UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 324

September Term, 2016

ALBERT BURLEY

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 7, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Convicted, by a jury, in the Circuit Court for Baltimore City, of second degree assault, Albert Burley claims that the court abused its discretion in denying his request to excuse a juror, who, according to two courthouse deputies, purportedly saw Burley, in shackles and handcuffs, in the courthouse hallway during a break in the proceedings. Finding no abuse of discretion, we affirm.

After the jury was selected, but before opening statements, the court recessed for lunch. When the court reconvened, and before the jury was brought in, the court was informed by a courthouse deputy that, during the recess, one of the jurors had seen Burley "going into the lockup." The deputy described the encounter to the court as follows:

> We were on – we were coming from the elevator. You know we had to – out lock up is right down on the first floor. . . . And she [the juror] was right there and I mean she was really staring and I'm trying to get him in there. They couldn't get the, you know, door open fast enough. So I really think she saw."

The deputy also related that the juror, was "turning and looking" as she waited to get on the elevator.

When the jury returned to the courtroom, the judge called the juror to the bench, and asked if she had seen the defendant during the lunch break. The juror responded, "No." Defense counsel requested nothing further from the court, stating "I don't know what to do. I don't know what she saw, I don't know what she didn't see. I can only take her at her word."

On the second day of trial, defense counsel proffered that another officer had "confirmed that the juror did see Mr. Burley going into the lockup in handcuffs and in shackles," and then requested that the court excuse the juror and replace her with an

alternate. The court expressed that it was not inclined to conduct further individual voir dire of the juror, or to excuse the juror "in light of what the voir dire revealed yesterday," and stated its belief that the conclusions drawn by the officer and defense counsel regarding the "truthfulness or the observation powers" of the juror were "not warranted[.]" The court explained that it would, however, ask the entire jury panel whether they had seen or had contact with any witnesses, parties or counsel in a way that may affect their ability to be fair and impartial, then instructed the jury as follows:

> If any of you have had any contact with any witnesses or parties or lawyers or *have observed any of the witnesses or parties or lawyers in any manner that might affect your ability to be fair and impartial as jurors*, either raise your hand or [write] me a note and let me know that you've got a question that I'll address with you up here at the bench.

(Emphasis added). When there was no response from any of the jurors, the court asked if there was any need for counsel to approach the bench, and defense counsel declined, stating, "No, Judge, we're fine, thank you." The trial then proceeded.

Burley claims that (1) the court failed to make a finding as to whether or not the juror saw him in restraints and, if so, what affect it had on her suitability as a juror, and, therefore, it was an abuse of discretion to deny the motion to replace the juror with an alternate; and (2) even if it is was not error to deny the request to replace the juror, the court's investigation into, and resolution of, the juror issue was inadequate.

Maryland Rule 4-312(g)(3) provides, in pertinent part, that, "[a]t any time before the jury retires to consider its verdict, the trial judge may replace any jury member whom the trial judge finds to be unable or disqualified to perform jury service with an alternate[.]" A court's ruling on a motion to remove a juror is "a discretionary one which will not be

disturbed absent an abuse of discretion." *State v. Cook*, 338 Md. 598, 611 (1995). Moreover, we defer to a trial judge's determination as to whether a seated juror should be excluded on grounds particular to the individual juror because**,** in evaluating the juror, "the trial judge has the opportunity to question the juror and observe his or her demeanor." *Id.* at 615. "We will not substitute our judgment for that of the trial judge unless the decision is arbitrary and abusive or results in prejudice to the defendant." *Id.*

Although, under the circumstances of the instant case, the better course of action may have been to replace the juror with an alternate, in order to exclude any question of juror taint, we are unable to conclude that the circuit court abused its discretion by declining to do so. The juror expressly stated that she did not see the defendant during the lunch break, and then did not respond when the court asked the jury, as a whole, if any of them had observed any of the witnesses or parties or lawyers in any manner that might affect their ability to be fair and impartial. The judge had the opportunity to observe the juror's demeanor and assess her credibility, and apparently believed that she had not seen Burley, or, at least, that if she had looked at Burley as he was being escorted into lockup, she did not recognize him as the defendant in the case in which she had just been selected to serve as a juror.[1] We see nothing arbitrary, abusive or prejudicial in the judge's ruling.

[1] We note that, even assuming that the juror inadvertently saw Burley in handcuffs and shackles, and recognized him, it would not have necessarily required the court to exclude the juror. *See e.g.*, *Bruce v. State*, 318 Md. 706, 721 (1990) (holding that defendant was not denied a fair trial as a result of the jury's inadvertent sighting of deputies removing handcuffs from him as the jury was led into the courtroom); *State v. Latham*, 182 Md. App. 597, 617 (2008) (holding that defense counsel was not ineffective for failing to request corrective measures after a juror momentarily glimpsed the defendant in handcuffs

Finally, Burley's claim that the court's investigation into, and resolution of, the juror issue was inadequate is not preserved for our review. Defense counsel did not object to the court's admonishments to, or inquiries of, the jury, and requested no further hearing, or instruction, or any other action from the court. *See Gilliam v. State*, 331 Md. 651, 691 (1993) ("As Gilliam did not object to the course of action proposed by the prosecution and taken by the court, and apparently indicated his agreement with it, he cannot now be heard to complain that the court's action was wrong."), *cert. denied*, 510 U.S. 1077 (1994). In any event, we see nothing improper about the way in which the court addressed the matter.

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

and shackles, stating that "not all juror sightings of a restrained defendant are so inherently prejudicial as to require corrective measures by the trial court" (citing *Bruce*, *supra*), and observing that "most jurors find little or no import in such a sighting"), *cert. denied*, 407 Md. 277 (2009).