Circuit Court for Washington County
Case No. 21-K-11-046237

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2075

September Term, 2019

JAMES ANTWON HARRIS

v.

STATE OF MARYLAND

Kehoe,
Reed,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: April 5, 2021

In 2011, a Washington County jury convicted appellant James Antwon Harris ("Harris") of second degree assault and reckless endangerment. In December 2019 the court granted Harris the right to file a belated appeal from his 2011 conviction as a post-conviction remedy. On appeal, Harris presents two questions for this court's review, as follows:

1. Did the circuit court in 2011 err in denying the appellant's motion for a mistrial?

2. Did the circuit court in 2011 err in refusing to give the jury an instruction on the defense of mutual affray?

For the reasons set forth below, we affirm the circuit court.

BACKGROUND & PROCEDURAL HISTORY

In May 2011, Jessica Crisp and Dustin Smith were living in a second floor apartment in Hagerstown. Alisa Fall lived in the apartment below on the first floor. Around 1:00 or 1:30 a.m. on May 10, 2011, Crisp and Smith were awoken by loud noises. Crisp went into the stairwell to talk to Fall and complain about the noise. Crisp remained on the landing between the first and second floor, and asked Fall what the problem was.

While Crisp and Fall were talking, five people, including Harris, emerged from Fall's apartment into the hallway. The group began to yell at Crisp and Smith. The group ascended the stairs and one member began to hit Smith while Crisp attempted to defend them by hitting him in the head with her cell phone. Crisp testified that Harris, along with the other four, kicked her, punched her, and pummeled her in an attempt to get to Smith.

Another neighbor called the police and the group disbanded. Crisp informed police that she did not consent to being punched or kicked, and at one point was thrown down the stairs. Smith described the scene as a "melee" and watched numerous people hit and kick Crisp in an effort to get to Smith and punch him.

Harris was convicted on both counts and sentenced to five years with credit for time served on the count for reckless endangerment; and a concurrent ten years with credit for time served, all but seven years suspended, and three years of supervised probation for the second-degree assault count.

At a post-conviction hearing, the court determined that Harris's counsel rendered deficient performance and granted Harris the right to file this belated appeal from his 2011 conviction. We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I. MOTION FOR MISTRIAL

Harris asserts that the circuit court erred when it denied his motion for a mistrial. After Crisp testified, the court recessed for lunch. When court resumed, a deputy escorted Harris from the courthouse lockup, down a back corridor not typically used by the public, and into the courtroom. The jury room was also located in the same back corridor, and some members of the jury saw the deputy escorting Harris in the corridor to the courtroom. The jurors were unable to see the detention area from where Harris was brought. The deputy was in uniform, but was not wearing a gun, and Harris was dressed

in street clothes without handcuffs or any other restraints. Concerned that seeing Harris in custody being escorted by a uniformed deputy unfairly prejudiced the jury against him, defense counsel moved for a mistrial. The court denied the motion, determining that because Harris was not in prison attire or restraints, the deputy was unarmed, and none of the jurors have any law enforcement background with knowledge of courthouse protocol, it was unlikely that the jury would infer that Harris might be incarcerated because they saw him in that hallway.

We review a circuit court's decision to deny a motion for mistrial for abuse of discretion. *Simmons v. State*, 436 Md. 202, 212 (2013). "[T]he declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Barrios v. State*, 118 Md. App. 384, 396 (1997) (Internal citations and quotations omitted). This court "will not reverse a trial court's denial of a motion for mistrial unless the defendant was so clearly prejudiced that the denial constituted an abuse of discretion." *Id*. at 397 (Internal citations and quotations omitted). Further, we do not "determine whether less stringent security measures were available to the trial court, but rather whether the measures applied were reasonable and whether they posed an unacceptable risk of prejudice to the defendant." *Id*. (Internal citations and quotations omitted).

Some courtroom security practices, such as restraining a defendant or requiring prison attire, are "inherently prejudicial" and "pose an unacceptable threat to defendant's right to a fair trial." *Bruce v. State*, 318 Md. 706, 721 (1990) (Internal citations and

quotations omitted). The defendant in *Bruce* complained about the number and proximity of both uniformed and plain clothed officers in the courtroom, as well as one time when handcuffs were being removed from Bruce as the jury was led into the courtroom. *Id*. at 720. The Court in *Bruce* determined that the defendant was not "confronted with an inherently prejudicial practice like shackling during a trial" or "an extensive security force so close to the defendant that it could create the impression in the minds of the jury that the defendant is dangerous." *Id*. (Internal citations and quotations omitted). The Court ultimately held that "[t]his one inadvertent viewing of Appellant in handcuffs clearly did not require the trial judge to take any action *sua sponte*, and did not result in any prejudice to the defendant's right to a fair trial." *Id*. at 721.

In the present case, Harris was seen briefly in a back corridor, in close proximity to a uniformed but unarmed deputy. As the circuit court noted, there were a range of inferences the jurors could have made simply because they "happene[ed] to see him in the hallway outside the jury room, which could very well be the hallway a lot of individuals come to." The court also noted none of the jurors worked at the Detention Center or the Sheriff's Department or had any law enforcement background with knowledge of courthouse protocol. Harris was not dressed in prison attire, nor did he have leg irons or handcuffs. We find that this one inadvertent viewing of Harris in a back corridor in close proximity to a uniformed officer did not result in any prejudice to Harris' trial, and the court did not abuse its discretion in denying the motion for a mistrial.

II. MUTUAL AFFRAY JURY INSTRUCTION

The second issue on appeal concerns whether the circuit court abused its discretion in refusing to give a jury instruction of mutual affray. Harris contends that trial counsel requested an instruction on the defense of mutual affray, a common law defense to assault on the theory that a voluntary decision to fight another may constitute consent to being hit, negating a required element of assault, *i.e.*, that the victim did not consent to the contact. The court denied the request, reasoning that the evidence failed to generate the defense. The court explained that it didn't think there was "any evidence that the victim in this case, Ms. Chrisp [sic], invited this contact or was involved in a mutual affray." Further, Ms. Crisp's testimony indicated she attempted to quiet the individuals so that she could sleep; there was no evidence of a boxing match, wrestling match, or "a mutual agreement to have a fist fight or anything of that nature." After the court promulgated jury instructions, Harris' counsel advised the court that he had no objection to the instructions.

This court reviews a circuit court's refusal to give a jury instruction under the abuse of discretion standard. *See Johnson v. State*, 223 Md. App. 128, 138 (2015). Further, "we consider whether the instruction was generated by the evidence, whether it was a correct statement of law, and whether it otherwise was fairly covered by the instructions actually given." *Id*. (Internal citations and quotations omitted).

Maryland Rule 4-325(e) states that "[n]o party may assign as error the giving or 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." Harris' counsel failed to object after the instructions were promulgated. To remedy this deficiency, Harris contends that substantial compliance with Rule 4-325(e) is sufficient to preserve his argument for appellate review. *See Horton v. State*, 226 Md. App. 382, 413-14 (2016) (holding that substantial compliance with Rule 4-325(e) may be sufficient to preserve arguments even if the party fails to renew an objection on the record after the jury has been instructed).

The requirements to prove substantial compliance with Rule 4-325(e) includes:

> [T]here 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.

Bowman v. State, 337 Md. 65, 69 (1994) (quoting *Gore v. State*, 309 Md. 203, 309 (1987)). To show that further objection would have been "futile or useless," it is not enough to show that counsel raised an objection before the jury was instructed, counsel indicated the basis of the objection, and the court made clear that it disagreed with counsel's argument. *See Montague v. State*, 244 Md. App. 24, 61 (2019), *aff'd on other grounds*, 471 Md. 657 (2020). In *Montague*, the defendant argued that the court erred in promulgating an instruction on concealment when there was no evidentiary basis. *Id.* Though "[t]he objection was certainly made to the trial court before the jury was instructed," "[t]he basis for this objection was made clear to the court at that time," and "it is equally clear that the trial court did not agree with the premise of trial counsel's

argument," this Court determined that nothing in the record suggested that renewing the objection would have been futile or useless. *Id*.

The Court in *Montague* compared the defendant's case with cases where the record reflected affirmative statements by the court that signaled to counsel that regardless of counsel's objection, the court would not change it's ruling. *Id*. (comparing *Gore v. State*, 309 Md. 203, 206 (holding that, after the trial court stated to defense counsel "you can object all you want, but I'm not going to [give the controverted instruction]," no additional objection was required to comply with the rule)). The court in *Sims v. State* held that substantial-compliance decisions "represent the rare exceptions [to Rule 4-325(e)], and that the requirements of the Rule should be followed closely." 319 Md. 540, 549 (1990). "Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost." *Id*.

Harris' counsel failed to object after the jury was instructed. Counsel also failed to show that further objection would be futile or useless. The record does not indicate that it would have been futile for counsel to renew the objection after the court instructed the jury. On the contrary, the court welcomed the objection, indicated it was unable to find a criminal pattern jury instruction on mutual affray, and denied the request to provide the instruction. We therefore conclude that, in accordance with Maryland Rule 4-325, Harris waived his objection by failing to object after the jury was instructed, and the issue is not preserved for our review.

JUDGMENT OF THE 2011 CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.