UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2425

September Term, 2014

MICHAEL D. BRISCOE

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Arthur, J.

Filed: September 2, 2016

Appellant Michael D. Briscoe shot Shariel McCutcheon nine times, including twice, at close range, in the forehead, after she kicked down the door of the apartment where he was sleeping and tried to kill him. At trial, the State contended that Mr. Briscoe's right to use deadly force in self-defense had abated before he fired the fatal shots, because by that time Ms. McCutcheon was so badly wounded that she no longer presented a threat. Rejecting Mr. Briscoe's testimony that he believed Ms. McCutcheon was still a lethal threat, a jury in the Circuit Court for Prince George's County convicted him of first-degree murder and using a handgun to commit a crime of violence.

Mr. Briscoe, who was sentenced to life plus 20 years, raises a single issue on appeal: Did the lower court err in failing, upon request, to instruct the jury as to the defense-of-habitation doctrine?

Mr. Briscoe concedes that his defense counsel did not comply with the preservation requirements of Md. Rule 4-325(e), but asks us to overlook that omission because of substantial compliance with that rule, plain error, or ineffective assistance of counsel. For the reasons explained below, we decline to excuse Mr. Briscoe's failure to request the jury instructions that he belatedly contends should have been given.

FACTS AND LEGAL PROCEEDINGS

I. The Shooting

Mr. Briscoe was involved in a sexual relationship with Quita Nicholson at the time of the murder. Mr. Briscoe's victim, Ms. McCutcheon, was Ms. Nicholson's former girlfriend.

Ms. Nicholson had begun seeing Mr. Briscoe after her two-year relationship with Ms. McCutcheon ended in January 2012. By October 2012, Mr. Briscoe was regularly spending nights at Ms. Nicholson's apartment in Glenarden. According to Ms. Nicholson, Ms. McCutcheon was trying to renew their relationship during this entire time.

In early October 2012, Ms. McCutcheon encountered Mr. Briscoe for the first time, in Ms. Nicholson's apartment. When Ms. McCutcheon demanded to know who he was, Mr. Briscoe responded with a vile racial epithet and another vulgarity in which he proclaimed his sexual relationship with Ms. Nicholson. Enraged, Ms. McCutcheon had to be held back from attacking Mr. Briscoe. In the presence of Mr. Briscoe, Ms. Nicholson, Ms. Nicholson's 16-year-old son Steve, and others, Ms. McCutcheon employed the same epithet and repeatedly threatened to kill Mr. Briscoe.

The next day, Ms. McCutcheon drove up next to Mr. Briscoe outside the apartment building, accompanied by her brother and armed with a handgun. Brandishing the weapon, Ms. McCutcheon said that she and her brother would be coming to "smoke" Mr. Briscoe and warned him to "be strapped." According to Mr. Briscoe, when he tried to talk to Ms. McCutcheon's brother, she yelled, "Don't talk to him[;] ant[e] up," which he interpreted to mean that he should get a weapon.

About two weeks later, shortly after 2:00 a.m. on October 21, 2012, Ms. McCutcheon began banging on the locked door of the Nicholson apartment, demanding to be let in. Mr. Briscoe, Ms. Nicholson, and her son were sleeping in the apartment.

When Ms. Nicholson refused to open the door, Ms. McCutcheon kicked it open. After trading blows with Ms. Nicholson in the living room, Ms. McCutcheon ran into the bedroom, where, according to Ms. Nicholson, Mr. Briscoe was still sleeping. Ms. Nicholson followed, and she and Ms. McCutcheon continued fighting. The State and Mr. Briscoe offered conflicting accounts of the ensuing events.

A. Quita Nicholson's Testimony

According to Ms. Nicholson, after Ms. McCutcheon shoved her into a dresser, knocking a television over, Mr. Briscoe woke up. From the floor, Ms. Nicholson saw him sit up in bed and lean over. After about 30 seconds (during which it is unclear what was happening), Ms. Nicholson heard a single gunshot. She claimed not to know who fired the shot.

At that point, Ms. Nicholson said, she ran from the room and out of the apartment, leaving her son behind. She knocked on a neighbor's door, but no one answered. She ran outside, but realized that she had left her son behind. She began calling for him. When he arrived about a minute later, they went to his friend's apartment in a neighboring building. Ms. Nicholson insisted that she heard only one shot and that she did not see Ms. McCutcheon with a gun or other weapon.

B. Steve Nicholson's Testimony

Steve Nicholson testified that at about 2:00 a.m. he heard banging on the front door. He got up to see what was happening, but his mother told him to go back to his room. About five seconds after he got back to his room, Ms. McCutcheon broke through

the door. He heard her arguing with his mother as they ran past his bedroom, toward his mother's bedroom, where Mr. Briscoe was sleeping. His mother called for him from her bedroom, and he went into the hallway outside of her closed bedroom door. He pushed the door open and saw Ms. Nicholson and Ms. McCutcheon fighting each other.

Young Mr. Nicholson said that after he opened the door Mr. Briscoe, who was still in bed, "woke up" and appeared to be "scared." Mr. Briscoe stood on the bed and pulled a pistol from his pants pocket. Ms. McCutcheon did not have a weapon. Mr. Briscoe fired one shot at Ms. McCutcheon, who fell to the floor at Mr. Nicholson's feet, in the hallway. She was "curled" on her side, "screaming and crying" and grabbing her leg. At that point, Mr. Nicholson said, his mother ran out of the bedroom and out of the apartment. The young man watched as Mr. Briscoe walked over to Ms. McCutcheon, stood directly above her, and fired three shots. Ms. McCutcheon continued to scream and cry.

Mr. Nicholson ran out of the apartment. From the landing in the stairwell, he looked back. Through the open door, he saw Ms. McCutcheon lying on her stomach in the living room, next to the couch. She was screaming and calling his mother's name.

C. Mr. Briscoe's Testimony

Testifying in his own defense, Mr. Briscoe said that he awoke to find Ms. McCutcheon, in his bedroom, fighting with Ms. Nicholson and trying to get to him. Because Ms. McCutcheon had threatened to kill him two weeks earlier, he had purchased a handgun, but had not yet obtained ammunition for it.

He said that he grabbed his unloaded weapon and pointed it "to bluff" Ms. McCutcheon. Ms. McCutcheon, he said, responded by pulling out a loaded handgun. Mr. Briscoe grabbed her gun and used the handle of his to strike her, causing her to drop her weapon on the floor. In the struggle for Ms. McCutcheon's gun, it went off, the shot grazing Mr. Briscoe "on his right side." He believed that Ms. McCutcheon "came to kill" him, "because that's what she told [him] she was going to do," and because, he said, she brought a loaded gun into the bedroom.

Mr. Briscoe said that he eventually got possession of Ms. McCutcheon's gun and, using several vulgarities, yelled at her to leave. Meanwhile, he said, Ms. McCutcheon had grabbed his gun. He claimed that Ms. McCutcheon tried to fire his gun and, realizing that it was not loaded, charged at him. He fired multiple shots at her, claiming to have made "sure [he] was shooting down." He claimed that Ms. McCutcheon reached into her waistband, which, he said, made him think that she might be going for another weapon. He fired again, hitting her in the buttocks, which, he said, caused her to stumble. During this time, he said, he was calling for Ms. Nicholson and was "scared" to leave because he did not know whether Ms. McCutcheon's brother had come with her. He also thought that her brother might be present and might come to her aid. He said that he was so scared, he "didn't realize how many times [he] was shooting."

Mr. Briscoe denied that Ms. McCutcheon ever fell to the floor. Instead, he said, she "kept heading for the front door." He said that he grabbed some clothes, put them on, searched the apartment for Ms. Nicholson and her son, and called for them, but got no

response. As he was leaving the apartment, he said, he saw Ms. McCutcheon "on one knee" in the living room, near the couch and front door. As Mr. Briscoe tried to leave the apartment, Ms. McCutcheon "grabbed" his wounded leg with one hand and reached toward her hip with the other. He claimed that she was "cursing" and taking "swipes" at him, making him believe that she had another weapon. "[S]haking," Mr. Briscoe said, he fired two or three shots down at her.

At that point, Mr. Briscoe testified, he ran to the laundry room, where he left both guns, and then to a vacant apartment in the building. He remained there while the police responded, afraid that they would shoot him or that they would not protect him from Ms. McCutcheon's brother. He retrieved his own gun and, after buying ammunition for it, fled to a hotel in Virginia, where he used his medical training in home healthcare to treat his gunshot wound. When the police apprehended him at the hotel four days later, on October 25, 2012, he showed them his wound.[1]

D. Forensic and Other Evidence

Forensic, testimonial, and other circumstantial evidence indicated that after Mr. Briscoe first shot Ms. McCutcheon in the bedroom, she remained conscious and moved from the hall into the living room, toward the front door of the apartment. She was discovered lying in the doorway of the apartment, with seven gunshot wounds in her legs,

[1] While he was incarcerated pending trial, Mr. Briscoe became aware that Ms. Nicholson and Steve Nicholson had made statements to the police that were inconsistent with his account and that supported the murder charges. At trial, the State presented evidence that Mr. Briscoe wrote letters, drew pictures, and made phone calls in which he instructed Ms. Nicholson about what to say and threatened her son.

lower back, and abdomen, as well as two "rapidly fatal" gunshots fired at close range into the left side of her forehead. Some of the seven gunshots in the lower body entered from the front; others entered through her back. One gunshot had broken her right tibia and fibula, the long bones in the lower leg.

The State's Theory

In closing argument, the State contended that after Mr. Briscoe wounded Ms. McCutcheon he decided to kill her and was no longer acting in self-defense as he fired the later shots, including the two, fatal head-shots. The prosecutor maintained that, although Mr. Briscoe may have had the right to fire the first shot in self-defense, Ms. McCutcheon was no longer a threat to him once he had shot her multiple times, and hence he could not have believed that he remained in danger or that lethal force continued to be necessary.

Jury Instructions

When the trial court reviewed its proposed jury instructions on self-defense with counsel, the following discussion occurred:

> THE COURT: The charges are first degree, second degree, manslaughter before you get to the use of a handgun. So [MPJI-Cr] 4:17.2, which is first degree premedi[tated], second degree[] specific intent[,] involuntary manslaughter under the perfect and imperfect self-defense. So, we'll have [Parts] A, B, and C [of MPJI-Cr] 4:17.2. I'm not going to get into duty to retreat. I think under these circumstances that's not necessary. It wouldn't have been evidence arguably – it is certainly wouldn't [sic] have been any avenue of retreat at that point, so we won't get into that.

[DEFENSE COUNSEL]: I'm sorry. I'm having a [hard] time hearing you, Your Honor.

THE COURT: I'm not going to get into a duty to retreat under the circumstances of this case because at least arguably it was his home and, moreover, it really wasn't any place to retreat under these facts and circumstances.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE COURT: Then [MPJI-Cr] 4[:]35.4, use of a handgun in the commission of a crime of violence, and the crime [sic] of violence are murder and manslaughter, and then [MPJI-Cr] 5[:]07, self-defense.

[DEFENSE COUNSEL]: Actually, Your Honor, based upon your previous comment of you're not going to give the duty to retreat, arguably it is his house. We would be asking for [MPJI-Cr] 5[:]02, defense of habitation, deadly force.

THE COURT: There is no evidence that he was defending his habitation. He said he was doing it because he was afraid that she was coming to kill him. So, arguably it was his house, but that wasn't why he was shooting, at least there's no evidence of that.

[DEFENSE COUNSEL]: Thank you, Your Honor.

[PROSECUTOR]: Your Honor, the State would object to [MPJI-Cr] 5[:]07, the actual self-defense instruction. I believe that the language in [MPJI-Cr] 4[:]17.2 encompasses that instruction. Actually, at least the copy I have of [MPJI-Cr] 5[:]07, it[s] notes on use actually indicate[] that if the defendant is charged with murder and/or manslaughter and if there's an issue of perfect or imperfect self-defense use [MPJI-Cr] 4[:]17.2.

THE COURT: Yes, you're right. All right. Anything else?

* * *

> [DEFENSE COUNSEL]: Your Honor, I will say for the record I'm reading the same note and I will concur with the State as it relates to [MPJI-Cr] 5[:]07.

(Emphasis added.)

The court proceeded to give Parts A, B, and C of MPJI-Cr 4:17.2, the pattern instruction covering perfect and imperfect self-defenses as they relate to first-degree murder, second-degree murder, and voluntary manslaughter. The court deviated from the pattern instruction only in omitting the language regarding retreat.

The pattern instruction on self-defense (including the retreat provision omitted by the trial court) reads as follows:

> C
>
> VOLUNTARY MANSLAUGHTER
> (PERFECT/IMPERFECT SELF-DEFENSE)
>
> Voluntary manslaughter is an intentional killing, which is not murder because the defendant acted in partial self-defense. Partial self-defense does not result in a verdict of not guilty, but rather reduces the level of guilt from murder to manslaughter.
>
> You have heard evidence that the defendant killed (name) in self-defense. You must decide whether this is a complete defense, a partial defense, or no defense in this case.
>
> In order to convict the defendant of murder, the State must prove that the defendant did not act in either complete self-defense or partial self-defense. If the defendant did act in complete self-defense, your verdict must be not guilty. If the defendant did not act in complete self-defense, but did act in partial self-defense, your verdict must be guilty of voluntary manslaughter and not guilty of murder.

Self-defense is a complete defense, and you are required to find the defendant not guilty, if all of the following four factors are present: (1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];

(2) the defendant actually believed that [he] [she] was in immediate and imminent danger of death or serious bodily harm;

(3) the defendant's belief was reasonable; and

(4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual force. **[[This limit on the defendant's use of deadly force requires the defendant to make a reasonable effort to retreat. The defendant does not have to retreat if [the defendant was in his or her home] [retreat was unsafe] [the avenue of retreat was unknown to the defendant] [the defendant was being robbed] [the defendant was lawfully arresting the victim]].**

In order to convict the defendant of murder, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty, unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete self-defense was absent.

Even if you find that the defendant did not act in complete self-defense, the defendant may still have acted in partial self-defense. [If the defendant actually believed that [he] [she] was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person would not have so believed, the defendant's actual, though unreasonable, belief is a partial self-defense and the verdict should be guilty of voluntary manslaughter rather than murder.] [If the defendant used greater force than a reasonable person would have used, but the defendant actually believed that the force used was necessary, the defendant's actual, though unreasonable, belief is a partial self-defense and the verdict

> should be guilty of voluntary manslaughter rather than murder.]
>
> In order to convict the defendant of murder, the State must prove that the defendant did not act in complete self-defense or partial self-defense. If the defendant did act in complete self-defense, the verdict must be not guilty. If the defendant did not act in complete self-defense, but did act in partial self-defense, the verdict must be guilty of voluntary manslaughter and not guilty of murder.

(Emphasis added.)

In accordance with its earlier ruling, the trial court did not give the portion of Part C covering the duty to retreat. Nor did the court give Part D of the pattern instruction, which addresses defense of habitation. Part D provides as follows:

> D
>
> VOLUNTARY MANSLAUGHTER
> (PERFECT/IMPERFECT DEFENSE OF HABITATION)
>
> Voluntary manslaughter is an intentional killing that is not murder because the defendant acted in partial defense of [his] [her] home.
>
> You have heard evidence that the defendant killed (name) in defense of [his] [her] home. You must decide whether this is a complete defense, a partial defense, or no defense in this case.
>
> In order to convict the defendant of murder, the State must prove that the defendant did not act in either complete defense of [his] [her] home or partial defense of [his] [her] home. If the defendant acted in complete defense of [his] [her] home, your verdict must be not guilty. If the defendant did not act in complete defense of [his] [her] home, but did act in partial defense of [his] [her] home, the verdict should be guilty of voluntary manslaughter and not guilty of murder.

> Defense of one's home is a complete defense, and you are required to find the defendant not guilty, if all of the following five factors are present:
>
> 1. (name) entered [or attempted to enter] the defendant's home;
>
> 2. the defendant actually believed that (name) intended to commit a crime that would involve an imminent threat of death or serious bodily harm;
>
> 3. the defendant reasonably believed that (name) intended to commit such a crime;
>
> 4. the defendant believed that the force that [he] [she] used against (name) was necessary to prevent imminent death or serious bodily harm; and
>
> 5. the defendant reasonably believed that such force was necessary.
>
> If you find that the defendant actually believed that (name) posed an imminent threat of death or serious bodily harm, and that such belief was reasonable, you must find the defendant not guilty. If you find that the defendant actually believed that (name) posed an imminent threat of death or serious bodily harm, but that such belief was unreasonable, you should find the defendant not guilty of murder, but guilty of manslaughter. If you find that the State has persuaded you, beyond a reasonable doubt, that the defendant did not have an actual belief that (name) posed an imminent threat of death or serious bodily harm, you should find the defendant guilty of murder.

DISCUSSION

Md. Rule 4-325(c) mandates that the trial court, upon "the request of any party, shall instruct the jury as to the applicable law[.]" Under subsection (e) of Rule 4-325, however:

> [n]o 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, 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.

"Maryland Rule 4-325(e), as well as a multitude of cases . . . , 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." *Walker v. State*, 343 Md. 629, 645 (1996) (collecting authorities); *accord Morris v. State*, 153 Md. App. 480, 509 (2003). Mr. Briscoe concedes that his trial counsel did not comply with Rule 4-325(e).

Defense counsel asked for MPJI-Cr 5:02, which is titled "Defense of Habitation – Deadly Force." The Notes on Use, however, explain that this instruction applies only "if the defendant is charged with an assaultive crime[.]" "If the defendant is charged with murder," the Notes on Use advise courts to "use MPJI-Cr 4:17.2(D) (Homicide – First Degree Premeditated Murder, Second Degree Specific Intent Murder and Voluntary Manslaughter (Perfect/Imperfect Defense of Habitation)." MPJI-Cr 4:17.2 covers every degree of homicide that was at issue in this case.

After initially indicating that it would give MPJI-Cr 5:07 on self-defense, the court reviewed the pattern instructions and agreed that MPJI-Cr 4:17.2 contained all the pertinent instructions on self-defense. The court ruled that there was no basis for a separate defense-of-habitation instruction in addition to those self-defense instructions. Mr. Briscoe did not object.

The trial court gave parts A, B, and C of MPJI-Cr 4:17.2, covering perfect and imperfect self-defense as they relate to first-degree murder, second-degree murder, and voluntary manslaughter. It left out the language in part C about a duty to retreat and all of the language in part D covering defense of habitation. At the conclusion of its instructions, the court announced that counsel would proceed with closing arguments.

Defense counsel did not renew his earlier request for a separate defense-of-habitation instruction like the one in part D of MPJI-Cr 4:17.2. Nor did he raise the argument, advanced for the first time in his brief in this Court, that the circuit court should have devised a customized version of the instruction, based on case law establishing that the defense-of-habitation doctrine encompasses qualified privileges to defend others; to act upon a reasonable belief that the intruder will "commit any felony achieved 'by forcible means, violence, and surprise'"; and to "'pursue the assailant until he finds himself or his property out of danger[.]'" Brief at 19-22 (citing *Crawford v. State*, 231 Md. 354, 360, 362-63 (1963); *Law v. State*, 21 Md. App. 13, 27-28 (1974).

Conceding those omissions, Mr. Briscoe characterizes them as "slight procedural defect[s]" and asks us to "forgive" them. Brief at 24. In support of that contention, he argues that trial counsel's earlier request for the pattern instruction constituted substantial compliance with Rule 4-325(e). Alternatively, he contends that counsel's failure to object was an oversight that proved so prejudicial that it warrants relief as either plain error or ineffective assistance of counsel.

"The purpose of Rule 4-325(e) is to give the trial court an opportunity to correct an inadequate instruction." *Bowman v. State*, 337 Md. 65, 69 (1994); *accord Morris*, 153 Md. App. at 509. If the omission is brought to the trial court's attention by an objection, the court has an opportunity to amend or correct its charge. *Johnson v. State*, 310 Md. 681, 686 (1987); *accord Morris*, 153 Md. App. at 510. In this way, "the preservation requirement protects the trial judge from being sandbagged." *Morris*, 153 Md. App. at 510.

To the limited extent to which Mr. Briscoe asked for a defense-of-habitation instruction, it was only for an inapplicable pattern instruction in MPJI-Cr 5:02, and not for the pattern instruction in part D of MPJI-Cr 4:17.2 or for the type of customized instruction that he now says the trial court should have fashioned, on its own it appears, from case law that defense counsel never mentioned. When the court denied the request for MPJI-Cr 5:02, defense counsel acknowledged that ruling and made no further mention of a defense-of-habitation instruction.

This was far more than a "slight procedural defect." On appeal, Mr. Briscoe insists that he was entitled to a defense-of-habitation instruction that reflects the case law that distinguishes that defense from the principles of self-defense that are covered by the pattern instructions given by the trial court. But Mr. Briscoe did not inform the trial court of the arguments, presented in the briefs filed in this Court, about which aspects (if any) of Part D of MPJI-Cr 4:17.2 were not "fairly covered" by Parts A, B, and C; which principles (if any) from the case law were not covered by the pattern instructions; and

whether such distinctions (if any) were actually relevant to his defense. If defense counsel had argued that Mr. Briscoe was entitled either to Part D of MPJI-Cr 4:17.2 or to a modified version of that instruction, the trial court would have had an opportunity to consider its ruling in light of those arguments and authorities. We cannot fault the circuit court judge for failing to give an instruction that no one ever asked him to give.

Granting relief in these circumstances would undermine the important functions of the preservation rule. For the reasons explained below, none of the three theories advanced by Mr. Briscoe as grounds to "forgive" the failure to preserve his appellate contentions persuades us to exercise our discretion to do so.

Substantial Compliance

Citing *Gore v. State*, 309 Md. 203, 209 (1987), Mr. Briscoe argues that defense counsel's request for the inapplicable pattern instruction constitutes substantial compliance with the preservation requirement in Rule 4-325(e). *Gore* does not support Mr. Briscoe's argument.

In *Gore*, 309 Md. at 205, the trial court, on its own motion, informed counsel that it intended to give a supplemental instruction. At a bench conference, defense counsel objected. *Id.* at 206. Despite the objection, the court proceeded to deliver the supplemental instruction. *Id.* Although counsel did not reiterate the objection after the court had delivered the instruction (*id.*), the Court of Appeals concluded that he had substantially complied with Rule 4-325(e). *Id.* at 209.

Relying on *Bennett v. State*, 230 Md. 562 (1962), the Court identified "[s]everal conditions" that a defendant would have to show in order to establish substantial compliance with Rule 4-325(e):

> there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Gore, 309 Md. at 209; *accord Bennett*, 230 Md. at 568-69 (holding that counsel substantially complied with predecessor of Rule 4-325(e), because he submitted written instructions; the court had reviewed and rejected one instruction; and counsel objected, on the record, in chambers, to the court's decision).

Mr. Briscoe cannot establish even the first of these conditions, as he did not object at any time to the instruction that the court gave, let alone to the failure to give the inapplicable defense-of-habitation instruction in MPJI Cr. 5:02 or another instruction that he failed to request. Consequently, he cannot establish substantial compliance.

Plain Error

Plain error relief is unavailable in these circumstances. For the fairness reasons discussed above, "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). The Court of Appeals has established the following four-part test for plain error review:

> First, there must be an error or defect – some sort of "[d]eviation from a legal rule" – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the . . . proceedings." Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error – discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Meeting all four prongs is difficult, "as it should be."

State v. Rich, 415 Md. 567, 578 (2010) (citations omitted; emphasis added); *see McCree v. State*, 214 Md. App. 238, 2721 (2013).

Mr. Briscoe does not meet the second and third requirements. He requested the defense-of-habitation instruction in MPJI-Cr 5:02, which directs the jury that it should find a defendant not guilty if it finds that the victim entered the defendant's home; that the defendant reasonably believed that victim intended to commit a crime that would involve an imminent threat of death or serious bodily harm; and that the defendant reasonably believed that the force that he or she used against the victim was necessary to prevent imminent death or serious bodily harm. MPJI-Cr 4:17.2.D, which Mr. Briscoe did not request, gives similar directions, but also informs the jury that it should find the defendant guilty of manslaughter if it finds that he or she did not reasonably believe that the victim posed an imminent threat of death or serious bodily harm.

In summary, the defense-of-habitation instructions, like the self-defense instructions, focus on the imminent threat of death or serious bodily harm, on the

reasonableness of the defendant's belief about the victim's malign intentions, and on the reasonableness of the defendant's belief about the necessity of the use of force. Consequently, it is difficult to see how the alleged error in not giving the instructions was clear or obvious, rather than subject to reasonable dispute. It is similarly difficult to see how the alleged error could have affected the outcome of the proceedings. Accordingly, we decline to exercise our "unfettered discretion," *Morris*, 153 Md. App. at 507, to recognize plain error in the circumstances of this case.

Ineffective Assistance of Counsel

As a general rule, a criminal defendant should raise a claim of ineffective assistance of counsel in a post-conviction proceeding, and not on direct appeal. *See, e.g.*, *Mosley v. State*, 378 Md. 548, 562 (2003). Appellate courts prefer not to evaluate ineffective assistance of counsel claims in direct appeals, "because the trial record rarely reveals why counsel acted or omitted to act[.]" *Id.* at 560. The trial record typically lacks that important information "because the character of counsel's representation is not the focus of the proceedings and there is no discussion of counsel's strategy supporting the conduct at issue." *Smith v. State*, 394 Md. 184, 200 (2006). By contrast, in a post-conviction proceeding, the court can take evidence and have "counsel testify and describe his or her reasons for acting or failing to act[.]" *Johnson v. State*, 292 Md. 405, 435 (1982), *abrogated in part on other grounds, Hoey v. State*, 311 Md. 473, 494-95 (1986).

In this case, the record contains nothing to show why Mr. Briscoe's counsel failed to object to the instructions that the court gave, failed to request the defense-of-habitation

instruction in MPJI Cr. 4:17.2, and failed to request a custom defense-of-habitation instruction. For that reason, we have no basis to evaluate whether counsel's inaction reflects a careless omission or a conscious, strategic decision. Similarly, we have no basis to evaluate whether counsel's strategy, if any, was reasonable or flawed. Nor do we have a basis to evaluate whether Mr. Briscoe knew of and either consented to or objected to some strategic decision by counsel.

Under the facts of this case, the post-conviction court will be in a far better position than we are to determine intelligently whether counsel's actions met the applicable standard of competence under *Strickland v. Washington*, 466 U.S. 668 (1984), and the many cases that follow and apply it. In short, as the record before us is not sufficiently developed to permit review of Mr. Briscoe's ineffective assistance of counsel claim on direct appeal, we shall not address it.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.