs challenges for cause, given the acceptance of the jury that was ultimately selected in this case, a jury that was clearly sworn to its oath, and absent any claim of actual juror misconduct, we decline to exercise plain error review.

II.

Appellant asserts that defense counsel provided ineffective assistance by not objecting to alleged inconsistent verdicts when the jury acquitted him on two counts of second degree assault of the police officers involved, but convicted him of resisting arrest. The State presents a detailed response why defense counsel was not ineffective by not objecting to the alleged legally inconsistent verdicts.

Here, appellant was charged in the District Court of Maryland for Somerset County with two counts of second degree assault—one of Sergeant Hoover and the other of Deputy Corbin. He was also charged with resisting arrest. The jury was instructed that there were two separate counts of second degree assault as follows:

> Second degree assault, that's -- there are two counts of that because there are two individuals involved in that, and their names are on the verdict sheet. It would take, in this case, a form of what we used to call battery. So, in this case, a second degree assault is causing offensive physical contact to someone else. The State must prove the Defendant caused offensive physical contact with or to Sergeant Mark Hoover or -- and, not or -- and that the contact was a result of an intentional [or] reckless act on his part, and was not accidental, and that the contact was not consented to by Sergeant Mark Hoover or was not legally justified. There doesn't have to be injury. The key words are offensive physical contact.

> I'll repeat it because of the second individual against whom assault has been alleged, Kayla Corbin. Again, assault is causing physical -- offensive physical contact to someone else. In order to convict the Defendant of assault, the State must prove the Defendant caused offensive physical contact to Deputy Kayla Corbin, that the contact was a result of an intentional or reckless act on his part, and was not accidental, and the contact was not consented to by Deputy Corbin or was not otherwise legally justified.

See Md. State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:01(C) (2d ed. 2020) ("MPJI-Cr").

The jury also was instructed as to resisting arrest:

> He's charged with resisting arrest. To convict the Defendant of resisting arrest, the State must prove that a law enforcement officer attempted to arrest the Defendant, that the Defendant knew he was a law enforcement officer, that the Defendant intentionally refused to submit to the arrest and resisted the arrest by force or threat of force, and that the arrest was lawful, that is, the officer had probable cause to believe that the Defendant had committed a crime. In this case, it would be fleeing and eluding.
>
> Probable cause exists when the facts and circumstances taken as a whole would lead a reasonable law enforcement officer to believe that the Defendant was committing -- was fleeing and eluding in this case, which is a misdemeanor. And probable cause is less than a certainty, but more than a mere suspicion.
>
> An arrest is the taking, seizing -- seizure or detaining of a person by touching or placing hands on that person or by any act or words that indicates the officer's intention to take into custody that subject and that -- and that subjects him to the actual control and will of the officer making the arrest. It's an objective test, which is whether a reasonable person in the Defendant's position would have understood that he was under arrest.

See MPJI-Cr 4:27.1.

After closing arguments and deliberations, the jury acquitted appellant on both counts of second degree assault on the officers, but convicted him of resisting arrest. The jury was hearkened to their verdict. The trial court then collected the verdict sheet, showed

it to counsel, and asked whether both sides were "satisfied with the verdict sheet." Defense counsel replied "[y]es." The court and the parties then proceeded to discuss sentencing, specifically, merger of offenses. Defense counsel never raised an objection to any inconsistency with the jury's verdicts.

In *Price v. State*, 405 Md. 10 (2008), the Court of Appeals held that in "similarly situated cases on direct appeal where the issue was preserved, and verdicts in criminal jury trials rendered after the date of our opinion in this case, inconsistent verdicts shall no longer be allowed." *Id.* at 29. This holding applies "only to legally inconsistent jury verdicts, but not to factually inconsistent jury verdicts." *McNeal v. State*, 426 Md. 455, 458 (2012); *see Wallace v. State*, 219 Md. App. 234, 251 n. 12 (2014). In distinguishing the two, the *McNeal* Court explained:

> A legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law. Verdicts where a defendant is convicted of one charge, but acquitted of another charge that is an essential element of the first charge, are inconsistent as a matter of law. Factually inconsistent verdicts are those where the charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge. The latter verdicts are illogical, but not illegal.

McNeal, 426 Md. at 458 (citations and footnotes omitted); *see also Travis v. State*, 218 Md. App. 410, 449 (2014) ("In the universe of inconsistent verdicts, the percentage of factually inconsistent verdicts is far greater than is the percentage of legally inconsistent verdicts."); *Teixeira v. State*, 213 Md. App. 664, 668 (2013) (observing that appellate review of inconsistent verdicts is *de novo*).

Both parties direct our attention to *Nicolas v. State*, 426 Md. 385 (2012), and ask us to apply that case here. In *Nicolas*, the Court of Appeals made clear "that the offense of second degree assault merges into the offense of resisting arrest under the required evidence test." *Id.* at 407; *see Butler v. State*, __ Md. App. __, No. 1037, Sept. Term, 2021, slip op. at 19 (filed Aug. 31, 2022). The State attempts to distinguish the application of the *Nicolas* holding to this case on several grounds, including that "*Nicolas* veered from a strict application of the required elements test to scrutinize the facts of the case—an exercise that may be appropriate in a merger inquiry but not in a legal-inconsistency one." The State continues that there may be situations, such as in this case and as discussed in *Rich v. State*, 205 Md. App. 227, 240-50 (2012) (discussing distinctions involving application of force or threat of force used to resist as opposed to refusal to submit to arrest), and *DeGrange v. State*, 221 Md. App. 415, 421 (2015) (observing that both refusal to submit to arrest and resistance by force or threat of force required), where the type of force used to resist arrest was more passive than affirmative and therefore, not a "level of force" sufficient to prove second degree assault.

In reply, appellant concedes that a fair reading of *Nicolas* allows for situations where the level of force used to resist arrest could be one of two different modalities. As appellant puts it: "one which involves the application of force to a person and the other which involves the application of force to an inanimate object." Nevertheless, appellant continues, even using this modality test, the facts of this case "involved the application of force to the body of an officer," and that the second degree assault at issue here was a lesser included offense of resisting arrest. Because he was acquitted of second degree assault of

the officers, and convicted of resisting arrest, appellant maintains that the verdicts were legally inconsistent and that defense counsel was ineffective for not objecting.[7]

Ineffective assistance of counsel claims are governed by the settled doctrine of *Strickland v. Washington*, 466 U.S. 668 (1984). Pursuant to *Strickland*, a defendant claiming ineffective assistance of counsel that rendered his conviction or sentence invalid must show (1) *deficient performance*—"counsel's representation fell below an objective standard of reasonableness," and (2) *prejudice*—"there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 688, 694.

[7] In *Butler*, decided after the briefs were filed in this case, this Court looked to the specific facts of *Nicolas*, including that the defendant assaulted the police officers before and after an arrest was initiated, and explained that case as follows:

> The crux of Nicolas' argument was that the record was ambiguous "as to whether the jury convicted him of assault based on conduct that preceded or followed the initiation of the officers' attempt to arrest him" and that the ambiguity must be resolved in his favor. [*Nicolas*, 426 Md.] at 411. The Court of Appeals agreed, holding that, in resolving the factual ambiguities at trial in Nicolas' favor, his convictions for assault and resisting arrest were based on the same acts and should have been merged at sentencing. *Id.* at 408. Key to the Court's decision was the ambiguity in when the officers initiated the arrest. Reasoning that a reasonable jury could have found that the arrest began before or after the assaults, the Court ruled in Nicolas' favor and merged the convictions. *Id.* at 412-14.

Butler, slip op. at 20.

Whether we read *Nicolas* as turning on "levels of force," as in the *Rich* and *DeGrange* opinions, or "when" the assault occurred, as in *Butler*, ultimately, the *Nicolas* opinion comes back to the "same acts" test as applied to merger questions. *Nicolas*, 426 Md. at 404-05. The Court of Appeals held that there was a factual ambiguity in the record as to whether the second degree assaults and resisting arrest were based on the same acts and that the merger question would be resolved in Nicolas's favor. *Id.*

Ordinarily, an ineffective assistance claim is more appropriately resolved in a collateral proceeding initiated under the Uniform Post-Conviction Procedure Act. *See* Md. Code Ann., Crim. Proc. §§ 7-101–7-301. *See also Robinson v. State*, 404 Md. 208, 219 (2008) ("[A] claim of ineffective assistance of counsel should be raised in a post-conviction proceeding, subject to a few exceptions."); *Mosley v. State*, 378 Md. 548, 558-59 (2003). In *Mosley*, the Court of Appeals reaffirmed:

> When a defendant attacks a criminal judgment on the basis of denial of effective assistance of counsel, the Act thus provides the defendant with the possibility of an evidentiary hearing, reflecting a recognition that "adequate procedures exist at the trial level, as distinguished from the appellate level, for taking testimony, receiving evidence, and making factual findings thereon concerning the allegations of error." Post-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness.

Mosley, 378 Md. at 560 (citations omitted); *see Bailey v. State*, 464 Md. 685, 704 (2019) (quoting *Mosley*, 378 Md. at 560); *see also Perry v. State*, 344 Md. 204, 227 (1996) ("This Court ordinarily has required claims of ineffective assistance of trial counsel to be developed on post conviction, where a full, factual record can be made."), *cert. denied*, 520 U.S. 1146 (1997); *Walker v. State*, 338 Md. 253, 262 (1995) ("The consideration of ineffective assistance claims in a trial setting provides the opportunity to develop a full record concerning relevant factual issues, particularly the basis for the challenged conduct by counsel."), *cert. denied*, 516 U.S. 898 (1995); *Harris v. State*, 295 Md. 329, 338 (1983) ("'Where, as here, the record sheds no light on why counsel acted as he did, direct review by this Court would primarily involve 'the perilous process of second-guessing', perhaps

resulting in an unnecessary reversal in a case where sound but unapparent reasons existed for counsel's actions.'") (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)).

As appellant observes, there is a limited exception to these rules. "'[W]here the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim, there is no need for a collateral fact-finding proceeding, and review on direct appeal may be appropriate and desirable.'" *Robinson*, 404 Md. at 219 (quoting *Smith v. State*, 394 Md. 184, 200 (2006)). *See Mosley*, 378 Md. at 566 (noting "rare instances" where ineffective assistance of counsel claim addressed on direct appeal); *Testerman v. State*, 170 Md. App. 324, 335 (2006), *cert. dismissed as improvidently granted*, 399 Md. 340 (2007).

The instant case, in our view, is a quintessential example of the need for a collateral proceeding to resolve appellant's claim of ineffective assistance of counsel. Regarding the deficient performance prong of the *Strickland* test, the parties dispute whether the verdicts were legally inconsistent, and that issue is not properly before us in the instant appeal. *See Givens*, 449 Md. at 486 (holding that "to preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts before the verdicts are final and the trial court discharges the jury."). Moreover, the record below does not reveal why defense counsel failed to object to the allegedly inconsistent verdicts. Defense counsel's failure to object may very well have been the product of reasonable professional assistance, and thus not deficient.

Finally, on the prejudice prong of the *Strickland* test, without a further record, it is unclear whether there was a reasonable probability that, if defense counsel had objected,

the result of the proceeding would have been different, *to appellant's benefit*. An objection to allegedly inconsistent verdicts may well have resulted in a worse result for appellant. *See Tate v. State*, 182 Md. App. 114, 136 (2014) (noting that upon timely objection, the jury is to be reinstructed and allowed to resume deliberations until the inconsistency is resolved), *cert. denied*, 406 Md. 747 (2008). Accordingly, we decline to consider appellant's issue of ineffective assistance of counsel on direct appeal.

JUDGMENTS OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.