UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1619

September Term, 2014

DEREZ DEAUNTAE HUNT

v.

STATE OF MARYLAND

Hotten,
Nazarian,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: June 29, 2015

Appellant, Derez Deauntae Hunt, was convicted by a jury in the Circuit Court for Harford County of theft under the value of $1000. In this appeal, he presents one question for our consideration: Was the trial judge's jury instruction on circumstantial evidence erroneous? We shall hold that the language of the instruction was within the discretion of the trial court and was not erroneous.

I.

Appellant was indicted by the Grand Jury for Harford County with burglary in the first degree, burglary in the third degree, burglary in the fourth degree and theft under the value of $1000. The jury convicted him of theft and acquitted him of first degree burglary.[1] The court sentenced appellant to a term of incarceration of eighteen months and ordered restitution in the amount of $400.

Inasmuch as the sole issue in this appeal relates to the jury instruction the court gave in response to a jury note inquiring as to the circumstantial evidence instruction, we will set out only those facts relevant to the appeal issue. The court acknowledged that it did not give any examples of circumstantial evidence and discussed with counsel the court's proposed example it intended to tell the jury—one related to children in a room where objects had been broken. Defense counsel objected to any example that differed from that in the pattern instruction.

[1]The State *nolle prossed* the third and fourth degree burglary charges.

In the initial jury instructions at the close of all of the evidence, the trial court elected to instruct the jury on the meaning of circumstantial evidence, deviating from the Maryland Criminal Pattern Jury Instruction. Md. State Bar Ass'n., *Pattern Jury Instructions,* Cr-3.01 (2nd ed. 2013).[2] The court instructed the jury as follows:

> "During final argument you may hear the attorneys use the term 'inference,' and in their arguments they may ask you to infer on the basis of your reason, experience and common sense, from one or more established facts, the existence of some other fact. An 'inference' is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists. There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The State may ask you to draw one set of inferences, while the defense may ask you to draw another. It is for you, and you alone, to decide what inferences you will draw.
>
> There are two types of evidence which you may consider in this case: direct evidence and circumstantial evidence. Direct evidence is that which is attributable to direct, actual knowledge of a fact. Circumstantial evidence is that which proves the facts in issue indirectly by proof of a chain of facts and circumstances from which an inference may arise as to the facts in issue.
>
> A conviction may rest on circumstantial evidence alone or on direct evidence alone or on a combination of circumstantial and direct evidence. No greater degree of certainty is required when the evidence is circumstantial than when it is direct.
>
> Regardless of the type of evidence presented, you must be convinced of the Defendant's guilt beyond a reasonable doubt by all of the facts and circumstances of the case as well as by any rational inferences which may arise.

[2] All subsequent references to pattern jury instructions shall be to Md. State Bar Ass'n, *Pattern Jury Instructions.*

> So, while you are considering the evidence presented to you, you are permitted to draw from the facts, which you find to be proven, such reasonable inferences as would be justified in light of your experience."

After the jury began to deliberate, the jury sent a note to the judge, asking the court to give "examples of circumstantial evidence related to burglary." The court re-instructed the jury as follows:

> "During final argument you may hear the attorneys use the term 'inference,' and in their arguments they may ask you to infer on the basis of your reason, experience and common sense, from one or more established facts, the existence of some other fact. An 'inference' is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact which you know exists. There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The State may ask you to draw one set of inferences, while the defense may ask you to draw another. It is for you, and you alone, to decide what inferences you will draw.
>
> There are two types of evidence which you may consider in this case: direct evidence and circumstantial evidence. Direct evidence is that which is attributable to direct, actual knowledge of a fact. *For example, my robe is black and everybody can see that my robe is black.* Circumstantial evidence is that which proves the facts in issue indirectly by proof of a chain of facts and circumstances from which an inference may arise as to the facts in issue. *I give this example of circumstantial evidence. A parent is in one room. Children are playing in another room. The parent hears something break in that room where the children are playing. The parent goes to that room, sees the broken object on the floor, but the children are not there. The children deny that they broke the object. The parent infers that it wasn't a ghost or the wind, that the children must have broken it. So no one saw the children break the object but circumstantially the parent infers based on their reason and*

> *common sense that it was the children and not some other type of event.*
>
> A conviction may rest on circumstantial evidence alone or on direct evidence alone or on a combination of circumstantial and direct evidence. No greater degree of certainty is required when the evidence is circumstantial than when it is direct.
>
> Regardless of the type of evidence presented, you must be convinced of the Defendant's guilt beyond a reasonable doubt by all of the facts and circumstances of the case as well as by any rational inferences which may arise.
>
> So, while you are considering the evidence presented to you, you are permitted to draw from the facts, which you find to be proven, such reasonable inferences as would be justified in light of your experience." (emphasis added).

Defense counsel objected to the court's jury instruction, stating as follows:

> "Your honor, I would object to anything other than the pattern jury instruction. I think the Courts have been clear. Straying away from that is the fastest way to come back."

As indicated, the jury acquitted appellant of burglary and convicted him of theft. The court sentenced appellant, and this timely appeal followed.

II.

Before this Court, appellant argues that the trial court deviated from the pattern circumstantial evidence instruction in a manner prejudicial to appellant.[3] Appellant argues

[3]Maryland Criminal Pattern Jury Instruction 3:01 reads as follows:

> There are two types of evidence — direct and circumstantial. An example of direct evidence that it is raining is when you look out the courthouse window and see that it is

(continued...)

that the pattern circumstantial evidence instruction is "credibility neutral," but the instruction the court created, where the parent asked the children if they broke the object and they denied it, relied upon a determination that someone is lying. The court's instruction, in appellant's view, mislead the jury as to the nature of circumstantial evidence.

The State argues that even though the court's instruction included the fact that the children denied breaking the object, the instruction was not biased and remained "credibility neutral." The State reasons that when the instruction is considered as a whole, the fact that the children denied breaking the object was not important to the inference the parent drew from the evidence. It presented only the reason that the mother drew the significant inference. Additionally, the State notes that the response to the jury note requesting examples of circumstantial evidence related to burglary could not have been misleading because the jury acquitted appellant of the crime of burglary.

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[3](...continued)

> raining. An example of circumstantial evidence that it is raining is when you see someone come into the courthouse with a raincoat and umbrella that are dripping water.
>
> The law makes no distinction between the weight to be given to either direct or circumstantial evidence. No greater degree of certainty is required of circumstantial evidence than of direct evidence.
>
> In reaching a verdict, you should weigh all of the evidence presented, whether direct or circumstantial. You may not convict the defendant unless you find that the evidence, when considered as a whole, establishes [his] [her] guilt beyond a reasonable doubt.

III.

An appellate court reviews a trial court's decision to give a particular jury instruction for abuse of discretion. *Appraicio v. State,* 431 Md. 42, 51 (2013). Whether a jury instruction was given properly is a question of law that this court reviews *de novo*. Whether the trial court should give a supplemental jury instruction in a criminal case lies within the discretion of the trial court. *Lovell v. State,* 347 Md. 623, 657 (1997). Nonetheless, a trial court should respond to a deliberating jury's question in a way to try to clarify any confusion evidenced by the jury question, particularly when the question involves an issue central to the case. *State v. Baby,* 404 Md. 220, 263 (2008).

IV.

Maryland Rule 4-325 addresses jury instructions in criminal cases. The Rule provides that at the request of any party, the trial court shall instruct the jury as to the applicable law in the case. Rule 4-325(c). As for appeal, the Rule provides specifically that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Rule 4-325(e).

Appellant's argument that the children example was not "credibility neutral" and that it improperly relied upon a determination that someone was lying is not preserved for our review. That argument was never presented to the trial court. Appellant never articulated

distinctly his objection to the children-breaking-objects example. As the Rule states clearly, a defendant is required to state "distinctly" the grounds for his objection to preserve it for appeal. *See Grandison v. State*, 425 Md. 34, 69 (2012). We have stated often that the purpose of this provision of the Rule is to provide the trial court with an opportunity to correct any error in the jury instruction before the jury begins deliberating. *Id.* Where no timely objection is made to the instruction, we may consider the issue and reverse only if the trial court committed plain error in the instruction. *See Savoy v. State*, 420 Md. 232, 243 (2011). Plain error in jury instructions is the rare case, indeed. *Id.* at 255. Appellant has failed to satisfy the Rule requirement of stating distinctly his objection to the court's example, and we decline to review for plain error.

We turn then to the objection which was preserved for our review—that the court committed reversible, prejudicial error in not giving the jury the circumstantial evidence instruction verbatim from the Maryland Pattern Jury Instruction. Although many Maryland appellate decisions have urged the trial court to instruct the jury using the Maryland State Bar Association Criminal Pattern Jury Instructions, in Maryland, as opposed to some other states, the Court of Appeals has not mandated by rule or case law that trial judges instruct juries from one particular form "pattern jury instruction," with the exception of the reasonable doubt instruction set out in the State Bar Pattern Jury Instructions. *See, e.g., Ruffin v. State,* 394 Md. 355, 373 (2006) (holding that in "every criminal jury trial, the trial court is required to instruct the jury on the presumption of innocence and the reasonable doubt standard of

proof which closely adheres to MPJI-CR 2:02. Deviations in substance will not be tolerated"); *Hall v. State*, 214 Md. App. 208, 222–23 (2013). Appellant has cited no Maryland case mandating the verbatim use of any particular circumstantial evidence instruction or particular example of circumstantial evidence, and our own research has not uncovered any case. Appellant's argument that the trial court erred by straying from "the approved pattern jury instruction of circumstantial evidence" has absolutely no support in Maryland law and is simply wrong.

Assuming *arguendo* that any claim of error regarding the court's children example was preserved for our review, we would find that the court did not err in crafting its own example and declining to use the example set out in the pattern instruction, although the judge would have been better advised to use the non-objectionable, neutral pattern rain example. As the State points out in its brief, the fact that the children denied breaking the object was not biased and, when viewing the instruction as a whole, that the children denied breaking the object was not the significant inference the parent drew from the circumstantial evidence. Nonetheless, including a denial of an accused, *i.e.*, the children, could lead to other objections not here presented. Moreover, because the jury acquitted appellant of the burglary charge, any error would have been harmless beyond a reasonable doubt.

While we hold that the trial court did not err in deviating from the pattern instruction, we reiterate that which has been so often stated by this Court and the Court of Appeals—"that it is well-established that a trial court is strongly encouraged to use the

pattern jury instructions." *Johnson v. State,* 2015 Md. App. LEXIS 68, 30 (2015); *Yates v. State*, 202 Md. App. 700, 723 (2011) (noting that we have repeatedly "recommended that trial judges use the pattern instructions"), *aff'd*, 429 Md. 112 (2012); *Minger v. State*, 157 Md. App. 157, 161 n.1 (2004) (stating that "[a]ppellate courts in Maryland strongly favor the use of pattern jury instructions."); *Green v. State*, 127 Md. App. 758, 771 (1999) (noting that "we say for the benefit of trial judges generally that the wise course of action is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions"). The far safer course for the trial court, and with little intrusion on the broad discretion of the court, is to instruct from the pattern jury instruction.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.