UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0274

September Term, 2015

CHARLES J. ROBERTS

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

File: May 12, 2016

Following a trial in the Circuit Court for Montgomery County, a jury convicted appellant, Charles J. Roberts, of possession of a firearm by a prohibited person, possession of PCP, and resisting arrest. The trial court sentenced appellant to a total prison term of ten years, suspending all but six years, to be followed by five years of supervised probation.[1]

On appeal, appellant asks us to consider the following question: "Did the trial court err in its answers to jury notes sent while the jury was deliberating [appellant's] fate?" For the reasons that follow, we shall affirm the judgments of the trial court.

BACKGROUND

On the evening of May 21, 2014, Montgomery County police officers responded to a 911 call regarding two men—one in possession of a handgun—who appeared to be under the influence of drugs in the area of Victory Farm Drive, Montgomery County.[2] When the officers encountered two men matching the descriptions given to the 911 operator, the man later identified as appellant was stumbling and talking loudly, while the second man, later

[1] The court imposed a ten-year sentence on the firearm charge, suspending all but six years, along with a concurrent three years on the drug charge and a concurrent two years on the resisting arrest charge.

[2] The caller described the person with the gun as a black man wearing a black jacket and jeans. Appellant, the other man, was described as lighter-complected and wearing white pants, white shoes, and a red, white, and blue striped shirt. From the CAD report received from the 911 dispatcher, however, the responding officers believed it was the man in the striped shirt who had the gun, so they focused the majority of their attention on appellant.

identified as Kittrell Budd, appeared to be trying to pull appellant away from the nearby apartment complex. The officers did not, at that time, observe a weapon.

After surveilling the men for a short time, Detective Christopher Bush ordered four officers to stop the men. The officers approached the men shouting, "Police, don't move. Put your hands up," but the two men took off running in different directions. Officers recovered a vial of suspected PCP from the spot where the men had been standing.[3]

The officers who pursued appellant observed him reaching into the waistband of his pants while he ran and holding onto something at his waist in a "furtive" and "suspicious and abrupt" manner. Appellant slipped and fell, and, to one officer, it sounded like something metallic hit the ground. When appellant rose, one of the officers saw a handgun on the ground where appellant's stomach had been, and yelled, "Gun."[4]

The officers ordered appellant to stop and show his hands; instead, appellant ran off again. One officer gave chase while another remained with the gun. A short time later, the pursuing officer caught up to appellant and took him to the ground. Despite being told that he was under arrest and to stop resisting, appellant, appearing high on drugs, "put up a very big fight," requiring five officers to subdue and handcuff him. Budd surrendered to police without incident; no contraband was found on his person.

[3] The county's forensic scientist later confirmed that the substance comprised 3.37 grams of PCP.

[4] Budd was nowhere near the gun. The gun was later determined to be an operable 9mm Sig Sauer. At trial, the parties stipulated that appellant was prohibited from possessing a firearm.

DISCUSSION

During its deliberations, the jury sent the trial court two notes containing questions that related to the handgun possession charge. Appellant argues that the court's responses to those questions were insufficient and failed to convey adequately the law critical to the charge of possession of the handgun. The State counters that (1) appellant affirmatively waived any consideration of error with regard to the response to one of the notes; and (2) appellant's argument with regard to the other note is meritless, because the court could not have answered the jury's question in the manner appellant sought without opining on the verdict, which would have improperly invaded the province of the jury.

At the close of all the evidence, the trial court instructed the jury with regard to possession of a regulated firearm:

> Possession means having control over a thing, whether actual or indirect. The defendant does not have to be the only person in possession of a firearm. More than one person may have possession of the same object at the same time. A person not in actual possession who knowingly has both the power and intention to exercise control over an object either personally or through another person has indirect possession.
>
> In determining whether the defendant had indirect possession of a firearm, consider all of the surrounding circumstances. These circumstances include the distance between the defendant and the firearm and any indications that the defendant was participating with others in the mutual use of the firearm.

Defense counsel and the prosecutor declared themselves satisfied with the instruction as given.

During deliberations, the trial court informed the parties that it had received two notes from the jury:

THE COURT:	One note reads as follows: "Does knowingly hanging out with someone brandishing a firearm constitute having power and intention related to indirect possession of a firearm?" The second question is: "Does 'use of a firearm' include merely carrying a loaded gun, or does it require firing it or threatening to fire it?" Let's take the first one first. "Does knowingly hanging out with someone brandishing a firearm constitute having power and intention related to indirect possession of a firearm?"
[PROSECUTOR]:	Your Honor, I would ask that they be instructed they've been given all the appropriate instructions with respect to the law of possession. They're to continue deliberating, and I—
THE COURT:	Well, let me tell you what I propose to do, and then I will be glad to hear your comments. My proposal is to write them as follows: "Whether the defendant indirectly possessed a firearm is for you to decide."
[DEFENSE COUNSEL]:	I would ask the Court to answer the first question no, because they're asking a reasonable legal question, and there's a clear answer. And the answer is, if [SECOND DEFENSE COUNSEL] and I are hanging out and I know perfectly well that she has a gun, she usually does, that the fact that I'm choosing to associate with her doesn't mean that I'm somehow in possession of her handgun.
[PROSECUTOR]:	Your Honor, I'd object to that, because I think they've been instructed on joint and several and

actual possession. They have the law with respect to it. I think for them to start lobbing hypotheticals to us, they're looking for more insight other than what the law and the instructions allow.

THE COURT: What I will do is, I will say: "Please refer to the jury instructions regarding possession, and whether the defendant indirectly possessed a firearm is for you to decide." Let me just write that.

[DEFENSE COUNSEL]: I think that what is for them to decide is whether the State has proven that. So I'd ask the Court to phrase that as—

THE COURT: Okay.

[PROSECUTOR]: That's fine.

THE COURT: Number two: "Does use of a firearm include merely carrying a loaded gun, or does it require firing it or threatening to fire it?"

And my proposed response to that is that "Use of a firearm is not limited to firing it or threatening to fire it."

[DEFENSE COUNSEL]: I don't know where the use language comes from, but—

THE COURT: The use language comes from the instruction when we asked them to consider the circumstances regarding the possession, because we looked through just to find out where it came from. It said, "These circumstances include the distance between the defendant and the firearm and any indication that the defendant was participating with others in the mutual use of a firearm." And that's where they got the term use of a firearm.

[DEFENSE COUNSEL]: Could you please repeat your proposed response?

THE COURT: My proposed is that "Use of a firearm is not limited to firing it or threatening to fire it."

[PROSECUTOR]: That's fine.

[DEFENSE COUNSEL]: Well, then what would use include if not firing it—

THE COURT: That's for them to decide. But here they're asking, they're basically wanting me to tell them, is there a requirement that he fired it or threatened to fire it for it to constitute use of a firearm, or is possession, just possession, really enough. I'm not telling them either way. I'm just saying that there is no requirement that he fire it or threaten to fire it.

[DEFENSE COUNSEL]: But that is how firearms are used. And so it's not enough that—if the other person possessed the firearm, and—

THE COURT: You want me to tell them that possession is enough for use? I don't think you want me to do that.

[DEFENSE COUNSEL]: I don't want the jury to have the misapprehension that merely associating with someone that has a firearm, even if I know that that person has a firearm, is sufficient for me to be in possession of the firearm.

THE COURT: But that's not what—

[PROSECUTOR]: That's not the question.

THE COURT: —this question goes to. This question just—they're asking me, use of possession, is that enough to just say that he carried a loaded gun, or does it require firing it or threatening it?

[DEFENSE COUNSEL]: Bearing it.

THE COURT: And that's why what I'm proposing to say is that use of a firearm is not limited to firing it or threatening to fire it.

[PROSECUTOR]: That's fair.

[DEFENSE COUNSEL]: I guess I'd still object to that response, because that is how one uses a firearm. If it were being used—I can't think of any other way to use it. If it were being used as a paperweight—

[PROSECUTOR]: Well, to threaten. To play.

THE COURT: I don't know. You know, it's true that those are the uses that are commonly associated with a weapon, firing it or threatening to fire it. But I don't know what else it might be there for. There may be other uses I can't even think of. But what they're talking about, mutual use of the firearm, I'm not sure. That's got to be up to them to decide. I can't tell them what it is.

[DEFENSE COUNSEL]: I would then—I think we're giving them more of a response on the second question than the first. And so my preference then for the second question would be to refer them to the instructions themselves rather than saying that use includes possession, because I'm not sure that that's true.

[PROSECUTOR]: And I would object to that, Your Honor. Because I think their question is very specific, whether or not there was a requirement. And there is no requirement that it had to been used [sic], or attempted to use, or used in a menacing manner. I thought that the Court's proposed instruction was fair. If anything, it was overly fair to the defendant, and I think it's appropriate.

[DEFENSE COUNSEL]: It's true that the jury doesn't have to find that the gun was used in order to find that it was possessed. But the jury instruction speaks about use in terms of it as a factor in determining whether there is possession, and that's a commonly understood phrase that they should interpret as inconsistent with the understanding of the English language, without nudging from the Court.

THE COURT: I'm just thinking. All right. Here's what I'm proposing to do. I'm proposing to respond to them: "Use of a firearm is to be determined by the jury."

[DEFENSE COUNSEL]: All right.

[PROSECUTOR]: Can it say "use, if any?" Because I'm just concerned—

THE COURT: Okay.

[PROSECUTOR]: —that they're now going to think that—

THE COURT: I don't see that that makes any difference, but sure.

[DEFENSE COUNSEL]: I don't object to that phrasing.

THE COURT: Okay.

[PROSECUTOR]: But then, Your Honor, can—

THE COURT: Yes?

[PROSECUTOR]: Can it be just clear that use of the firearm or intention to use is not a requirement of possession? Because now I'm concerned that what's going to be sent back to them is that they have to find an intent, and there is no specific intent associated with this count.

THE COURT: Oh, I don't think that there is. I'm going to also say, please refer again to jury instruction regarding possession.

* * *

All right. Thank you, folks.

[DEFENSE COUNSEL]: Thank you.

The court's responses in accordance with the above discussion were provided to the jury in writing, and the jury posed no further questions before reaching its verdict.[5]

In our view, appellant has failed to preserve this issue—relating to either jury question—for our review. Maryland Rule 4-325(e) provides:

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

In *Jones-Harris v. State*, we pointed out that "'Maryland Rule 4-325(e), as well as a multitude of cases in th[e Court of Appeals], make it clear that the failure to object to a jury instruction ordinarily constitutes a waiver of any later claim that the instruction was erroneous.'" 179 Md. App. 72, 86 (quoting *Walker v. State,* 343 Md. 629, 645 (1996)),

[5] As to the first question, the court wrote, "Please refer to jury instruction regarding possession; whether the State has proved Defendant had indirect possession of a firearm is for you to decide." (Jury note #1). Regarding the second question, the court answered, "Use, if any, of a firearm is to be determined by the jury. Please refer to jury instruction regarding possession." (Jury note #2).

cert. denied, 405 Md. 64 (2008). The waiver rule applies equally to a re-instruction. *See Collins v. State*, 318 Md. 269, 284 ("Counsel's failure to except to the reinstruction is indicative of an acceptance . . . . Under these circumstances, defense counsel has failed to preserve the challenge to the court's instructions . . . ."), *cert. denied*, 497 U.S. 1032 (1990); *see also Dawkins v. State*, 313 Md. 638, 642-43 (1988) ("If the instruction claimed to be error occurs during supplemental instructions, *and the party promptly objects after the supplemental instruction*s, Rule 4-325(e) appears to entitle that party to challenge the supplemental instructions on appeal." (Emphasis added)).

In this matter, there was significant discussion among the attorneys and the trial court about the proper response to the jury's questions. With regard to the first question—"Does knowingly hanging out with someone brandishing a firearm constitute having power and intention related to indirect possession of a firearm?"—defense counsel initially asked the court to respond with a flat, "No." After the prosecutor's objection to that response and further discussion, however, the court stated that it would advise the jury to "refer to the jury instructions regarding possession, and whether the defendant indirectly possessed a firearm is for you to decide." Defense counsel did not object to that proposed response, instead merely asking the court to phrase its answer in terms of the jury having to decide whether the State had proven whether appellant indirectly possessed a firearm.

The trial court and the prosecutor agreed to that request, and the jury was so instructed. Consequently, appellant received exactly what he asked for, and he cannot now

claim error by the court in its response to the first jury note. *See Raras v. State*, 140 Md. App. 132, 168-69, *cert. denied*, 367 Md. 90 (2001).

Appellant similarly waived any claim of error with regard to the second jury note. In its second note, the jury asked, "Does 'use of a firearm' include merely carrying a loaded gun, or does it require firing it or threatening to fire it?" Defense counsel did object to the court's initial suggested response and advised the court that it was his preference that "the second question would be to refer them to the instructions themselves rather than saying that use includes possession, because I'm not sure that that's true." When the court advanced its next proposed response, "Use of a firearm is to be determined by the jury," defense counsel said, "All right." The prosecutor then asked the court to substitute "use, if any" for "use" in the response, and defense counsel replied, "I don't object to that phrasing." Again, the jury was so instructed, and appellant cannot claim error when he affirmatively agreed to the response offered by the court.

Even if appellant had preserved the issue, we would find no error in the court's responses to the jury's questions. Md. Rule 4-325(a) requires the court to instruct the jury at the close of the evidence and permits the court to supplement those instructions at a later time, "when appropriate." The decision of whether to supplement the instructions, and the extent of such supplementation, "'are matters left to the sound discretion of the trial judge, whose decision will not be disturbed on appeal in the absence of a clear abuse of discretion.'" *Smith v. State*, 371 Md. 496, 508 (2002) (quoting *Mitchell v. State*, 338 Md. 536 (1995)). It is the trial court that is in the best position to weigh the facts and

circumstances and "to surmise which of the phrases in his instructions have been absorbed and which should be embellished or repeated." *Jefferson v. State*, 194 Md. App. 190, 207 (2010) (quoting *Oliver v. State*, 53 Md. App. 490 (1983)).

Appellant argues that the jury, through its notes, was asking whether it could find appellant guilty of possessing a handgun if he did not have the gun under his control or in his direct possession. Nothing in the instructions as given, he continues, explained the concept of "mere presence."

After much discussion at the bench about potential responses to the jury's questions, the trial court ultimately exercised its discretion by advising the jury to rely upon the court's original instruction relating to possession—direct or indirect—of a firearm by a prohibited person, with the addition of verbiage that it was up to the jurors to determine if the State had proved the elements of the crime.

The original instruction, to which neither side objected, adequately answered the question of whether appellant could be found guilty of possessing the handgun if it was not under his control or direct possession.[6] Moreover, the record belies appellant's assertion that the jury was not instructed about a person's "mere presence" during the commission of a crime. Indeed, the court instructed the jury that

> a person's presence at the time and place of a crime without more is not enough to prove that a person committed the crime. The fact that a person witnessed a crime, made no objection, or did not notify the police, does not make that person guilty of a crime.

[6] In attacking the response to the jury's note regarding indirect possession, appellant appears to ignore the fact that the State arguably adduced sufficient evidence of his *direct* possession of the firearm.

> However, a person's presence at the time and place of the crime is a fact in determining whether the defendant is guilty or not guilty.

Therefore, had appellant preserved the issue he presents, we would conclude that there was no abuse of the trial court's discretion in responding as it did to the two notes propounded by the jury.

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