Circuit Court for Montgomery County
Case No. 126978, 126792

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2758

September Term, 2015

ALBERT CARL OTTO

v.

STATE OF MARYLAND

Friedman,
Shaw Geter,
Eyler, James
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: July 3, 2017

Albert Carl Otto, IV was convicted of raping his girlfriend. Otto alleges that the trial court erroneously admitted a videotaped interview with their daughter and recorded phone calls with his mother into evidence, and erroneously instructed the jury. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Otto and S.L.[1] dated for many years and had three children together. Although the couple did not live together, they saw each other nearly daily. In early 2015, S.L. accused Otto of raping her on three occasions: on January 1, 2015; on January 8, 2015; and on February 2, 2015. Police arrested Otto in February and charged him with three counts of second-degree rape based on those three occasions. Otto was released pending trial on the condition that he have no contact with S.L. Otto, however, violated the no-contact order, and married S.L. Because of their marriage, when it came time for trial, S.L. invoked her marital privilege and refused to testify. The State was then left with the task of prosecuting its rape case without the testimony of the complainant.

On the first day of trial, the State called D.L., Otto and S.L.'s then-7-year-old daughter to the stand anticipating that she would testify that she had witnessed Otto rape S.L. through a crack under the door. The basis for the State's belief that D.L. would testify

[1] Consistent with the practice of this Court, and at the request of Otto with the consent of the State, we will refer to Otto's victim by her initials, S.L. We will also refer to Otto and S.L.'s child, D.L., by her initials. We will not, however, refer to Otto by an abbreviated form of his name, and we deny the portion of his motion requesting that we do so.

in this regard was that, after Otto's arrest, Meggie Newton, a social worker employed by Montgomery County Child Welfare Services, interviewed D.L. The interview was videotaped. On the videotape, D.L. described to Newton how she had watched through a crack in the door as Otto "hurt" S.L. Thus, the State expected D.L. to testify that she had witnessed the rape.

On the witness stand, however, D.L. claimed that she did not remember telling anyone that Otto hurt S.L. and that she did not even remember talking to Newton. Trying to salvage the situation, the State cued up the beginning of the videotape of D.L.'s interview with Newton and showed D.L. a still frame that depicted Newton and D.L. sitting in the interview room. After looking at the still frame from the videotape, D.L. testified that she remembered sitting in the room and talking to the woman, but did not remember what they talked about.

The State then played about an hour of the videotape, without the jury present, in an effort to refresh D.L.'s recollection. After watching, however, D.L. testified, in front of the jury that, yes, she remembered talking to the woman, but "No. My dad did not hurt my mommy. … No, that didn't happen." The State then moved that the entire videotape be admitted into evidence. Otto objected to admitting the videotape based on the rule prohibiting the admission of hearsay and on the rule prohibiting the admission of "other crimes" evidence.

Before the trial court ruled on the admissibility of the videotape, the State again questioned D.L., asking if she remembered Otto hurting her mom or Otto removing D.L.

and her siblings from the bedroom while S.L.'s hands were tied. D.L. again responded that "I was confused. We didn't, that never happened." Happy with that testimony, Otto then withdrew all hearsay objections to the recorded interview. The State again moved and the trial court admitted the videotape into evidence as a prior recorded inconsistent statement under Rule 5-802.1. The entire recorded interview of D.L. by Newton was then played for the jury.

On the fourth day of trial, the State sought to admit audio excerpts of telephone calls between Otto, who at the time was in jail, and his mother. In accordance with common practice, these telephone calls were recorded and the full transcripts of these calls span dozens of pages. The State prepared audio excerpts of the calls—with corresponding transcripts—and offered them into evidence. The trial court admitted the audio excerpts and transcripts over Otto's objection. We have quoted the audio excerpts, as transcribed at trial, here in full:

OTTO:	Look, you need to get in touch with [D.L.] and [S.L.] and take them out grocery shopping. Take some money over. I need to get an idea of where her head is at and if she intends to try to help resolve this. Okay?
[MOTHER]:	Why is she going to tell me that? If I try to –
OTTO:	Mom, you'll get an idea. Just spend the time with her, okay? And get her out grocery shopping. Take some money over.
[MOTHER]:	I'm worried about yourself okay?
OTTO:	Mom, I'm worried about myself and my best chance is for her to help out.

[MOTHER]: I know that. I know that. Are you still there?

OTTO: Yeah.

[MOTHER]: (Unintelligible)

OTTO: All right, please do that. I'm worried about the kids having food and I'm worried about where her state of mind is and where it's going to stay.

[MOTHER]: I don't think (unintelligible).

OTTO: They are. I talked to them. Please do that. Take some money out of my wallet, like you know, three or four hundred. Take them grocery shopping. Give her the rest of the money. Okay? And try to get some idea of where her head is at and what she intends to do to help me with this.

OTTO: Call my attorney. Tom[2] won't answer the phone. I talked to Maria. Again, [M]om, if it works out that she asks for the kids to come there to the house, then, you know, so be it. I need to keep an eye on them.

Try to find out through Maria (unintelligible).

[MOTHER]: Well, you haven't talked to Laurie or your dad, right?

OTTO: I just talked to Laurie. My dad is busy on a conference call. (Unintelligible).

[MOTHER]: Did you tell them that they were going to discuss about you marrying her?

[2] The parties have not explained, nor is it relevant to this appeal, who Tom, Maria, and Laurie are. We are satisfied, however, that they are not individuals whose identify needs to be further protected.

OTTO: We didn't get into that. I just told her how important it is to me that my family open up and accept them right now. I mean, they're my kids and let's do what we can for them. See if you can talk to Maria today and find out if this is going to happen or not, okay?

[MOTHER]: If she's willing to marry you?

OTTO: Yeah.

OTTO: Stay close to her and the kids.

[MOTHER]: What?

OTTO: Stay close to her and the kids.

[MOTHER]: (Unintelligible).

OTTO: Yeah, I know.

[MOTHER]: I'd like to see my grandchildren, too.

OTTO: Keep working on it.

[MOTHER]: (Unintelligible).

OTTO: Yes, she has.

[MOTHER]: Much, much better. (Unintelligible). I was so surprised when she called yesterday in the parking lot and said I'm here. Can I come in?

OTTO: Probe [D.L.] for information when you're with them, too.

[MOTHER]: What?

OTTO: I said probe [D.L.] for information when you're with them, too.

OTTO: Not yet. I'd like it to be covered one more month, at least, (unintelligible). Then I'll start making plans to pack all my stuff up. But I

told Maria in the meantime, she asked (unintelligible). I'd like to move her and the kids in the house or something. My best chance out of this is for my family to help her out. If it helps recant all this stuff, if, you know, she's left in an entirely abandoned position right now too, then she's just want to cooperate with the State to get the State's assistance. And that's going to screw me.

Take care. I'll call you tomorrow.

[MOTHER]: (Unintelligible).

OTTO: Okay, well just wait, okay? Tomorrow (unintelligible). We need to let her know, okay?

[MOTHER]: Yeah, I'm going to talk to your dad tomorrow and push him to hire him. But you'd better back off it.

OTTO: No, he told me he would.

[MOTHER]: Yeah (unintelligible). I'm going to get him to hire her – or hire him.

OTTO: I don't want to eat up my time. (Unintelligible).

[MOTHER]: Yes, I know. I know. I got that information from Maria tonight. I got a lot of information from Maria tonight.

OTTO: Okay.

[MOTHER]: I understand it. I understand. Okay? I'm going to get your dad tomorrow to hire that attorney.

OTTO: Yeah, if he doesn't, this is going to be real bad, [M]om.

[MOTHER]: Yes, I know.

OTTO: The best chance I have is for [S.L.] to recant all this. And the only way she's going to be in the mood to do that is if my family takes care of her right now. You understand that?

[MOTHER]: Yeah, that's why your dad is paying for her attorney.

[MOTHER]: He already approached your dad. Your dad told me, and asked him to support her financially. He told her no.

OTTO: Who approached her?

[MOTHER]: He approached your dad.

OTTO: Who did?

[MOTHER]: [S.L.]

OTTO: She did?

[MOTHER]: Your dad told me that.

OTTO: And he told her no? Is he out of his fucking mind? What the fuck is wrong with him?

[MOTHER]: I guess because he's paying for the attorney and I guess –

OTTO: Does he not understand what's going to happen to me if he doesn't help out? You've got to get that –

[MOTHER]: You're breaking up. You broke up real bad.

OTTO: Mom, listen to me. If he doesn't help her out I am screwed. Okay? It's obvious – it's obvious – (unintelligible).

[MOTHER]: Okay, honey. Honey, don't get upset. It's not going to (unintelligible).

OTTO: No, no, no, this needs to happen or I am screwed. If my family doesn't take care of her right now, I am screwed.

[MOTHER]: Well, your family means your dad, because your mother doesn't have the money.

OTTO: You can have [S.L.] move into the house. You can stay there in the house with them. Help her. Get on her – do you understand what I'm saying?

[MOTHER]: Yes, but how long do you think I can stay here, honey?

OTTO: As long as it needs to be. As long as (unintelligible).

[MOTHER]: Do you want me to lose my home?

OTTO: No, I don't. You can bounce back and forth. You've been there for a month before. You can do it again.

[MOTHER]: And I didn't like doing it, but I'll do what I can.

OTTO: Well, I'm sorry, but that's what needs to happen. (Unintelligible).

[MOTHER]: Okay. Okay, honey.

OTTO: (Unintelligible). I need you to talk to them all tonight. And my dad needs to understand that (unintelligible) is a huge mistake. The only chance I have is for my family to take them in, take care of those kids. If she wants to be part of this family, recant everything she said.

[MOTHER]: (Unintelligible).

OTTO: No, you can't. But listen to me. That is what needs to happen. My family needs to take

	care of her and those kids. Those are my kids. (Unintelligible). Get that message to my dad one way or the other. If this doesn't happen, I am screwed.
[MOTHER]:	And what happens if you don't get out on the 20th?
OTTO:	Well, then I don't know. You know? If my family opens their arms to her and helps out with these kids, I'm sure she'll be more than happy to recant all this stuff. But if we screw her over, then she's not.
[MOTHER]:	I understand what you're saying. But I can't say back to you anything else.
OTTO:	I know.
[MOTHER]:	I understand what you're saying, but I can't say anything to make –
OTTO:	That's what needs to happen. And get through to my dad that he needs to help take care of her right now, one way or another.

After the State rested its case, Otto sought to admit the full paper transcripts of the calls, not just the few pages introduced at trial and reproduced above. Otto did not seek to admit the complete audio recordings of all of the calls, just the full transcripts. Otto argued that the full transcripts, as opposed to the audio excerpts played for the jury (and the transcripts thereof), painted a broader picture of what he was concerned about in the calls and that, under the doctrine of verbal completeness, the full transcripts should be admitted. The trial court denied Otto's request to admit the full transcripts of the recorded jail calls.

At the close of evidence the trial court instructed the jury. One of the instructions that the trial court gave to the jury, over Otto's objection, before it asked any questions, was that "if I did not give you a legal definition, then the answer that you're going to get to that question is that you must rely on your own understanding of how that word is used every day in the English language."

The jury found Otto not guilty of the January 1 rape and guilty of the January 8 rape. The jury did not reach an agreement as to the February 2 rape and a mistrial was declared on that count. Otto was sentenced to a term of seven years incarceration with all but 280 days suspended and five years of supervised probation. As a result of his conviction, Otto was also required to register as a Tier II sex offender.

DISCUSSION

Otto raises three issues on appeal: (1) whether the trial court erred in admitting the videotape recording of D.L.'s interview; (2) whether the trial court erred by not admitting the full transcript of the recorded jail telephone calls; and (3) whether the trial court erred by giving a jury instruction that Otto claims told jurors they could not ask questions.

I. Admission of D.L.'s Recorded Interview

Otto's first claim of error is that the trial court should not have admitted the videotape recording of D.L.'s interview with Meggie Newton as a prior inconsistent statement. Otto argues that the videotape does not fall within any hearsay exceptions and is, therefore, not admissible under Rule 5-802.1. Otto also argues that admission of the videotape is a violation of this Court's rule in *Corbett v. State*. 130 Md. App. 408 (2000).

He contends that under *Corbett*, as a precondition for admissibility the trial court should have first made a finding of whether D.L.'s inability to remember was genuine or contrived. *See Corbett*, 130 Md. App. at 425 (requiring trial courts to determine if a witness's inability to remember events is fake). Thus, we will consider, first, whether Otto waived his objection to the admission of the videotape. We find that he did. Nonetheless, we will also explain (1) why despite being hearsay the videotape was nevertheless admissible under the rule governing prior inconsistent statements; and (2) why our analysis from *Corbett* is inapplicable here.

Hearsay is an out of court statement that a party seeks to offer into evidence for the truth of the matter asserted. Md. Rule 5-801(c). Hearsay is not admissible unless it falls into an exception. Md. Rule 5-802. One of these exceptions is for prior inconsistent statements. Out of court statements that are inconsistent with a witness' in court testimony are admissible as substantive evidence—as an exception to the prohibition on the admission of hearsay evidence—if the declarant testifies at trial and the statement was either "(1) given under oath …; (2) reduced to writing and was signed …; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement." Md. Rule 5-802.1(a).

There is no doubt that the recorded interview is hearsay because it was an out of court statement by D.L. offered to prove that Otto raped S.L. Otto originally objected to the introduction of D.L.'s recorded interview on several grounds, including that it was hearsay. After D.L. testified that "it didn't happen" (that is, that Otto did not hurt S.L.),

however, Otto withdrew his hearsay objections to the recorded interview, including that the statement was not properly admitted as a prior inconsistent statement under Rule 5-802.1. *See Dionas v. State*, 199 Md. App. 483, 523 (2011) (rev'd on other grounds, 436 Md. 97 (2013)) (noting that a party does not preserve an issue for appeal if the objection raised was on other grounds than that raised on appeal and that the purpose of the preservation rule, found in Maryland Rule 8-131, is to allow the trial court to correct trial errors). Thus, it is not properly before us.

Despite having waived his hearsay arguments, Otto nevertheless argues here that the trial court should not have admitted D.L.'s recorded interview as a prior inconsistent statement. Otto argues that D.L. never adopted or signed the recorded interview. Again, it is conceded that D.L.'s statement in the recorded interview is hearsay. Hearsay is only admissible if it falls into an exception, the relevant exception here being the exception for prior inconsistent statements. Prior inconsistent statements are admissible if the declarant (D.L.) testifies at trial and the statement was either (1) given under oath, (2) reduced to writing and signed, or (3) recorded contemporaneously by stenographic or electronic means. Md. Rule 5-802.1(a). D.L.'s statement comports with the third category of Rule 5-802.1(a): it was recorded contemporaneously by electronic means. Rule 5-802.1 does not require that a statement recorded by electronic means contemporaneously with the making of the statement be also adopted or signed by the declarant. Otto's argument, therefore, that D.L. needed to adopt somehow the statement confuses the subsections of Rule 5-802.1(a) and we decline to add such a requirement to this subsection.

Otto also argues that even if the recorded interview was a prior inconsistent statement, that under *Corbett*, the trial court was required first to make a finding of whether D.L. was lying about being able to remember the events she talked about in the recorded interview. Because the trial court did not make such a finding, Otto claims error. In *Corbett*, this Court held that when a witness is able to testify but is unwilling to do so and feigns memory loss, the in court testimony of not remembering creates an inconsistency that brings the matter within the ambit of Rule 5-802.1. *Corbett*, 130 Md. App. at 425. "[I]nconsistency may be implied in that testimony because by claiming that he does not remember an event that he does remember, the witness is denying, albeit indirectly, that the event occurred." *Id*. That is not the situation here. D.L. did at times testify that she was confused or did not remember. She ultimately testified, however, that Otto did not hurt S.L. That testimony carries an implicit statement that D.L. did remember and that the events she described in the recorded interview did not happen. Because she remembered, *Corbett* is not applicable.

In conclusion, Otto waived his hearsay objection. Even if the argument had been preserved, the recorded interview was admissible as a prior inconsistent statement because it meets the requirements of Rule 5-802.1(b). Finally, the *Corbett* rule is not applicable. We conclude, therefore, that the trial court did not abuse its discretion by admitting the recorded interview.

II. Jailhouse Telephone Calls

As described above, the State played parts of telephone calls between Otto and his mother from jail. Otto next argues that after admitting the excerpts the trial court should have allowed him to introduce into evidence the full transcript of the recorded telephone calls. Otto argues that pursuant to the doctrine of verbal completeness, the full transcript was necessary to give context and to correct the "misleading picture" painted by the audio excerpts and corresponding transcripts.

The State responds that Otto was required to introduce the full transcript of the recorded telephone calls at the time the State sought to admit the redacted audio excerpts and corresponding transcripts. Because Otto did not do so at that time, although he did object on other grounds, the State concludes that Otto waived this argument. Alternatively, the State argues that the trial court properly exercised its discretion in denying Otto's request to introduce the full transcript because the full transcript does not satisfy the requirements for admission under the doctrine of verbal completeness.

The common law doctrine of verbal completeness "allows a party to respond to the [introduction], by an opponent, of part of a writing or conversation, by admitting the remainder of that writing or conversation." *Conyers v. State*, 345 Md. 525, 541 (1997). "[W]hen any part of an oral statement has been put in evidence by one party, the opponent may afterwards (on cross examination or re-examination) put in the remainder of what was said on the same subject at the same time." *Feigley v. Baltimore Transit Co.*, 211 Md. 1, 9 (1956) (citing Wigmore on Evidence, 3rd Ed., Vol. VII, § 2115).

Maryland has codified a modification to the common law doctrine of verbal completeness in Maryland Rule 5-106. *Conyers*, 345 Md. at 540. That modification effects only timing, not the substance of what is admitted under the Rule:

> When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Md. Rule 5-106.

Maryland Rule 5-106 allows the adverse party to introduce the remainder of the writing or statement "earlier in the proceedings than the common law doctrine of completeness [would have permitted]." *Conyers*, 345 Md. at 541. As explained by the Committee Notes and *Conyers*, Rule 5-106 does not foreclose a party from putting in the remainder of what was said at a later point, rather it allows the opposing party, if it so desires, to bring in the remainder earlier. Md. Rule 5-106 Committee Note ("The Rule thus provides for the *alternative* of an earlier admission of evidence … than does the common law rule of completeness.") (emphasis added); *Conyers*, 345 Md. at 541.

The State is, therefore, incorrect that Otto was required to offer the full transcripts at the same time that the State offered its redacted audio excerpts and corresponding transcripts. Otto had two options: (1) using the modified timing rule of Rule 5-106, offer the full transcripts contemporaneously with the State's introduction of the redacted audio excerpts; or (2) under the traditional common law timing, offer the full transcripts later in his own case. Otto chose to offer the full transcripts in his own case under the traditional

common law timing, not Maryland's modified timing rule of Rule 5-106. That was his choice and is not a waiver of the issue.

Otto is still bound, however, by the limitations of the doctrine of verbal completeness. Those limitations were first explained by the Court of Appeals in *Feigley v. State*:

> In the definition of the limits of this right, there may be noted three general corollaries of the principle on which the right rests, namely:
>
> (a) No utterance irrelevant to the issue is receivable;
>
> (b) No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable;
>
> (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.

Feigley, 211 Md. at 10 (quoting Wigmore on Evidence, 3rd Ed., Vol. VII, § 2113). These limitations ensure that "[t]he doctrine of verbal completeness does not allow evidence that is otherwise inadmissible as hearsay to become admissible solely because it is derived from a single writing or conversation." *Rutherford v. State*, 160 Md. App. 311, 320 (2004) (citing *Conyers*, 345 Md. at 545). Among the difficulties in applying the rule, of course, is deciding how broadly or narrowly to construe what constitutes the "same subject."

At trial, Otto argued that the audio excerpts of the calls (and their corresponding transcripts) introduced by the State left the misleading impression that Otto's only concern was getting S.L. to recant. Otto argued that the full transcript of the calls revealed that

Otto's main concern was to get out of jail on pre-trial release so that he could take care of his family and address his financial concerns. The trial court, however, found that the remainder of the calls did not concern the same subject: "the focus is on [Otto] is here because of what [S.L.] said. And he wants her to recant so he can get out so this whole thing can [go] away." As a result, the trial court concluded that the remainder of the calls would not help the jury understand the redacted audio excerpts of the calls but would instead confuse the jury. On appeal, Otto renews his arguments that the entire recorded conversations revealed a much more "complex and nuanced discussion" that was "not remotely as nefarious" as the redacted excerpts that the State played.

As described above, we are discussing a series of recorded telephone calls between Otto and his mother that span several days. Otto and his mother discuss how Otto needs her to convince his father to pay for an attorney for S.L. and how he needs his father to financially support S.L. They discuss moving S.L. into Otto's house, the ramifications that move could have on his bond, and whether S.L. and the children would just have to move again if Otto lost his lease on the house. During several of the calls, they discuss the need to pay Otto's bills, especially his rent, and Otto's attempts to get family members and friends to provide funds to cover those bills. Many times they discuss Otto's child from his prior marriage, how that child is doing, and Otto's mother's attempts to keep the child for visits. During several calls, Otto's mother brings up how Otto's ex-girlfriend is trying to get back into his house to retrieve personal items and Otto explains what personal items the ex-girlfriend and her children still have in the house. Additionally, several times the

conversation turns to whether Otto will marry S.L., whether S.L. is willing to marry him, and how Otto's mother can communicate with S.L. due to the language barrier (S.L. is a native Spanish speaker).

We conclude that the trial court did not abuse its discretion by determining that the full transcript of the calls was not admissible under the doctrine of verbal completeness. *See Rutherford*, 160 Md. App. at 322-23 (holding that the trial court did not abuse its discretion by denying a request to admit a second statement under the doctrine of verbal completeness). The trial judge here construed the subject of the audio excerpts narrowly as statements pertaining to persuading S.L. to recant. Otto would have us construe the same subject broadly to encompass the whole range of topics. Although we can imagine construing the subject of the calls differently, we cannot say that the trial court's decision was an abuse of discretion. *Consolidated Waste Industries, Inc. v. Standard Equipment Co.*, 421 Md. 210, 219 (2011) (stating that "an abuse of discretion occurs when a decision is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable") (internal citations and quotations omitted). A reasonable person could certainly share the view that the calls concerned only the narrow topic of Otto's attempts to persuade S.L. to recant. We conclude, therefore, that the trial court did not abuse its discretion by refusing to admit the full transcript of the recorded telephone calls.

III. Jury Instruction

Otto's final claim of error is that the trial court erred by giving the following instruction to the jury:

> A question that I used to get with some regularity is what is the legal definition of [fill in the blank]. Sometimes jurors get really caught up on a specific word, and they want to know is there a legal definition. … [I]f I did not give you a legal definition, then the answer that you're going to get to that question is that you must rely on your own understanding of how that word is used every day in the English language. …

Otto objected to the instruction before it was given and the trial court responded that it would be willing to give an amended instruction if Otto provided the language. Otto declined the opportunity to provide an alternative instruction but reiterated that he objected to the instruction being given. Otto did not object again after the instructions were given to the jury, however, until after the jury retired to deliberate.

Otto argues that the trial court's "policy" of giving this instruction is "a violation of the role of the trial judge, the jury instructions, and the jury" because it is an attempt to keep jurors from asking questions.[3] Otto contends that the trial court should not have given the instruction because juries are hard to predict and may only communicate during deliberations through questions to the trial judge. The State contends that Otto did not

[3] Otto also states in his questions presented to this Court that the jury instruction "appears to contradict *Montgomery*" and that "[t]he implications of this 'policy' are far reaching, implicating violations of the Federal and Maryland constitutions." These unsupported statements are insufficient to constitute argument on these points and, as a result, we will not include them in our review. *See* Maryland Rule 8-504(a)(6) (requiring that briefs include "[a]rgument in support of the party's position on each issue.").

preserve this issue for appeal because he did not renew his objection to the jury instruction until after the jury had retired to deliberate. As an alternative, the State also argues that the trial court did not abuse its discretion in giving the jury instruction because the instruction merely warned the jury that there were certain questions it could not answer.

The State is correct that, although Otto objected before the jury instructions were given, he didn't object after the instructions were given until the jury retired to deliberate. Md. Rule 4-325(e) (stating that a party must object "on the record *promptly after the court instructs the jury*") (emphasis added). That constitutes a waiver. *Bowman v. State*, 337 Md. 65, 67 (1994) (holding that "appellate review of a jury instruction will not ordinarily be permitted unless the appellant has objected seasonably so as to allow the trial judge an opportunity to correct the deficiency *before the jury retires* to deliberate.") (Emphasis added). Even if he hadn't waived, however, this objection would still have been of no avail.

We review "a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011) (citation omitted) (explaining that when a decision is a matter of discretion, it will not be disturbed unless "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."). Jury instructions must be generated by the facts of the case, be a correct statement of applicable law, and not be fairly covered by the other instructions given. Maryland Rule 4-325(c); *Stabb*, 423 Md. at 465.

Here, we conclude that the trial court did not abuse its discretion by giving the jury instruction because it was a correct statement of applicable law and was not covered by the

other instructions. Contrary to Otto's argument, the trial court was not following a personal, mandatory "policy." The trial court indicated that it would be willing not to give the instruction if an alternative instruction was provided. The trial court, through its experience, reasonably anticipated that the jury would have questions and through the instruction explained that, even though the jury could ask questions, the trial court may not be able to answer every question. The trial court's instruction was a correct and applicable statement that even if the jury asked a question during deliberations, the judge might not answer the question. *Lovell v. State*, 347 Md. 623, 657 (1997) (holding that "[w]hether to give a jury supplemental instructions in a criminal cause is within the discretion of the trial judge"). This instruction was also not covered by the other instructions. We, therefore, conclude that the trial court did not abuse its discretion.

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