Circuit Court for Montgomery County
Case No. 138197C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2009

September Term, 2022

TYRECE A. JONES

v.

STATE OF MARYLAND

Reed,
Beachley,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: March 11, 2024

*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).

Appellant, Tyrece Jones, was convicted by a jury sitting in the Circuit Court for Montgomery County of carjacking and second-degree assault.[1] Appellant raises the following two questions on appeal, which we have slightly rephrased for clarity:

I. Did the suppression court err when it denied appellant's motion to suppress his confession to the police where the confession occurred in the police car as appellant was being transported to the detention center several hours after his initial *Miranda*[2] warnings?

II. Did the trial court err when it instructed the jury on: A) exclusive, unexplained possession of recently stolen property, and B) flight?

For the following reasons, we shall affirm the judgments. We shall begin with the facts and law related to appellant's suppression hearing to answer the first question raised and then turn to the facts and law related to appellant's challenges to the jury instructions.

I. *Miranda*

Suppression hearing facts

On the evening of January 14, 2021, a carjacking was perpetrated by a lone assailant in Chevy Chase, Maryland. The following afternoon, the police stopped the stolen car, which contained appellant and two other men. Appellant fled the vehicle but was captured by the police. Appellant was subsequently transported to police headquarters by the lead detective. Once there, the detective advised appellant of his *Miranda* rights. Appellant

[1] The jury acquitted appellant of armed carjacking and first-degree assault. The court sentenced appellant to 20 years of imprisonment for carjacking, all but eight years suspended; a consecutive five-year sentence for assault, all suspended; five years of probation upon his release from prison; and $3,207 in restitution.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

made no incriminating statements. A few hours later, the same detective transported appellant to the detention center in a patrol car. Appellant confessed to the carjacking during his ride to the detention center.

Prior to trial, appellant moved to suppress the statement he made in the police car, arguing that his confession was invalidly obtained. At the suppression hearing, lead detective Paris Capalupo of the Montgomery County Police Department testified for the State, and appellant testified in support of his motion.

Detective Capalupo testified that, following appellant's arrest, he transported appellant to police headquarters for questioning. Appellant was placed in an interview room around 5:00 p.m. The interview room was equipped for audio and video recording, and a CD of the recordings was admitted into evidence. Appellant's handcuffs were removed, but he remained in leg shackles.

About 30 minutes after being placed in the interview room, Detective Capalupo entered the room and began asking appellant for background information. Appellant indicated, among other things, that he was several years sober, 19 years old, and enrolled in college. Appellant answered most of the biographical questions but refused to give his address and cell phone number. Based on the information provided, the detective filled out the background section of a Montgomery County Department Police Advice of Rights Form.

The detective then read appellant each of the rights listed on the form and placed a checkmark next to each right after appellant indicated that he understood. The form provided:

1. You have the right now and at any time to remain silent.
2. Anything you say may be used against you.
3. You have the right to a lawyer before and during any questioning.
4. If you cannot afford a lawyer, one will be appointed for you.
5. (Note: #5 will only be used for an arrestee who will be charged as an adult.) You have the right to be taken promptly before a District Court Commissioner who is a judicial officer not connected with the police. A Commissioner will inform you of each offense you are charged with and the penalties for each offense; provide you with a written copy of the charges against you; advise you of your right to counsel; make a pre-trial custody determination; and advise you whether you have a right to a preliminary hearing before a judge at a later time.
6. Do you understand what I have just said? Answer:_____

The detective wrote "yes" after question number six, and appellant signed the form at the bottom. The detective began reading the form at 5:46 p.m., and appellant signed the form at 5:48 p.m. Appellant agreed to waive his *Miranda* rights and speak to the detective.

Appellant and the detective talked for approximately thirty minutes. The detective reviewed the carjacking evidence the police had gathered, including: a video of the carjacking; the victim's description of the carjacker; the gun and car involved in the carjacking and appellant's cell phone, all of which the police would test for DNA and fingerprints; and information from one of the other men who had been in the stolen car

with appellant. Appellant declined to answer certain questions and made no incriminating statements.

Detective Capalupo concluded the interview around 6:20 p.m., telling appellant that he would drive him to the detention center after he had completed some paperwork. The detective left the room and returned about an hour later. When the detective returned, he handcuffed appellant again and walked him out of the building where he placed him in the front seat of a police car and secured his seat belt.

The detective testified that as he began to drive to the detention center, he and appellant "just started talking." He could not remember who initiated the conversation. The detective testified that he engaged appellant in an "even friendlier" manner than during the earlier interview, like he was appellant's "mentor[.]" He testified that he then asked appellant:

> I'm investigating a carjacking where a woman was pumping gas alone, and she was attacked. And I said, do I need to keep looking for, you know, some guy, some stranger out there? Or do I have the right guy? And he told me, no you don't, you don't have to keep looking.

At this point, the detective turned on his cell phone recorder hoping that appellant would repeat his incriminating statement. The two continued to talk, with appellant expressing concern that "his life was gonna be over" and asking about "how much time he was gonna get." During the recording, appellant did not make any incriminating statements.

The detective testified that he and appellant spoke for a minute or so before he turned on his phone to record the conversation. The drive to the detention center took about 15 minutes. The detective denied telling appellant during the car ride that their

conversation was just between the two of them or that it was not being recorded. The detective estimated that less than two hours elapsed between when he started the interview with appellant at headquarters and when appellant was placed in the police car for transport to the detention center.

Appellant testified that when he and the detective entered the car, the detective began the conversation in a "friendly" manner, like he was "talking to me as a human, not with his badge." Appellant testified that the detective said to him, "you could just tell me the truth . . . it's between me and you[.]" Appellant offered conflicting testimony about whether the detective told him that their conversation would not be recorded. According to appellant, he did not believe that the *Miranda* warnings that the detective had read to him earlier in the interview room applied when they entered the car because in the car the detective had a "friendly" tone and "we start[ed] talking like we homeboys, like we, we cordial[.]"

After the parties' arguments, the court denied appellant's motion to suppress, ruling that Detective Capalupo was not required to re-advise appellant of his *Miranda* rights before speaking to him in the police car.

Appellate argument

Appellant argues on appeal that the suppression court erred when it denied his motion to suppress his incriminating statement in the car. He argues that under *State v. Tolbert*, 381 Md. 539 (2004), by the time the police reinitiated questioning him in the police car, his initial *Miranda* warnings had become stale due to the passage of time, change of

location, the detective's friendly tone, and his young age. Appellant differentiates the following three Maryland cases that have held that *Miranda* re-advisements were unnecessary: *Tolbert*, 381 Md. at 548–55; *Harper v. State*, 162 Md. App. 55, 85–87 (2005); and *Pryor v. State*, 195 Md. App. 311, 326–27 (2010). The State argues that the facts of this case fall within the parameters of the above three cases, all of which held that *Miranda* re-advisements were unnecessary. The State therefore asserts that the suppression court did not err in denying appellant's motion to suppress.

Preservation

We initially conclude that appellant has not preserved his argument for our review because he did not raise or pursue it below. After the evidentiary portion of the suppression hearing, the State initially stated that the five-factor test of *Tolbert* was applicable and then restated the five factors. The State then focused on whether or not there was an improper inducement when, according to appellant, the detective promised appellant that the conversation would remain between the two of them. The State urged the court to find the detective's testimony credible and argued that there was no improper inducement because he did not tell appellant that the conversation was between the two of them.

Appellant, in contrast, argued that the controlling law was *Lee v. State*, 418 Md. 136, 157 (2011), where the Maryland Supreme Court held that a detective's statement to a suspect during interrogation at a police station that their conversation was "just between you and me, bud. Only you and me are in here," rendered the suspect's prior *Miranda* waiver ineffective because the words "were nothing less than a promise of confidentiality"

in contravention of the *Miranda* warnings that stated that anything said may be used against the suspect in a court of law. Although appellant discussed the re-advisement of *Miranda* rights in the context of an improper inducement, appellant never cited *Tolbert* or its five-factor test.

After the party's arguments, the suppression court cited *Lee* and found insufficient evidence that the detective made an inducement. Like appellant, the court never cited nor addressed the *Tolbert* factors. The court concluded by stating: "[T]herefore, I'll determine that, that there was no improper inducement made after the wa[iv]er of *Miranda* occurred. Therefore, there was no requirement that the defendant be re-*Mirandized* prior to making any additional statements. So I'll deny the motion to suppress the statement." (Emphasis added).

On appeal, appellant states that the suppression court "should have addressed the [*Tolbert*/stale argument and the *Lee*/improper inducement argument] separately." Appellant does not raise the *Lee*/improper inducement argument on appeal but latches onto the court's statement in its conclusion that "there was no requirement that the defendant be re-*Mirandized*[,]" and argues that the court addressed the *Tolbert* factors and erred in its analysis. It appears to us, however, that the court made that statement in the context of a *Lee*/improper inducement analysis, not a *Tolbert*/stale *Miranda* analysis.[3] We have held

[3] Specifically, the court's response appears to be related to appellant's argument that, pursuant to *Missouri v. Seibert*, 542 U.S. 600 (2004), his statements were not admissible because he needed to be re-advised of his *Miranda* rights following the alleged improper inducement.

that Md. Rule 4-252(a), governing mandatory motions in circuit court, specifically provides "that a failure to raise a suppression issue in the trial court in a timely manner waives the issue [on appeal], absent good cause." *Carroll v. State*, 202 Md. App. 487, 513 (2011), *aff'd*, 428 Md. 679 (2012). By not raising the *Tolbert*/stale *Miranda* argument below, appellant has failed to preserve it for our review. Even if he had properly preserved the argument for our review on appeal, however, we would find it without merit. We explain.

Standard of review

On review of a motion to suppress, we apply the following well-recognized standard:

> [W]e view the evidence adduced at the suppression hearing, and the inferences fairly deducible therefrom, in the light most favorable to the party that prevailed on the motion. We defer to the trial court's fact-finding at the suppression hearing, unless the trial court's findings were clearly erroneous. Nevertheless, we review the ultimate question of constitutionality de novo and must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case.

Corbin v. State, 428 Md. 488, 497–98 (2012) (quotation marks omitted) (quoting *Williamson v. State*, 413 Md. 521, 531–32 (2010)).

***Miranda* law**

In the watershed case of *Miranda v. Arizona*, the United States Supreme Court recognized that a "police-dominated atmosphere" can be inherently coercive and potentially work to "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 445, 467. "[T]o combat these

pressures and to permit a full opportunity to exercise the privilege against self-incrimination,"[4] the Supreme Court set out the following prophylactic warnings that law enforcement personnel are required to convey to a suspect before a custodial interrogation:

> [A suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 467, 479. When the State at a criminal trial hopes to use an incriminating statement given during custodial interrogation, the State must "establish by a preponderance of the evidence that the statement satisfies the mandates of *Miranda*." *Tolbert*, 381 Md. at 557.

Whether police must give renewed *Miranda* warnings before interrogating a previously warned suspect where there is a break in interrogation depends on the totality of the circumstances. *Harper*, 162 Md. App. at 86. The Maryland Supreme Court has stated that a re-advisement is necessary when "the initial warnings have become so stale and remote that there is a substantial possibility the individual was unaware of his constitutional rights at the time of the subsequent interrogation[.]" *Tolbert*, 381 Md. at 553 (quoting *State v. McZorn*, 219 S.E.2d 201, 212 (N.C. 1975)). In making that determination, the *Tolbert* Court listed the following "illustrative factors":

> (1) the length of time between the giving of the first warnings and the subsequent interrogation . . .; (2) whether the warnings and the subsequent

[4] The privilege against self-incrimination is protected by the Fifth Amendment to the United States Constitution, which the Supreme Court has interpreted to provide that "[N]o person shall be compelled in any criminal case to be a witness against himself[,]" applied to the States through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6–7 (1964) (quoting *Bram v. United States*, 168 U.S. 532, 542 (1897)).

> interrogation were given in the same or different places . . .; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers . . .; (4) the extent to which the subsequent statement differed from any previous statements . . .; [and] (5) the apparent intellectual and emotional state of the suspect.

Id. (first four alterations in original) (quoting *McZorn*, 219 S.E.2d at 212)).

In each of the three cases cited by appellant, Maryland appellate courts held that re-advisement of *Miranda* was not necessary. In *Tolbert*, Tolbert's mother drove him to a Maryland State Police Barracks to take a polygraph test. *Id*. at 545. Once there, a corporal explained to Tolbert that the test would "take approximately two hours and it consisted of three phases—a pre-test interview, an instrumentation phase, and a post-test interview." *Id*. Tolbert was taken to a polygraph room where he was advised of his *Miranda* rights at 6:05 p.m. and the police performed the instrumentation phase of the test. *Id*. Tolbert was then taken "upstairs to another office" where he was not re-*Mirandized*. *Id*. at 545–46. During a conversation with the corporal, who told him that his responses had been deceptive, Tolbert confessed. *Id*. at 546. The corporal brought a second officer into the room, and Tolbert repeated his confession. *Id*. That officer placed Tolbert under arrest at about 8:00 p.m. and transported him to a police station where Tolbert confirmed his confession. *Id.* at 546, 554. All three statements were made "within two and a half hours of the initial advice of rights." *Id*. at 549.

The motions court held that the second and third statements were taken in violation of *Miranda* and granted Tolbert's motion to suppress them, reasoning that when the second officer entered the room during the interrogation, the interrogation changed from

noncustodial to custodial and required a re-advisement of *Miranda* warnings. *Id*. at 546–47. The State appealed and the Supreme Court reversed, holding that it was unnecessary to re-*Mirandize* Tolbert a second time. The Court explained that:

> [o]nly a short time elapsed between the time [Tolbert] was advised of his *Miranda* rights and the questioning by [the second police officer]. . . . [O]nly about two and a half hours elapsed from [Tolbert's] *Miranda* waiver to the time he made the third statement, and only two hours elapsed between the waiver and [Tolbert's] second statement. There was no break in the chain of events and [Tolbert] was continuously in the company of the police. The officers described [Tolbert's] demeanor as calm and quiet throughout the course of their dealings. [Tolbert's] three statements were substantially the same.
>
> Although [the corporal] brought [Tolbert] upstairs to another interview room after the instrumentation phase of the polygraph examination, [Tolbert] remained in the same building and was aware that the subsequent questioning was the third phase of the polygraph procedure as explained by [the corporal] before the test began. Although [the second officer] and [the corporal] were with different police departments, they were working on the same case. . . .
>
> We conclude that there was no violation of Tolbert's rights by the failure of the police to re-advise him of the *Miranda* warnings when his status became custodial. Considering the record and the totality of the circumstances, there is nothing to suggest that Tolbert was unaware of his rights. There is simply no evidence and he makes no argument to suggest that the effectiveness of the earlier *Miranda* warnings was diminished.

Id. at 554–55 (footnote omitted).

Our Court reached a similar result in *Harper*. In that case, Harper was arrested and taken to a police station where he was placed in an interview room at about 5:00 p.m. *Harper*, 162 Md. App. at 87. Around 6:45 p.m., a detective entered the room and advised him of his *Miranda* rights and spoke briefly with him before leaving. *Id.* Harper initially gave an exculpatory statement. *Id.* at 65. At 8:45 p.m., a second detective entered the

room, woke Harper up, and conducted an interview. *Id*. at 87. Harper then dictated an incriminating statement. *Id*. at 66. The Court rejected Harper's argument that the second detective was required to readminister *Miranda* warnings, noting that "[o]nly two hours elapsed between the advisement of rights and [the second detective's] interrogation," that Harper remained in the same room the entire time, and that Harper "was not interrogated by multiple officers." *Id*. at 87.

In *Pryor,* this Court similarly held that re-advisement of *Miranda* rights was not necessary. In that case, Pryor was taken to the police station where he was *Mirandized* and then questioned by the police for approximately 30 to 40 minutes during which he made an incriminating statement. 195 Md. App. at 320. A ten-minute break ensued, after which the interview resumed for about ten minutes and Pryor made a second incriminating statement. *Id.* at 321. The entire interview process lasted about an hour. *Id*. at 327. We held that the police were not required to re-*Mirandize* Pryor after the break, given the "brevity of the overall encounter and the brief length of time of the break[.]" *Id*. We noted that "the two statements took place in the same room, the same detectives were present during both statements, the statements apparently did not differ in their general complicity, and there was no apparent change in appellant's intellectual and emotional state between the two statements." *Id*.

Appellant points out that unlike the above three cases, he was interrogated in separate locations, and argues that there was a change in the tone of the interrogation because the interrogation at headquarters had the "trappings of a police interrogation"

while the questioning in the car did not. Additionally, he points out that during the interrogation at headquarters he admitted no complicity in the carjacking, but he did during the car ride. Appellant acknowledges that he was questioned both times by the same detective, and the length of time between the initial *Miranda* warnings and his confession was similar to that in *Tolbert* and *Pryor*. He argues, however, that those factors should be given less weight in the totality analysis in light of the change of location, the detective's change of tone, and the significant time he was left alone in the interview room before the change of location. He highlights that he was only 19 years old at the time of the interrogation.

The amount of time that elapsed between the initial *Miranda* warnings and confession was two and a half hours in *Tolbert*, and two hours in *Harper*. Appellant does not dispute that the time lapse here appears to be about the same, less than two hours—5:48 p.m. to 7:30 p.m. We have found longer delays insufficient to require renewed *Miranda* warnings. *See Collins v. State*, 52 Md. App. 186, 191 (1982), *aff'd*, 296 Md. 670 (1983) (renewed warnings not required where the confession was made within 5.5 hours from the original taking of the appellant into custody); *Smith v. State*, 20 Md. App. 577, 586 (1974) (renewed warnings not required where approximately 4.5 hours elapsed "between the administration of the warnings . . . and the commencement of the preparation of the statement"). Moreover, less than two hours is far short of those situations where we have found delay a factor favoring renewed warnings. *See Franklin v. State*, 6 Md. App. 572, 577–78 (1969) (questioning took place two days after initial *Miranda* warnings were

given); *Brown v. State*, 6 Md. App. 564, 566–67 (1969) (in excess of twelve hours elapsed between the time of the initial *Miranda* warnings and the ultimate inculpatory statement).

Appellant appeared calm during the questioning and was enrolled in college. The same detective who administered the *Miranda* warnings was the only officer who was present both times appellant was questioned. Although there was a change of location, we note that the second interview occurred with many of the "trappings" of law enforcement as appellant was placed in a police car in both handcuffs and leg shackles. Although appellant's statements changed from denying complicity to confessing to the crime, there is insufficient evidence that appellant's change of heart had anything to do with the length of time or change of location.

Viewing the evidence in the light most favorable to the State, we are not persuaded that the suppression court erred in denying appellant's motion to suppress as appellant has not sufficiently demonstrated that the *Miranda* warnings had diminished or become stale under the circumstances presented. Based on the totality of the circumstances, we conclude that renewed *Miranda* warnings were not required.

II. Jury instructions

Appellant argues that the circuit court erred in giving two jury instructions: 1) exclusive, unexplained possession of recently stolen property, and 2) flight. Appellant argues that the first instruction was given in error because there was no evidence that he was in "exclusive" possession of the stolen car. He argues that the second instruction was given in error because the instruction did not differentiate between consciousness of guilt

for the charged offense and consciousness of guilt for various uncharged offenses he may have committed, such as unauthorized use of a motor vehicle or unlawful possession of a firearm. The State argues that appellant has failed to preserve his arguments for our review, and in any event, they are meritless. We shall first briefly set forth facts elicited at trial to provide context to the arguments raised.

Trial facts

Around 8:15 p.m. on January 14, 2021, Kathryn Gilreath stopped her 2018 Audi A3 at a gas station on Connecticut Avenue in Chevy Chase, Maryland. After filling her car with gas, a man approached, pointed a gun at her, and demanded her car keys. When she tried to run, he tackled her and took her keys from her pocket. As he tried to start her car, she attempted to retrieve her purse and phone from the car. The man then exited the car and hit her in the chin and chest with his gun. He then got back in the car and drove away.

Ms. Gilreath described her assailant to the police after they arrived. Surveillance footage from the gas station at the time of the carjacking was admitted into evidence. Ms. Gilreath testified at trial that she believed appellant was her assailant, though she could not be 100% certain.

Police then contacted the company that maintained the tracking system on the stolen Audi A3 and set up a surveillance of it. Around 12:45 p.m. the day after the carjacking, the police observed the car in the parking lot of an apartment complex in Oxon Hill. Shortly thereafter, appellant was seen walking to the car with another man. The police then saw the car leave the lot with appellant driving and the other man in the front passenger seat.

The police followed the car and observed it stop twice, once for appellant and the passenger to switch places and again when they picked up a third man.

At some point, the officers attempted to stop the car by blocking it in, but the driver and appellant fled on foot and some officers gave chase. A handgun was found on the ground in the area of the back passenger side several feet from the Audi, which the police later confirmed was a functioning firearm. The officers pursuing appellant saw him get into another vehicle driven by a woman later identified as appellant's grandmother. The police stopped that car and arrested appellant. The police recovered appellant's cell phone during a search of the second car.

Appellant's phone contained video of the steering wheel of the stolen Audi; video of appellant and two other men playing music in the Audi; a photograph of an Audi key fob; and screen shots of web searches on the afternoon before the carjacking for ways to turn off a car alarm. The phone's browser history showed that continuously between 12:30 p.m. and 1:50 p.m. on the day after the carjacking, it was used to look up how to remove or disable the tracking system on cars, specifically a 2018 Audi A3. Cell site analysis revealed that appellant's phone used a cell phone tower in the area of the carjacking shortly before it occurred.

As discussed above, appellant was arrested and taken to a police station, where he waived his *Miranda* rights and eventually admitted involvement. Appellant, however, denied having a handgun. During a search of appellant's apartment, the detective found a pair of shoes that he believed looked "very similar" to the ones worn by the carjacker as

reflected in the surveillance footage. The recovered gun was sent for DNA testing but nothing of evidentiary value was found.

Law on jury instructions

Md. Rule 4-325(c) governs a trial court's instructions to a jury and provides:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

In sum, a trial court is required to give a requested instruction when: "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given." *Thompson v. State*, 393 Md. 291, 302–03 (2006) (quoting *Ware v. State*, 348 Md. 19, 58 (1997)).

Whether "the evidence is sufficient to generate the desired instruction in the first instance is a question of law for the judge." *Roach v. State*, 358 Md. 418, 428 (2000). Whether evidence supports the giving of a requested instruction is a "relatively low threshold"—the party must only show "some evidence" that supports the giving of the requested instruction. *McMillan v. State*, 428 Md. 333, 355 (2012) (quoting *Dykes v. State*, 319 Md. 206, 216 (1990)). In determining whether competent evidence exists to generate the requested instruction, we examine the record in the light most favorable to the requesting party. *Rainey v. State*, 480 Md. 230, 255 (2022) (quoting *Dykes*, 319 Md. at 216–17).

A. Jury instruction: Exclusive possession of recently stolen property

After the close of the evidence, the parties and the court discussed jury instructions. The court advised the parties that it would give a modified version of Maryland Pattern Jury Instruction—Criminal 4:32.3 on exclusive, unexplained possession of recently stolen property.[5] Specifically, the court proposed the following instruction, which it ultimately gave:

> Now, the next additional instruction is called inf[erence] from exclusive unexplained possession of recently stolen property. So, exclusive possession, either alone or with others have recently stolen property, unless it's reasonably explained, may be evidence of theft.
>
> If you find that the defendant was in possession of the property shortly after it was stolen, and the defendant's possession is not otherwise explained by the evidence, you may, but are not required to, find that the defendant was the thief.
>
> Similarly, in the event that you find that the property was stolen during the course of carjacking or armed carjacking, you may, but are not required

[5] MPJI-Cr 4:32.3, titled: "Theft, inference from exclusive unexplained possession of recently stolen goods" provides:

> Exclusive possession [either alone or with others] of recently stolen property, unless reasonably explained, may be evidence of theft. If you find that the defendant was in possession of the property shortly after it was stolen, and the defendant's possession is not otherwise explained by the evidence, you may, but are not required to, find the defendant guilty of theft.
>
> Possession means knowingly having the property on one's person or knowingly having the property within one's control or at one's disposal. In deciding whether the defendant's possession was sufficiently close in time to the theft to be evidence of participation in the theft, you should consider all the surrounding circumstances, including such factors as the type of property stolen, how the defendant may have come into possession, and the amount of time between the theft and the defendant's possession.

> to find that the defendant was the carjacker. Possession means knowingly having the property on one's person or knowingly having the property within one's control or one's disposal.
>
> In deciding whether defendant's possession was sufficiently close in time to the theft to be evidence of participation in the theft, you should consider all the surrounding circumstances including such factors as the type of property stolen, how the defendant may have come into possession, and the amount time between the theft and the defendant's possession.

Preservation

Md. Rule 4-325(f) provides: "No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." "[W]hen specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Handy v. State*, 201 Md. App. 521, 537 (2011) (quoting *Klauenberg v. State*, 355 Md. 528, 541 (1999)); *see also Gutierrez v. State*, 423 Md. 476, 488 (2011) ("[W]hen an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified." (second alteration in original) (quoting *Sifrit v. State*, 383 Md. 116, 136 (2004))).

Appellant objected to the court giving the above modified instruction, stating as follows: "Well, one, we don't want the instruction read at all. Neither the defense [n]or the State asked for it. Second, we would specifically, or even more object to the additional language that the [c]ourt included that is not part of the pattern jury instruction." Defense

counsel then added: "[I]n the notes of this instruction . . . it says, use this instruction if the defendant is charged with theft by unauthorized control. Meaning that he was charged with recent possession of stolen property. He is not charged with that. He is charged with the actual carjacking." After the court instructed the jury, appellant's counsel told the court: "I'd like to restate my objection about the jury instructions and . . . in particular about the instructions that we've argued over."

Even though appellant initially objected "generally" to the instruction, he then set forth three reasons for objecting: 1) no party requested it; 2) the judge modified it improperly; and 3) the instruction only applies where theft by unauthorized use is charged as part of the greater crime of armed carjacking. On appeal, however, appellant argues that the instruction was not generated by the evidence because he was never seen in "exclusive" possession of the stolen car but in the company of one or two other men, who could not be accomplices because the carjacking was committed by a lone assailant. He did not raise that argument below, and therefore, his argument is not preserved for our review.[6]

B. Jury instruction: flight

In *Thompson v. State*, 393 Md. 291 (2006), the Maryland Supreme Court engaged in a thorough analysis of Maryland law on the jury instruction concerning the defendant's flight and adopted the four-inference test set forth in *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977). That test provides that each of the following inferences must reasonably be drawn from the facts of the case before a flight instruction may be properly given: "(1)

[6] We note that appellant admitted to participating in the carjacking.

from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." 393 Md. at 312 (quoting *Myers*, 550 F.2d at 1049).

Preservation

During the parties' jury instructions discussion with the court, the State requested a flight instruction and appellant objected. Appellant argued that a flight instruction was not warranted because there were other valid explanations for his flight from the car other than the carjacking, *i.e.*, consciousness of guilt related to various uncharged offenses he may have committed, such as unauthorized use of a motor vehicle and unlawful possession of a handgun. The court disagreed and instructed the jury on flight as follows:[7]

> The final instruction is called flight or concealment. A person's flight immediately after the commission of a crime, or after having been accused of committing a crime is not enough by itself to establish guilt. But it is a fact that may be considered by you as evidence of guilt.
>
> Flight, under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight. If you decide there is evidence of

[7] MPJI-Cr 3:24 on flight or concealment of defendant provides:

> A person's flight [concealment] immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight [concealment] under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight [concealment]. If you decide there is evidence of flight [concealment], you then must decide whether this flight [concealment] shows a consciousness of guilt.

> flight that [sic] you must decide whether this flight shows a consciousness of guilt.

As stated above, after the court's instructions to the jury, appellant's counsel argued: "I'd like to restate my objection about the jury instructions and . . . in particular about the instructions that we've argued over."

On appeal, appellant argues that the above flight instruction was given in error because it skipped the third inference of *Thompson*—consciousness of guilt to consciousness of guilt concerning the crimes charged. Appellant acknowledges that the flight instruction given by the circuit court was in accordance with MPJI-Cr 3:24 on flight, but he argues that the instruction should not be given where, as in this case, flight may have been based on a non-innocent reason, such as consciousness of guilt for an uncharged offense. According to appellant, in these situations, a flight instruction is misleading and prejudicial.

The State frames appellant's argument on appeal as the trial court should have modified the pattern jury instruction on flight to fit the circumstances of his case, and because he did not make that argument below, we should not consider his argument on appeal. In our view, appellant's argument in the trial court is sufficiently similar to his appellate argument, and therefore is preserved for our review. However, as we explain, we find no merit to this argument.

Merits

We disagree with appellant's argument that a trial court should not give a flight jury instruction when there are non-innocent reasons for the flight, such as crimes with which

he was not charged. It is true that appellant was not charged with unauthorized use of a vehicle, nor was he charged with unlawful possession of a handgun. However, the law on flight does not require that those crimes be charged before the flight instruction may be properly given. Rather, the Maryland Supreme Court in *Rainey v. State*, 480 Md. 230, 257 (2022), clarified that the third prong of the four-prong *Thompson* test requires that the consciousness of guilt relate to "the crime charged *or closely related crime*[.]" (Emphasis added).

This clarification is in keeping with the issue before the *Thompson* Court. In *Thompson*, the police attempted to stop Thompson because he matched the description of a suspect in a recent attempted robbery and shooting. 393 Md. at 294. Thompson biked away from the police when approached, leading to a chase and his eventual apprehension. *Id*. The police found a significant quantity of cocaine on him following his arrest. *Id*. Thompson later told the police that he ran because he did not want to be found in possession of the cocaine. *Id*. at 313.

During trial for the robbery crimes, the trial court gave a flight jury instruction, and Thompson was later convicted of several crimes related to the robbery. *Id*. at 300. Thompson appealed. *Id.* The Maryland Supreme Court reversed his convictions, holding that the flight instruction was given in error. *Id.* at 316. The Court explained:

> The gravamen of the issue is whether Mr. Thompson fled in an attempt to avoid apprehension for the crimes for which he was on trial. In the present case, the jury was not presented with evidence of what may have been an alternative and at least a cogent motive for Mr. Thompson's flight, specifically that drugs were found on his person. During his interview with police, Mr. Thompson asserted that he ran from them because he had drugs

> in his possession, which, according to the State, amounted to eighty-six vials of crack cocaine at the time of his arrest. He was in essence arrested *in flagrante delicto* with respect to the crime of possession of controlled dangerous substances. We find that this fact, which was known to all parties involved although not revealed to the jury, undermines the confidence by which the inference could be drawn that Mr. Thompson's flight was motivated by a consciousness of guilt with respect to the crimes for which he was on trial in the present case; it provides a foundation for the alternate, and equally reasonable, inference that Mr. Thompson fled due to the cocaine in his possession, an action a person in his position may have taken irrespective of whether he also shot and attempted to rob Mr. Gottesman. Mr. Thompson thus was placed in a difficult situation where he must either not object to the highly prejudicial evidence concerning his possession of a significant amount of cocaine being introduced to the jury to explain his flight (or perhaps forced to make a Hobson's choice[8] to introduce such evidence himself), or decline to explain his flight and risk that the jury would not infer an alternative explanation for his flight.

Id. at 313–14 (footnotes omitted).

In *Thompson*, the Court held that when flight could be the result of an unrelated crime—such as Thompson's possession of cocaine, which was unrelated to the charges of attempted murder and armed robbery for which he was on trial—it was reversible error to give the flight instruction because of the Hobson's choice foisted on the defendant, *i.e.*, he could not offer his possession of cocaine as an obvious explanation for his flight because such evidence could unduly prejudice the jury. *Id.* at 315.

We note that the *Thompson* Court cited *Fuselier v. State*, 468 So. 2d 45 (Miss. 1985), where the Mississippi Supreme Court addressed a similar fact pattern. 393 Md. at 314–15.

[8] "Hobson's choice" is defined as "1. an apparently free choice when there is no real alternative 2. the necessity of accepting one of two or more equally objectionable alternatives." *See Hobson's Choice*, Merriam Webster, https://www.merriam-webster.com/dictionary/Hobson%27s%20choice.

In *Fuselier*, a prison escapee was charged with murdering a woman and stealing her car. 393 Md. at 314. The *Fuselier* court held that at defendant's trial for murder and theft, the defendant "was obviously put in a no-win situation by either being required to explain his flight and the fact he was a prison escapee or not explaining the flight and subjecting himself to the flight instruction." *Id.* (quoting *Fuselier*, 468 So.2d at 57). Because the prison escape was unrelated to the murder and car theft crimes, the trial court erred in giving a flight instruction. *Id.* at 314–15 (citing *Fuselier*, 468 So.2d at 57).

The present case is distinguishable. Here, appellant ran from a stolen vehicle. He was arrested and tried for the armed carjacking of the same vehicle that occurred the previous day. Unlike the facts of *Thompson* and *Fuselier*, there was no second, *unrelated* crime he would have had to disclose to explain his flight from the stolen vehicle. The acts of unauthorized use of a motor vehicle or unlawful possession of a firearm were "closely related" to the crimes charged. Accordingly, we are not persuaded that the circuit court erred in giving a flight instruction under the facts of this case.

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