UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1216

September Term, 2015

HARRISON BRIGHT

v.

STATE OF MARYLAND

Arthur,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: November 17, 2016

Harrison Bright appeals from his convictions in the Circuit Court for Baltimore City of first-degree murder, and related firearm offenses. He raises the following questions for our review:

> "1. Did the trial court err by failing to suppress two pre-trial photographic identifications of Mr. Bright because they were impermissibly suggestive?
>
> 2. Did the trial court err by admitting bad acts evidence against Mr. Bright?
>
> 3. Was the evidence insufficient to convict Mr. Bright?
>
> 4. Did the trial court commit plain error by giving a confusing jury instruction in response to a question during deliberations?"

We shall answer the above questions in the negative and affirm.

I.

Appellant was convicted by a jury in the Circuit Court for Baltimore City with the offenses of first degree murder, use of a handgun in the commission of a crime of violence, wearing, carrying or transporting a handgun, and possession of a handgun by a prohibited person. The court sentenced appellant to a term of life imprisonment, suspend all but 50 years and 5 years' probation for murder, 5 years consecutive for use of a handgun, and 5 years consecutive for prohibited person in possession of a regulated firearm.

Appellant filed a pre-trial motion to suppress two photo-identifications of appellant by witnesses Craig Henderson and Toni Eberhart. Detective Shawn Reichenberg of the Baltimore City Police Department testified that he showed Mr. Henderson and Ms.

Eberhart a photo array containing 6 photos. He explained that police print the 6 array photographs on one piece of paper, with a paragraph on the back that is supposed to be read to the viewer before showing the array. Detective Reichenberg asked Mr. Henderson, "[i]f I show you a group of pictures, do you think you could identify who Hood is?" He then read the paragraph on the back of the array, stating in part, "[t]he six photographs on this form may or may not contain the picture of the subject in connection with the investigation." Detective Reichenberg told Ms. Eberhart, "I'll show you a photo array to see if you can identify the individual that you saw shoot Shawn" before reading the same paragraph that he read to Mr. Henderson. Detective Reichenberg stated that Mr. Henderson had given him the name "Hood," and that both witnesses advised him that they were familiar with the suspect. The following exchange occurred:

> [DEFENSE COUNSEL]: Thank you sir. Now, do you believe that those statements would indicate that the person they should pick out is definitely in that photo array?
>
> [DETECTIVE REICHENBERG]: In my opinion, in my opinion, no. The difference in this case is that they all know one another and have for years. So by them telling—they gave—they provided me the nicknames. So, like, in the instance with Hood—with them saying "Hood did it," I don't know who Hood is. But if I say to you—you know, if I say to that person, "Can you identify Hood?" That doesn't necessarily mean that Hood's on the photograph.

The circuit court denied appellant's motion to suppress the pre-trial identifications.

The primary issue at trial was whether the State proved that appellant was the shooter of Shawn Pooler. Mr. Henderson testified that in the early morning of August 13, 2013, he was with "Toni," "Shawn," "Hood," appellant, and a couple friends at a gas

station. He stated that he had known appellant and Mr. Pooler all his life. Mr. Henderson testified that he ran into Mr. Pooler and Ms. Eberhart on the way from the gas station to his house and that Ms. Eberhart went into her house, leaving him outside with Mr. Pooler and appellant. He and Mr. Pooler were talking with appellant, who left briefly and then returned with a .38 Smith and Wesson in his pocket. Appellant asked Mr. Henderson where the money and drugs were, and Mr. Henderson stated that he sold drugs all summer. Mr. Henderson stated that appellant walked away, started talking to Mr. Pooler, and then appellant reached for a gun, at which point Mr. Henderson walked away down Tunbridge Road. About three seconds later, Mr. Henderson heard three or four gunshots, and he then ran away, continuing down Tunbridge Road. Mr. Henderson saw police cars traveling in the opposite direction, but he kept walking because he did not know his friend had just been shot. He found out that Mr. Pooler had been shot on the way home, but he did not go to the police because "he didn't feel like it."

Ms. Eberhart, who lived on the street, testified that about 1:40 a.m. she was in front of her house with her cousin, Mr. Pooler. She stated that at some point they were joined by appellant. She testified that she, Mr. Pooler, appellant, and a few other people walked to a bus stop and a store. Mr. Pooler missed his bus, and Ms. Eberhart told him he could spend the night at her house. When they arrived at the house, she went inside to get Mr. Pooler some Kool-Aid and when she returned, appellant arrived outside her home, "holding Mr. Pooler] by the shirt...and he was fussing with him." She saw appellant holding a gun to Mr. Pooler's ear, and then saw appellant shoot Mr. Pooler in the head. She saw

appellant shoot Mr. Pooler four or five times, and then he pointed the gun at her and told her she had better not say anything. She ran back into the house to call 911, but she did not tell the police about appellant because she was afraid.

Assistant Medical Examiner Pamela Southall performed the autopsy of Mr. Pooler, and testified that Mr. Pooler had four gunshot wounds—to his left cheek, right side of the chest, right buttock, and back of right thigh. The cause of death was multiple gunshot wounds. During cross-examination by defense counsel, she testified that there was no evidence of any close-range firing on any of the wounds and there was no gunpowder residue or soot on any of them.

At the close of the State's case, defense counsel moved for judgment of acquittal, stating as follows:

> [DEFENSE COUNSEL]: Your Honor, if the State rests, then we make a motion for judgment of acquittal.
>
> THE COURT: Yes, sir.
>
> [DEFENSE COUNSEL]: As ludicrous as the evidence is, *I do believe that there is some basis on which the jury could find guilt, so I will submit on the motion*.
>
> THE COURT: All right. At this point in time, on the basis of the evidence that's been received thus far, I will have to deny your motion for judgment of acquittal as to each of the counts.

The court denied appellant's motion for judgment of acquittal. The defense rested, without presenting any evidence, stating as follows:

> [DEFENSE COUNSEL]: Your Honor, the defense has no witnesses and would rest. We'd renew our motion now in the light most favorable to the defense.

THE COURT: No.

[DEFENSE COUNSEL]: It was worth a shot. We would ask that the Court *take into consideration the people who have testified, the variance in their testimony, and realize that there's not enough evidence to go to the jury.*

During jury deliberation, the jury sent two questions to the court. First, the jury asked if Ms. Eberhart, Mr. Pooler, and appellant were all blood relatives. Second, the jury asked, "what constitutes a close range shooting?" Defense counsel addressed the instruction for the second question with the circuit court as follows:

THE COURT: Now, what about the second one?

THE STATE: Same thing. Rely on your own recollection.

THE COURT: Ah, you two think alike, I see.

[DEFENSE COUNSEL]: *And so, uh, that's certainly sufficient too*—they've got the report, so they can look at the report and then remember what was said. As far as—that's my reaction, Your Honor.

THE COURT: I do want your client to come up so he can be a part of this... I don't want him to miss any important phase of the—

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[DEFENSE COUNSEL]: Your honor, uh, I've had an opportunity to speak to Mr. Bright relative to the questions that were presented to the Court by the jury of what constitutes a close-range shooting and were both the victim and the defendant to him our response—joint response—is going to be, you have heard all the evidence, you have to base your deliberation on what you've already heard.

THE COURT: Okay. I'm going to read the actual question

on the record.

The court instructed the jury as follows:

> THE COURT: ...Question number 2 was: "What constitutes a close-range shooting?" My answer is: "You must rely on your own memory of the evidence. Signed, the Judge." You may take this back upstairs and give it to the jury, and we will recess and await the call of the jury.
>
> [DEFENSE COUNSEL]: Thank you very much, Your Honor.

As noted above, defense counsel lodged no objection to the court's responses to the jury questions.

The jury convicted appellant of all four counts. This timely appeal followed.

II.

Appellant argues first that the trial court erred by failing to suppress two pretrial photographic identifications of appellant on the grounds that the procedure was impermissibly suggestive as to lead to an irreparable misidentification. Appellant contends that the pretrial identification of appellant was "impermissibly suggestive" when Detective Reichenberg said to Mr. Henderson, "if I showed you a couple of pictures do you think you could identify who Hood is?" Even though Detective Reichenberg then read the language on the back of the photo array, appellant maintains that Detective Reichenberg's statement created the implication that "Hood" was in the photo array. For the same reasons, appellant asserts that Detective Reichenberg's statement to Ms. Eberhart asking if "she could identify the individual she saw shoot Mr. Pooler" was equally "impermissibly

suggestive." Appellant reasons that the burden should have shifted to the State to prove that the reliability of the identifications outweighed the suggestibility of the procedure. Second, appellant argues that, under Maryland Rule 5-404(b), the trial court erred in not excluding Ms. Eberhart's testimony that appellant pointed a gun at her and stated "you better not say anything." Appellant reasons that this testimony was uncharged criminal conduct that did not fall within any of the exceptions under Rule 5-404(b). Third, appellant argues that the evidence was insufficient to convict appellant. Appellant reasons that there was no physical evidence connecting him to the crime and no gun was ever recovered. He argues also that the State's case was based exclusively on the contradictory testimony of Mr. Henderson and Ms. Eberhart. Given the lack of evidence and inconsistencies in testimony, appellant concludes that no rational trier of fact could have convicted appellant of any crime.

Finally, appellant argues that the circuit court committed plain error by telling jurors to rely on their memory of a key piece of evidence—what a "close-range" shooting is—when there had never been any testimony about the evidence in question. Appellant claims that this instruction was confusing and inaccurate, and the circuit court could have instructed the jurors that they had "heard all the evidence in the case" or that they "should use their common sense." Further, the issue of a "close-range" shooting was central to the case because it could cast doubt on Ms. Eberhart's testimony. Appellant states that this error on a central issue to the case was compelling because the confusing jury instruction came during deliberation, and the instruction was the last thing the jury heard before returning a

verdict. Thus, appellant argues that the trial court committed plain error that this court should address.

The State counters that the circuit court concluded correctly that the two pretrial photo array identifications of appellant were not "impermissibly suggestive." Specifically, the State reasons that asking a witness "do you think you can identify [a suspect]," is not the same as suggesting that the witness is in the photo array. The State maintains that because these identifications were not "impermissibly suggestive," the circuit court was correct to not examine the reliability of the identifications and consequently admit the identifications.

The State argues that the circuit court exercised its discretion properly by admitting evidence that appellant threatened an eyewitness immediately after he shot the victim. The State maintains that Rule 5-404(b) does not apply to this situation, reasoning that appellant's action is an intrinsic act to the charged crimes because it occurred immediately after Ms. Eberhart witnessed the shooting of Mr. Pooler. And even if Rule 5-404(b) does apply, the State maintains that the evidence is nonetheless admissible to show appellant's consciousness of guilt and to explain why Ms. Eberhart said she did not see the shooter when she called 911 initially.

Third, as to the sufficiency of evidence, the State maintains that this issue is not preserved for appellate review because appellant did not argue with the requisite specificity the grounds for his motion for judgment of acquittal. Even if appellant preserved his sufficiency argument, the evidence was nonetheless sufficient to sustain appellant's

convictions. The State bases this conclusion on Ms. Eberhart's testimony that she saw appellant shoot and kill Mr. Pooler, which was further corroborated by Mr. Henderson's testimony. Apparently, the jury found the eyewitnesses believable despite any testimonial conflicts, and thus, the State maintains that this Court should defer to the jury's judgment.

Finally, the State argues that by agreeing with the court's proposed answer to a jury question concerning definition of a close-range shooting, appellant affirmatively waived his claim that the answer was error. Even if not waived, the State concludes there was no error committed by the circuit court because the Court instructed the jury properly to rely on its memory and the instruction was in no way confusing.

III.

When reviewing a denial of a motion to suppress evidence, ordinarily this Court considers only the record of the suppression hearing and not the evidence produced at trial. *Prioleau v. State*, 411 Md. 629, 638 (2009). Unless clearly erroneous, we accept the suppression court's factual findings regarding the credibility of witnesses. *Id.* This Court, however, conducts its own "independent review of the legal questions presented at the suppression hearing by applying the laws to the facts." *Volkomer v. State*, 168 Md. App. 470, 485 (2006). We review the evidence, and all reasonable inferences, in the light most favorable to the prevailing party. *Id.*

The Fourteenth Amendment to the United States Constitution provides "a due process check on the admission of eyewitness identification, applicable when the police

have arranged suggestive circumstances leading [a] witness to identify a particular person as the perpetrator of a crime." *Perry v. New Hampshire,* 132 S. Ct. 716, 720 (2012). The test in Maryland, as well as the federal model, for the admissibility of eyewitness testimony has two steps. In step one, the trial court must determine whether law enforcement employed "unnecessarily suggestive" identification procedures. *Id.* at 722; *see also Neil v. Biggers*, 409 U.S. 188, 197-99 (1972). If the trial court finds that law enforcement did not utilize "unnecessarily suggestive" identification procedures, the due process inquiry ends. *See Perry*, 132 S. Ct. at 720, 724-25. But if the court finds that "unnecessarily suggestive" procedures were used, the court should proceed to step two. At step two, the court should consider "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Biggers*, 409 U.S. at 199. At that stage, the court considers a variety of factors, "includ[ing] the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 199-200.

Maryland courts recognize that: "'[d]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *Webster v. State*, 299 Md. 581, 599-600, 474 A.2d 1305 (1984) (quoting *Moore v. Illinois*, 434 U.S. 220, 227, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977)). In regards to pretrial identifications, due process principles

safeguard the accused against the admission of evidence based on an identification procedure that was "unnecessarily suggestive" that will likely lead to misidentification at trial. *See James v. State*, 191 Md. App. 233, 252 (2010). We apply a two-step inquiry to due process challenges to pretrial identifications. *Jones v. State*, 395 Md. 97, 109 (2006). A court will not admit a pretrial identification if it is found to be "impermissibly suggestive,"[1] and then found to be unreliable. *Id.*

The burden is on the accused to establish that the identification procedure was "impermissibly suggestive." *Id.* at 109-110. Suggestiveness can exist "during the presentation of a photo array when the manner itself of presenting the array to the witness or the makeup of the array indicates which photograph the witness should identify." *Smiley v. State*, 442 Md. 168, 180-81 (2015). Courts, which have considered police comments similar to the comment of Detective Reichenberg, have held that the remarks are not such to be considered "impermissibly suggestive." *See Towes v. United States*, 428 A.2d 836, 844-45 (D.C. 1981) (stating that an instruction to a witness that a photo array contains two subjects was not impermissibly suggestive because "those words would not have focused the witness' attention on any particular photos in the array."). *See* also *Smiley*, 442 Md. at 181-82 (declining to find a photo array as impermissibly suggestive where defendant's photo was one of two photos in the array that was not visibly altered by police, reasoning that the array did not suggest to the victim that the defendant was the

[1] Courts use the terms "unnecessarily" and "impermissibly" interchangeably in this context. *See Neil*, 409 at 196-97; *Webster*, 299 Md. at 600.

perpetrator because the six photographs in the array portrayed individuals with a number of other similar physical characteristics). In other words, "the sin is to contaminate the test by slipping the answer to the testee." *Conyers*, 115 Md. App.at 121. *See* also *Thomas v. State*, 213 Md. App. 388, 417 (2013) (holding that suggestivity "exists where the police, in effect, say to the witness: 'This is the man.'"). *See also State v. Williams*, 523 A.2d 1284, 1296 (Conn. 1987) (stating that a victim when presented with a display of photographs may reasonably assume "that police may consider one of the persons presented... [to be] a suspect in the case." (quoting *State v. Fullwood*, 476 A.2d 550 (Conn. 1984)).

If the answer to the first inquiry is "no," then this court need not examine the second inquiry, the identification is admissible at trial, and it is for the fact-finder (in this case, the jury) to decide whether the identification is to be believed and relied upon. *Jones*, 395 Md. at 109. If the identification was "impressively suggestive," however, then the court must decide, as an admissibility question and not a weight question, whether, under the totality of the circumstances, the identification was reliable. *Id.* During this second inquiry, the burden shifts to the State to prove "by clear and convincing evidence, that the independent reliability in the identification outweighs the corrupting effect of the suggestive procedure." *In re Matthew S.*, 199 Md. App. 436, 448 (2011) (quoting *Thomas*, 139 Md. App. at 208). In making this determination, courts will consider the following factors:

> "[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the

> accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation."

Neil, 409 U.S. at 199-200; *see also Webster*, 299 Md. at 607. A pretrial identification is deemed to be unreliable if there "is a very substantial likelihood of irreparable misidentification." *Turner v. State*, 184 Md. App. 175, 184 (2009) (quoting *Manson v. Brathwai*te, 432 U.S. 98, 116 (1977)).

Detective Reichenberg asked Mr. Henderson if he could "identify who Hood is" and if Ms. Eberhart could "identify the individual she saw shoot Mr. Pooler." Detective Reichenberg explained, however, that the two witnesses provided him with nicknames for appellant (Mr. Hood), which prompted him to ask the witnesses more specific questions. Asking the witnesses these questions is not the same as suggesting to the witnesses that the assailant is actually in the array, nor is it the same as suggesting which photo the witnesses should select. The extrajudicial identification was not "impermissibly suggestive" because the officer did not signal to the witnesses which photo they should select. *See Towles*, 428 at 844-45. As the photo array was not "impermissibly suggestive," the circuit court was not required to determine whether the identification was reliable. The court did not err.

IV.

We address next appellant's evidentiary argument that the trial court abused its discretion in admitting Ms. Eberhart's testimony that appellant pointed a gun at her

immediately after the shooting and told her not to talk to the police. Whether evidence is relevant is committed to the sound discretion of the trial court. *Claybourne v. State*, 209 Md. App. 706, 741 (2013). Therefore, when the trial court determines that testimony offered into evidence is relevant to the case before it, we do not reverse unless the "evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Id.* at 742 (quoting *Merzbacher v. State*, 346 Md. 391, 404 (1997)). Specifically, the admission of "other crimes" evidence is vested within the sound discretion of the trial court, and we will not reverse the trial court unless the court has abused its of discretion in admitting the evidence. *Copeland v. State*, 196 Md. App. 309, 316 (2010).

Md. Rule 5-404(b) states as follows:

> "**(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as prove of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."

The reason underlying Rule 5-404(b) is that a jury may conclude improperly that a defendant is "bad person," and may convict the defendant based on a propensity to commit criminal acts. *See Wynn v. State*, 351 Md. 307, 317 (1998); *Harris v. State*, 324 Md. 490, 496 (1991); *Ross v. State*, 276 Md. 664, 669 (1976).

Rule 5-404(b), however, does not "apply to evidence of crimes (or other bad acts or wrongs) that arise during the same transaction and are intrinsic to the charged crime or

crimes." *Odum v. State*, 412 Md. 593, 611 (2010). "Intrinsic" in this context means other criminal acts that are "inextricably intertwined" because "both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *Id.* at 612 (quoting *United States v. Chin*, 83 F.3d 83, 87-88 (4th Cir. 1991)). Further, the crimes charged cannot be fully explained without evidence of the other criminal acts. *Id.* at 614-15 (holding that the acts of robbery, carjacking, murders, and subsequent use of proceeds of the crimes were all intrinsic to the kidnappings because these crimes "blended...with the kidnappings that they formed one transaction . . . . "). The direct evidence found at a crime scene may reveal other chargeable offenses, but this possibility does exclude the evidence as a prior bad act. *Id.* at 611.

Even if Rule 5-404(b) applies, evidence of prior bad acts is admissible if it is relevant for purposes other than proving criminal propensity. Relevant to the present case, evidence of threats to a witness is admissible generally to show consciousness of guilt or to explain a prior inconsistent statement. *See Washington v. State*, 293 Md. 465, 470-72 (1982) (holding that prior bad acts are admissible as substantive evidence to show consciousness of guilt when the threats against a witness can be linked to the defendant, and are admissible even if the threats cannot be linked to the defendant if the testimony is used to rehabilitate a prior inconsistent statement); *Copeland v. State*, 196 Md. App. at 317 (finding that evidence showing that appellant attempted to intimidate a witness by threatening the witness' family is admissible to show consciousness of guilt); *Saunders v. State*, 28 Md. App. 455, 459 (1975) (finding that an "attempt by an accused to suborn a

witness is relevant and may be introduced as an admission by conduct, tending to show his guilt.").

Ms. Eberhart's testimony is intrinsic to the charged crime because appellant's threat at gunpoint that she "better not say anything" is part of a single criminal episode where the State can use the same evidence to prove that appellant shot Mr. Pooler. Further, this evidence is admissible for two other purposes: one, to show appellant's consciousness of guilt, and second, to explain Ms. Eberhart's prior inconsistent statement when she did not identify appellant to the 911 operator or police. We hold that the circuit court did not abuse its discretion in admitting the testimony of Ms. Eberhart.

V.

We address next appellant's sufficiency of the evidence argument. We review sufficiency of the evidence under the standard "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Albrecht*, 336 Md. 475, 479 (1993). The testimony of a single eyewitness is sufficient to support a conviction, and "weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks properly assigned to the fact-finder." *Marlin v. State*, 192 Md. App. 134, 153, *cert. denied*, 415 Md. 339 (2010). *See also Reeves v. State*, 192 Md. App. 277, 307 (2010) (finding that "[u]ltimately, it is the responsibility of the jury to determine the credibility of witnesses and to resolve conflicting testimony.").

We defer to the jury's "opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Sparkman v. State*, 184 Md. App. 716, 740 (2009), *quoting Pinkney v. State,* 151 Md. App. 311, 329, *cert. denied,* 377 Md. 276 (2003).

In order to preserve a sufficiency of the evidence argument for appellate review, Rule 4-324(a) requires that when a defendant in a criminal case moves for judgment of acquittal, the defendant must "state with particularity all the reasons why the motion should be granted." The issue of sufficiency is not preserved for appellate review if the movant "merely asserts that the evidence is insufficient to support a conviction, without specifying the deficiency . . . ." *Montgomery v. State*, 206 Md. App. 357, 385 (2012).

While appellant could have fleshed out his motion for judgment of acquittal with more particularity,[2] nonetheless we find this issue preserved. We recognize that in the heat of the trial battle, counsel may not articulate the basis for the motion as artfully as on appeal, but here, he did point to the contradictions in the witness' testimony.

The State presented sufficient evidence to support the judgments of convictions beyond a reasonable doubt. The testimony of one individual, if believed by the fact-finder, is sufficient to support a conviction, and here, Ms. Eberhart testified that she saw appellant shoot Mr. Pooler. Moreover, although corroboration is not required legally, Mr. Henderson corroborated her testimony, when he testified that he saw appellant reach for a

[2] Appellant asked the circuit court to "take into consideration the people who have testified, *the variances in their testimony*, and realize that there's not enough evidence to go to the jury."

gun, and then he heard three or four shots about three seconds later after he walked away from Ms. Eberhart's home. Whether a witness is to believed lies within the province of the jury. It is also for the jury to address the conflicts in any witnesses testimony, and we defer to the jury's judgment to the extent that conflicts existed between Ms. Eberhart's and Mr. Henderson's testimony, to resolve those conflicts. The conflict between Ms. Eberhart's testimony and Mr. Henderson's testimony was not such that a rational trier of fact could not have found the essential elements beyond a reasonable doubt.

VI.

Conceding that he failed to object to the court's response to the jury question, appellant asks this Court to review the court's response to the jury question for plain error. Md. Rule 4-325(e), requires a contemporaneous objection to preserve error for appellate review, stating as follows:

> "No party may assign as error 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. . . . An appellate court . . . may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object."

Plain error review "is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Robinson v. State*, 410 Md. 91, 111 (2009). It involves four prongs: (1) the error must not have been

"intentionally relinquished or abandoned"; (2) the error must be clear or obvious, not subject to reasonable dispute; (3) the error must affect appellant's substantial rights, which means he must demonstrate that it affected the outcome of the court proceeding; and (4) the appellate court has discretion to remedy the error, but this ought to be exercised only if the error affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Rich*, 415 Md. 567, 578 (2010). As Judge Charles E. Moylan, Jr., said it best:

> "Because defense reliance on the so-called 'plain error' exemption from the preservation requirement continues doggedly to exhibit such pandemic proportions, however, it behooves us periodically to reassert why appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon."

Morris v. State, 153 Md. App. 480, 507 (2003).

Applying this test, we decline to address appellant's argument as plain error, as we are not persuaded that plain error relief is warranted. As a threshold matter, appellant affirmatively waived the alleged errors. Appellant's counsel had an opportunity to object to the instruction, and actually agreed with the instruction. Had counsel made any objection known to the court, the trial court could have addressed the matter. Granting plain error relief in these circumstances would undermine the preservation rule, the purpose of which is to allow the trial court to avoid or correct instructional error. *See Robinson*, 410 Md. at 104-05; *DeLeon v. State*, 407 Md. 16, 26 (2008).

Even if appellant had not waived his complaints, he falls short of the requirements for plain error relief because the court's response was neither confusing nor improper.

There was no error that affected the jury's verdict or compromised "the fairness, integrity or public reputation of judicial proceedings." *See Rich*, 415 Md. at 578.

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