Circuit Court for Prince George's County
Case No.: CT170027X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2107

September Term, 2017

BRENNAN BOTTS

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: June 5, 2019

On December 10, 2016, Brennan Botts ("Appellant") was involved in a physical altercation with T.D.,[1] his long-time girlfriend and mother of his three children. He stood trial in the Circuit Court for Prince George's County for first- and second-degree rape and other related charges. Following the close of evidence, the State proposed a jury instruction on first-degree assault derived from the 2012 edition of David Aaronson's Maryland Criminal Jury Instructions and Commentary, in lieu of the applicable Maryland Criminal Pattern Jury Instructions.

Following guilty convictions for first- and second-degree assault and committing a crime of violence on the presence of a minor, Botts appealed. He asks us to review the 2012 Aaronson instruction on first-degree assault for plain error. Plain error review is foreclosed, however, because defense counsel affirmatively advised the court, multiple times, that the defense did not object to the instruction.

BACKGROUND

Botts stood trial on charges of: first and second-degree rape, first- and second-degree assault, and committing a crime of violence in the presence of a minor. We derive the following facts from his three-day jury trial held on August 8-10, 2017.

At 4:00 a.m. on December 10, 2017, Botts returned to the Oxen Hill apartment he shared with his longtime girlfriend, T.D. What began as an argument quickly escalated into a physical altercation. According to T.D., Botts pushed her to the floor, and the two began

[1] We refer to the victim by her initials to protect her privacy. *White v. State*, 223 Md. App. 353, 362 n.1 (2015).

to "tussle[], arguing back and forth." There was evidence that T.D. threw the first blow when she punched Botts in the face.

Kieran Crawford, a neighbor, heard screaming and doors slamming in the apartment building, followed by a woman crying. When Crawford opened the door, he found a woman sitting in the stairwell. After asking her what was wrong, Crawford testified that "she came running down the stairs screaming he's trying to kill me." Crawford told the woman to wait outside his apartment while he called 911. Shortly after that, Crawford saw an unidentified male run out of the building, get in a gray van, and then drive away.

A responding officer from the Sexual Assault Unit of the Criminal Investigation Division of the Prince George's County Police Department, Detective Clarissa Clarke, testified that T.D. disclosed to her on the day of the incident that Botts had held her head down, grabbed her arms, suffocated her with a comforter, and raped her. The detective observed blood on T.D.'s legs and physical injuries on her body. An investigator at the Crime Scene Investigation Unit of the Prince George's County Police Department took photographs and collected evidence, testifying at trial that he photographed what appeared to be bloodstains on T.D.'s comforter and jeans. Detective Clarke continued to interview T.D. at the police station, and an excerpt from the video recording was entered into evidence. Sometime later, after Botts was charged, the detective testified that T.D. approached her, stating that the incident "was a misunderstanding," that she wanted to drop the charges, and that Botts "was the sole provider and she needed him home."

A forensic nurse examiner and registered nurse, Sandra Carlin, who examined T.D. the day of the incident, also testified about the extent of T.D.'s injuries. She recounted that

T.D. described getting bitten, thrown down, forcefully grabbed, choked, and raped. Carlin documented T.D.'s injuries, including sclera (redness) in the inner eyes as a result of choking, petechia (redness) in the skin as a result of strangulation, a lip abrasion, body abrasions, bruising, red marks, bite marks, and vaginal injuries.

T.D.'s account of the events of December 10 diverged at trial. Although she confirmed that she asked her neighbor to call the police, she denied stating that anyone was trying to kill her. T.D. explained that Botts was the father to her three children and that they were living together at the time of this incident. That day, after Botts came home at around 4:00 a.m., an argument ensued. During that argument, T.D. hit Botts, and Botts responded by pushing her to the floor. She testified that she and Botts had "tussl[ed], argu[ed] back and forth[,]" and that he had "asked for the keys so that he c[ould] leave[.]" She refused to give him the keys, and after about 20 minutes, he left. She agreed that Botts had pushed her but stated that she had had "[n]o injuries." On the comments she made to Detective Clarke on the day of the incident, T.D. stated that there was "too much commotion going on in [her] head, so [she] couldn't focus on giving her a full story and answering questions correctly[.]" She did not recall telling the detective that Botts was trying to kill her.

Throughout trial, the State played recordings of phone calls Botts had made to T.D. from jail. In one recording, Botts asked T.D. to lie at trial and to say that nothing happened. In another, Botts said that he would never harm T.D. again, and that he was very sorry. He stated that he was planning a surprise Christmas wedding proposal, but that T.D. had ruined the plan by speaking with the police.

As will be discussed in more detail, after the conclusion of all the evidence, and prior to instructions, the prosecutor asked the trial court to give both instructions from Professor Aaronson's treatise on Maryland Criminal Jury Instructions concerning first-degree assault, including Section 5.10(C)—the instruction on intentionally placing another in fear of immediate physical injury. *See* 1 Aaronson, Maryland Criminal Jury Instructions and Commentary (3d ed. 2009) [hereinafter "Aaronson, *MCJIC*, 2009 edition"]. The prosecutor recognized that the instruction at issue was not included in the Maryland Pattern Instructions. *See generally* Maryland State Bar Ass'n, Maryland Criminal Pattern Jury Instructions (2012). Defense counsel responded that she had never seen Section 5.10(C) given to a jury. However, after viewing the first-degree assault statute, defense counsel stated, "I'm not going to object to the State including that instruction." And, when the court asked if counsel was agreeing to an instruction derived from Section 5.10(C), defense counsel replied affirmatively. Defense counsel also stated that she had no objection to instructing the jury consistent with Section 5.10 (A) from Professor Aaronson's treatise. That instruction stated that a first-degree assault may be found where the defendant caused or attempted to cause serious physical injury to another.

When the court then instructed the jury, it first instructed on the offense of second-degree assault, informing the jury that the crime may be committed by "intentionally frightening another person with the threat of immediate offensive physical contact or physical harm," or by committing a battery, in other words, by "causing offensive physical contact to another person." The court then gave the jury alternative definitions of first-

degree assault. The first was derived from Section 5.10 (A) of Aaronson, *MCJIC*, 2009 edition, as follows:

> First degree assault is committed when a person causes or attempts to cause serious physical injury to another person. The defendant is charged with the crime of first degree assault. In order for the defendant to be guilty of this offense, the State must prove beyond a reasonable doubt that, one, Brennan Botts caused or attempted to cause serious physical injury to another person; two, at the time, Brennan Botts had the apparent present ability to inflict serious physical injury to another; three, Brennan Botts intended to cause serious physical injury to another person; and, four, Brennan Botts' actions were not legally justified.

The court then gave another instruction on first-degree assault, derived from Section 5.10(C) of Aaronson, *MCJIC*, 2009 edition, as follows:

> First degree assault is committed when a person intentionally intends to place another in fear of immediate serious physical injury. The defendant is charged with the crime of first degree assault. In order for the defendant to be guilty of this offense, the State must prove beyond a reasonable doubt that, one, Brennan Botts committed an act with the intent to place another person in fear of immediate serious physical injury; two, at that time, Brennan Botts had the apparent present ability to inflict serious physical injury to another; three, T.D. reasonably feared immediate serious physical injury; and, four, Brennan Botts' actions were not legally justified.
>
> Assault in the first degree may be committed without actually touching, striking, or physically harming another so long as the defendant intended to frighten the victim with the threat of serious physical injury. . ..

The jury ultimately acquitted appellant of both rape charges and convicted him on the remaining assault crimes. He was sentenced to fifteen years, with all but twelve years suspended, for first-degree assault, with the second-degree assault conviction merged. He also received a concurrent three years, with all but nine months suspended, for committing a crime of violence in the presence of a minor, all to be followed by five years' supervised

probation upon release. Following his timely appeal, Appellant presents the following question:

> Did the trial court commit plain error in giving an instruction that misstated the definition of first degree assault and permitted the jury to convict Botts of first degree assault without finding that he intentionally caused or attempted to cause serious physical injury to another, as required by Md. Code (2002, 2012 Repl. Vol.) Criminal Law Art. § 3-202 (a) (1)?

DISCUSSION

There is no dispute that Appellant did not object to the inclusion of the instruction at issue. Appellant's argument is that the instructional error was so egregious as to warrant plain error review. He contends that the trial court committed plain error by giving the instruction derived from Section 5.10(C) of Professor Aaronson's treatise because it misstated the definition of first-degree assault and allowed the jury to convict him of that crime without finding that he intentionally caused or attempted to cause serious physical injury to another, as required by statute. The State responds that plain error review: (1) is not available because Appellant affirmatively waived any objection to the instruction and (2) is not warranted in any event. Appellant replies that the issue was not waived because he did not invite the error by indicating, at the end of all the instructions, that, except for an objection to the concealment instruction, "defense is satisfied."

We begin our analysis by discussing the nature of the alleged error.

Generally, the law of assault encompasses "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." Md. Code (2002, 2012 Repl. Vol.), § 3-201(b) of the Criminal Law Article ("Crim. Law"). "The statutory offense of second-degree assault includes three modalities: (1) intent to frighten, (2) attempted

battery, and (3) battery." *Snyder v. State*, 210 Md. App. 370, 382 (2013). "The intent to frighten variety [of assault] requires," among other things, "that the defendant commit an act with the intent to place another in fear of immediate physical harm." *Id*. In general, an assault, without more, is an assault in the second-degree. *See* Crim. Law § 3-203(b).

An assault in the first-degree, on the other hand, entails either "commit[ting] an assault with a firearm" or "intentionally cause[ing] or attempt[ing] to cause serious physical injury to another." Crim. Law § 3-202(a)(1)-(2). "Serious physical injury" means physical injury that "creates a substantial risk of death" or "causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." Crim. Law § 3-201(d). In cases that do not involve a firearm, first-degree assault is essentially a second-degree assault plus a specific intent to inflict serious physical injury. *See Snyder*, 210 Md. App. at 385-86. "[A] jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, whether or not the victim suffers such an injury. Also, the jury may infer that one intends the natural and probable consequences of his act." *Chilcoat v. State*, 155 Md. App. 394, 403 (2004).

In considering whether it was error to instruct the jury that the greater offense of first-degree assault may be committed when a person intentionally attempts to place another in fear of immediate serious physical injury, neither this Court, nor the parties for that matter, have found a case on point concerning this instruction. Notably, as Appellant points out, in his 2013 Supplement, Professor Aaronson eliminated the instruction in question. 1 Aaronson, Maryland Criminal Jury Instructions and Commentary, § 5.10(C),

at 180 (3d ed. 2013 Supp.) [hereinafter "Aaronson, *MCJIC*, 2013 Supp."]. He explained this deletion as follows:

> Unlike, Second Degree Assault, Assault in the First Degree under Md. of Code Ann. Crim. Law §3-202(a)(1), arguably, can be committed only one the way: when a person intentionally causes or attempts to cause serious physical injury to another person. *See* Instruction § 5.10 (A), First Degree Assault—Attempted Infliction of Physical Injury: Causing or Attempting to Cause Serious Physical Injury to Another Person, supra. If a person intentionally causes or attempts to cause a person to be placed in reasonable fear of serious bodily harm or death, but does not use a firearm or intend to cause actual physical harm, First Degree Assault has not been committed. To illustrate, if A intends to rob B by placing a knife next to B's throat, demanding money, but has no intention to actually harm B and B complies, A is guilty of Robbery and Assault in the Second Degree, and, perhaps, other offenses, but not Assault in the First Degree. For this reason, Instruction § 5.10(C), First Degree Assault—Attempted Infliction of Physical Injury: Intentionally Placing Another in Fear of Immediate Serious Physical Injury, *supra*, has been intentionally deleted.

Aaronson, *MCJIC*, 2013 Supp., § 5.10(D), at 181.

He further explained:

> Assault with intent to threaten or frighten requires a finding that the defendant committed assault by *attempting to frighten or threaten another person*. By contrast, no such requirement is imposed on assault with attempt to commit battery. In practice, the distinction may be a subtle one. Assume the accused approached the victim from behind and, unbeknownst to the intended victim, swung a bat at the victim's head intending to hit the victim's head, but missed. Regardless of whether the bat actually made contact with the victim, the accused committed first degree assault with intent to cause serious physical injury. *See* Instruction § 5.10(A), First Degree Assault - Attempted Infliction of Physical Injury: Causing or Attempting to Cause Serious Physical Injury to Another Person. Now assume that the accused approached the victim with a bat, but this time he did so while facing the victim. In an attempt to frighten the victim, but without intending to cause physical harm, the accused, while frantically waving the bat over his own head, threatened, "I'm going to bash your head in." In this case, under Md. Code Ann. Crim. Law § 3-202(a)(l), as explained above, the accused has not committed First Degree Assault since, in the absence of the use of a firearm,

> the accused did not "intentionally cause or attempt to cause serious physical injury to another".

Id. at 185 (emphasis in original).

Although the State argues that any error was not clear or obvious and did not affect Appellant's substantial rights, both parties appear to accept that the alternative instruction, enumerated in Section 5.10(C) of Aaronson, *MCJIC*, 2009 edition, that a person may commit a first-degree assault by placing another in fear of serious physical injury without also instructing that there must be the intentional commission or an attempted commission of serious physical injury, was an incorrect statement of law. The question then becomes whether that incorrect instruction amounted to plain error in this case.

Maryland Rule 4-325(e) specifically provides:

> No party may assign as error the giving or 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. Upon request of any party, the court shall receive objections out of the hearing of the jury. 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.

The first part of this rule means that "the failure to object to a jury instruction at trial results in a waiver of any defects in the instruction, and normally precludes further review of any claim of error relating to the instruction." *Lindsey v. State*, 235 Md. App. 299, 329 (citations omitted), *cert. denied*, 458 Md. 593 (2018). The rule allows for the possibility of plain error.

"Plain error is error that is so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App.

550, 565 (citation and internal quotation marks omitted); *Malaska v. State*, 216 Md. App. 492, 524-25 (explaining that plain error review can remedy defects that denied "a defendant's right to a fair and impartial trial"). Our discretion to recognize plain error is plenary. *Austin v. State*, 90 Md. App. 254, 262-64, 268 (1992); *see also Morris v. State*, 153 Md. App. 480, 513 (2003) ("Reversible error . . . is assumed, as a given, before the purely discretionary decision of whether to notice it even comes into play") (citation omitted).

Furthermore, plain error review is "reserved for those errors that are compelling extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Hallowell v. State*, 235 Md. App. 484, 505 (2018) (quoting *Newton v. State*, 455 Md. 341, 364 (2017), *cert. denied*, 138 S.Ct. 665 (2018)). "In order to be 'extraordinary,' and thus cognizable on review, an error must be more than prejudicial, indeed, more than merely reversible, had the error been properly preserved." *Steward*, 218 Md. App. at 568 (quoting *Morris*, 153 Md. App. at 511). Notably, when an issue is raised as to an alleged defective jury instruction, Maryland appellate courts "have been rigorous in adhering steadfastly to the preservation requirement." *Peterson v. State*, 196 Md. App. 563, 589 (2010); *see also Taylor v. State*, 236 Md. App. 397, 447 (2018) ("[I]n the context of erroneous jury instructions, the plain error doctrine has been used sparingly.") (quoting *Conyers v. State*, 354 Md. 132, 171 (1999)).

In order to conclude that an error amounts to plain error, the Court of Appeals has articulated the following four conditions, all of which must be met:

1. appellant did not intentionally relinquish or abandon the legal error;

2. the legal error is clear or obvious, and not subject to reasonable dispute;

3. the error affected the appellant's substantial rights, which means that it affected the outcome of the proceedings; and

4. the error seriously affects the fairness, integrity or reputation of judicial proceedings.

Newton, 455 Md. at 364 (citing *State v. Rich*, 415 Md. 567, 578 (2010)) (further citation omitted). *Accord Givens v. State*, 449 Md. 433, 469 (2016) (observing that "[m]eeting all four prongs is difficult, as it should be"); *see also Hallowell*, 235 Md. App. at 506 (concluding, in that case, that an instructional error affected "substantial rights" because it created the "distinct possibility" that the defendant was convicted of a "non-existent crime" and "seriously affected the fairness, integrity or public reputation of judicial proceedings"). A plain error analysis "need not proceed sequentially through the four conditions; instead, the court may begin with any one of the four and may end its analysis if it concludes that that condition has not been met." *Winston v. State*, 235 Md. App. 540, 568, *cert. denied*, 458 Md. 593 (2018).

As to the waiver prong, the case of *State v. Rich*, is instructive. In that case, defense counsel requested a voluntary manslaughter instruction concerning the hot-blooded response to legally adequate provocation. *Rich*, 415 Md. at 573. The jury convicted Rich of voluntary manslaughter. *Id.* This Court reversed the conviction, concluding that the evidence was insufficient to generate the issue of whether Rich acted in hot blooded response to legally adequate provocation. *Id.* The Court of Appeals reversed. *Id.*

The Court noted that defense counsel had requested the voluntary manslaughter instruction at issue, and that the "doctrine of invited error is applicable to his argument that

'the instructional error materially affected his right to a fair and impartial trial.'" *Rich*, 415 Md. at 575. The Court made clear that the doctrine of invited error is "applicable to appellate review of jury instructions specifically requested by the criminal defendant's counsel." *Id.* In reaching that conclusion, the Court was persuaded by a number of out-of-state authorities, as well as the Supreme Court's discussion of "plain error," in *United States v. Olano*, 507 U.S. 725 (1993), as further explained in *Puckett v. United States*, 556 U.S. 129 (2009). In *Puckett*, the Court wrote:

> We explained in *United States v. Olano*, that Rule 52(b) review – so-called "plain-error review" – involves four steps, or prongs. 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 district court 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."

Id. at 135 (internal citations omitted).

The Court of Appeals in *Rich*, 415 Md. at 579, then went on to discuss the Ninth Circuit's analysis of *Olano* in *United States v. Perez*, 116 F.3d 840, 842-45 (9th Cir. 1997). The Ninth Circuit observed that *Olano* did not specifically address invited error but did acknowledge the difference between "forfeited and waived rights." *Rich*, 415 Md. at 579-80 (quoting *Perez*, 116 F.3d at 845):

> Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the "intentional relinquishment or abandonment of a known right." **Forfeited rights are reviewable for plain error, while waived rights are**

> **not.** "If a legal rule was violated during the District Court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection."
>
> Until now, our invited error doctrine has focused solely on whether the defendant induced or caused the error. We now recognize, however, that we must also consider whether the defendant intentionally relinquished or abandoned a known right. If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.
>
> We do not mean to suggest that a defendant may have jury instructions reviewed for plain error merely by claiming he did not know the instructions were flawed. **What we are concerned with is evidence in the record that the defendant was aware of, i.e., knew of, the relinquished or abandoned right.**

Rich, 415 Md. at 580 (internal citations omitted) (quoting *Perez*, 116 F.3d at 845); *see generally, Exxon Mobil Corp. v. Ford*, 433 Md. 426, 462 (2013) ("The doctrine of acquiescence—or waiver—is that a voluntary act of a party which is inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review.") (internal citations and quotations omitted).

The Court of Appeals then concluded:

> We agree with this analysis. In the case at bar, when Respondent's trial counsel (1) argued that the issue of voluntary manslaughter was generated by the evidence, and (2) made a specific request for a voluntary manslaughter instruction, that action constituted an intentional waiver of the right to argue on appeal that the evidence was insufficient to support the voluntary manslaughter conviction.

Rich, 415 Md. at 581; *see also Booth v. State*, 327 Md. 142, 180 (1992) (declining to apply plain error review because "defense counsel affirmatively advised the court that there was no objection to the instruction which the court immediately thereafter gave to the jury. Error, if any, has been waived"); *cf. Hallowell*, 235 Md. App. at 502-04 (exercising plain error review despite defense counsel's statement that he was "satisfied" with the

instructions given, noting that "trial counsel had no basis to renew his previous objection to the second-degree felony murder instruction, because the court had acceded to his wishes"); *Yates v. State*, 202 Md. App. 700, 722 (2011) (recognizing that appellant's "failure to object constituted a forfeiture of his right to raise the issue on appeal, but it did not preclude this court from deciding whether to exercise its discretion to engage in plain error review"), *aff'd*, 429 Md. 112 (2012).

Here, after the court instructed the jury that they could convict Appellant of first-degree assault if they found him guilty of causing or attempting to cause serious physical injury, under 5.10(A), or of intentionally placing another in fear of immediate serious physical injury, under 5.10(C), the court asked counsel to approach the bench. The State requested that the court provide additional explanation concerning these two alternatives as follows:

> [THE STATE]: Just that in the same way second degree assault has alternative theories, the first degree assault does, too. So they don't have to find all of the elements under 5:10A, then also all of the elements under 5:10C.
>
> [DEFENSE COUNSEL]: For 5:10A, what are you saying the Court should add? What are you saying the Court should add?
>
> [THE STATE]: Just that there are two alternative ways of finding first degree assault in the same way as there are alternative ways of finding second degree assault.

[T3. 33]

The colloquy continued:

> [THE STATE]: Just the same thing; there are just – it's either first degree – all of the elements under the attempted infliction of physical injury – or, I'm sorry, with the causing or attempting to cause serious physical

injury or, alternatively, intentionally placing another in fear, then the serious physical injury.

[DEFENSE COUNSEL]: So you're saying or should go after A but before C?

[THE STATE]: The exact same way for second degree assault, that there are alternatives. And also a battery, I would ask that it – that also applies to the first degree.

THE COURT: So when we went over the instructions, you said this was one that you wanted us to read, then you said you wanted this to –we're asking you what do you want to say? We're asking you specifically what do you want, because we went over jury instructions that you wanted read, so it's not clear what you're asking the Court. And I think defense is not clear what you're asking, either, so that she knows what to object to or not to object to.

[THE STATE]: Just that 5:10A or 5:10C is a first degree assault.

THE COURT: Okay. *Do you understand what she's asking*?

[DEFENSE COUNSEL]: *Yes*.

[T3. 33-35] (Emphasis added).

The court resumed:

THE COURT: So you want me to go back on the record to say that 5:10A, when looking at first degree assault, you may use 5:10A or 5:10C?

[DEFENSE COUNSEL]: I don't think you should [do] that. *I think it should just read – you read 5:10A, first degree assault, read all of that, or first degree assault can be attempted whatever, then you read C.*

[THE STATE]: I don't think you need to read the actual instruction again.

[DEFENSE COUNSEL]: Just the word or, and the Court would go into the definition of 5:10C.

[THE STATE]: Just the titles. So first degree assault can be 5:10A, read the title, or a first degree assault can be 5:10C, then read the title.

[DEFENSE COUNSEL]: *No objection, Your Honor.*

[T3 at 35] (Emphasis added).

The court then clarified:

THE COURT: So let me make sure I understand what you want me to read. We're going to go back on the record. I'm going to read that 5:10A, first degree assault, attempted infliction of physical injury, causing, attempted or attempting to cause serious physical injury to another person; or 5:10C, first degree assault, attempted infliction of physical injury, place on another in fear of imminent serious physical harm. That's how you want me to read it?

[THE STATE]: No. I would ask that it be read as a first degree assault is the definition to find under 5:10A or also the definition under 5:10C.

THE COURT: Do you understand?

[DEFENSE COUNSEL]: Or also? Or also? Aren't those contradictory words? Seriously. It's either or they can find A or C, but you said also. So if you say –

[THE STATE]: I mean first degree assault can either be 5:10A or 5:10C.

[DEFENSE COUNSEL]: *No objection to the word or being added before you give the definition of C.*

THE COURT: Okay.

[THE STATE]: I don't think you have to read all the whole definition again.

[DEFENSE COUNSEL]: No.

THE COURT: Just first degree assault can be either 5:10A or 5:10C?

[THE STATE]: Yes.

THE COURT: Okay. Then second degree assault can either be intent to frighten or battery, and that's all I read?

[THE STATE]: Yes. I would let them know again they will get a copy.

[DEFENSE COUNSEL]: You don't have to reread it.

THE COURT: All right. Thank you very much.

[T3 at 35-36] (Emphasis added).

The court then instructed the jury as follows:

Ladies and gentlemen, when looking at second degree assault, second degree assault can be intent to frighten or battery. And you'll have each of those definitions when you go back.

Ladies and gentlemen of the jury, when looking at first degree assault, first degree assault can be the definition under 5:10A or the definition under 5:10C. And you'll have both of those definitions in the jury deliberation room.

[T3. 37]

After this, the parties approached the bench one more time, whereupon the court was assured that both parties were satisfied with the jury instructions:

THE COURT: Madam [S]tate, are you satisfied?

[THE STATE]: Yes, Your Honor.

[DEFENSE COUNSEL]: With the exception of my objection to the concealment definition, *defense is satisfied.*

THE COURT: All right. Thank you.

[**Id. at 37]** (Emphasis added).

Although there are differences between this case and *State v. Rich*, and although a persuasive argument can be made that three of the four prongs of the *Rich* test for plain error were met in this case, our review of the entire discussion between the parties

persuades us that Appellant affirmatively waived any objection to the alternative instruction that first-degree assault may be committed when a person intentionally intends to place another in fear of immediate serious physical injury. *See Booth*, 327 Md. at 180 (holding claim regarding error in allocution instructions was waived where "there is more . . . than the simple lack of an objection to the instruction as given" – defense counsel affirmatively advised court there was no objection to instruction); *see also Choate v. State*, 214 Md. App. 118, 130 (2013) (where a party "affirmatively (as opposed to passively) waived his objection by expressing his satisfaction with the instructions as actually given[,]" we are "especially disinclined to take the extraordinary step of noticing plain error"). Thus, we decline to exercise plain error review.

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