UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2161

September Term, 2014

DORRIEN ALLEN

v.

STATE OF MARYLAND

Meredith,
Reed,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: December 2, 2015

At the conclusion of a five-day jury trial in the Circuit Court for Baltimore City, Dorrien Allen, appellant, was convicted of murder in the first degree, attempted murder in the first degree, conspiracy to commit robbery with a deadly weapon, use of a handgun in the commission of a crime of violence, assault in the first degree, robbery with a deadly weapon, and conspiracy to commit robbery with a deadly weapon. The trial court sentenced the appellant to life imprisonment plus twenty-five years. This timely appeal followed.

QUESTIONS PRESENTED

Appellant presents the following questions for our review:

I. Did the trial court err in failing to instruct the jury on alibi?

II. Did the trial court abuse its discretion in removing a juror from the jury and replacing her with an alternate?

For the reasons stated below, we answer both questions in the negative and affirm appellant's conviction.

FACTS AND PROCEDURAL HISTORY

On the morning of January 15, 2013, Brandon Gadsby, twenty years old, and his girlfriend, Michelle Adrian, seventeen, drove in Gadsby's truck from Frederick County to Baltimore City for the express purpose of buying heroin. Gadsby and Adrian entered Baltimore City via Edmondson Avenue and proceeded down several residential streets before two young men waved Gadsby's vehicle over. One man, whom Gadsby later identified as Dorrien Allen, eighteen years old, wore an orange jacket; and the man later identified as Tevin Hines, also eighteen, wore a black jacket and black beanie cap. Gadsby testified that he stopped his truck on the side of the street and the two men approached the passenger side, where Michelle Adrian was sitting. Gadsby recounted that Allen asked if

he wanted "boy or girl," slang terms Gadsby understood to mean "heroin or cocaine." Gadsby said "boy," whereupon Hines told Allen that he would meet him "over there." Following this exchange, Allen entered the truck and sat on the passenger side of the truck's bench seat.

Gadsby testified that Hines walked toward the back of the truck while Allen directed Gadsby to drive to the 3900 block of Mulberry Street, approximately two or three blocks from where Gadsby encountered the two men. Gadsby parked in a lot adjacent to a cemetery. Allen exited the truck and disappeared from view when he entered an alley. According to Gadsby, Allen returned with Tevin Hines, but only Allen approached Gadsby's truck. Hines remained in the alley. Gadsby testified that Allen returned to the passenger side of the truck and returned to the bench seat. Gadsby recounted that he heard Hines say, "not yet, not yet," apparently indicating that they should wait until a nearby garbage truck was out of sight.

Gadsby testified that, after the garbage truck disappeared from view, Dorrien Allen pulled out a handgun. Gadsby described what happened next:

> [BY BRANDON GADSBY]: I – he said, ["]don't fuckin' move["] and I reached for my keys and, to start my truck and they he said, ["]are you trying to die[?"], and that's when fire – before I could even look at him the first shot got fired and shattered the window next to me.
>
> Q. [BY PROSECUTOR]: Okay. At that time did you know that you were shot?
>
> A. No, Sir.
>
> Q. So, after the Defendant shoots, after saying, were you trying to die, what happened then?

A. I handed – I reached out the money and said [“]here,[”] and I said, [“]take, take anything you want.[”] And that’s when he took the money outta my hand and –

Q. And that money, what was that money being used to buy?

A. Heroin.

Q. For whom.

A. For me and my girlfriend.

Q. So you guys took out that money together?

A. Yes, sir.

Q. Okay. And how much money was it?

A. It was $120.00.

Q. And what happened after – okay. So you hold up the money. And how do you hold it up? Is it in a bag? Is it –

A. I pull, I – it was underneath my leg. I pulled it out from underneath my leg and handed it out to him with my left hand.

Q. Okay. And so you hand it out to the Defendant. Then what happens?

A. That’s when he had grabbed the money out of my hand and stepped out of my truck, or opened the door to my truck.

Q. Okay. And where is your truck positioned now?

A. It’s still sitting at the same place facing the cemetery with the houses to my left and houses behind me.

Q. Okay. Excuse me. So, the Defendant steps out of your truck and then what happens?

A. He continued firing.

Q. Well, let's slow it down. He steps out of your truck and then what do you see him do?

A. I – at that time I just heard the second shot and it didn't, it wasn't –

Q. He steps out of your truck. Does he leave the door open or closed?

A. He leaves it open.

Q. Okay. And then what does he do with the gun, if you know?

A. He aims it towards me and my girlfriend.

Q. Okay. He aims it towards you and your girlfriend. And about how far away from the frame of the door of your truck is the end of that pistol?

A. It's right in – it's right inside the frame of my truck.

Q. Just right at the frame?

A. Yes, sir.

Q. Okay. And about how many feet wide is the bench [seat] of your truck?

A. Probably twice this stand right here.

Q. Twice that stand?

A. Yes, sir.

Q. Okay so once the Defendant –

A. Now we're estimating about six and a half, seven feet.

Q: So about seven feet.

A: Yes, sir.

Q: Okay. Now, once the Defendant points the gun, what does Ms. Adrian do?

A: She took cover and –

Q: What do you mean she took cover? What did she do?

A: She went in the fetal position.

Q: Okay. Towards which way? Towards the passenger door or away from the passenger door?

A: By that time I was also in the fetal position, so –

Q: How close was she to you?

A: Right next to me.

Q: And how close are you to your driver's side door at this point?

A: I was right next to it.

Q: And you said that she got in the fetal position and what did you do?

A: I also went in the fetal position.

Q: And then what did you hear, see or feel next?

A: I just heard bang, bang, bang, bang, bang. I couldn't tell you how many shots were fired.

Michelle Adrian died from multiple gunshot wounds. Gadsby, who survived the shooting, testified that the shooter in the orange jacket fled through a hole in the fence bordering the cemetery. Gadsby later identified Allen and Hines in photographic arrays provided to him by Detective Joshua Fuller of the Baltimore City Police Department Homicide Division.

On January 15, 2013, at approximately 9:30 a.m. — *i.e.*, about one hour before the shooting — Officer Kevin McLean, a patrol officer assigned to the Southwestern District of the Baltimore City Police Department, observed Dorrien Allen and Tevin Hines in front

of the Normandy Food Market located at 423 Normandy Avenue. Officer McLean was familiar with Allen and Hines based upon the officer's experience in the neighborhood. He testified that he had encountered Allen approximately fifty or sixty times over seven years, and had known Hines for two years. About twenty minutes after he observed appellants in front of 423 Normandy Avenue, Officer McLean drove around the corner to a convenience store located at 3939 Edmondson Avenue, which he routinely checked upon while on patrol. At that location, he observed Allen, "wearing a bright orange puff jacket and blue jeans," and Hines, "dressed in black," enter the store and exit almost immediately upon seeing Officer McLean in his police cruiser.

At around 10:47 a.m., Office McLean received a dispatcher's call reporting a shooting in the rear of the 3900 Mulberry Street, two blocks from the convenience store located at 3939 Edmondson Avenue. Officer McLean responded to the scene of the shooting, and, upon seeing that Gadsby and Adrian were suffering from gunshot wounds, McLean asked Gadsby for a description of the shooter. Officer McLean testified regarding the description provided by Gadsby:

> A. [BY OFFICER MCLEAN] He told me it was a black male wearing a orange jacket and blue jeans.
>
> Q. [BY PROSECUTOR] And what other description, if any?
>
> A. That, that was, he was dark complected and he had short hair.
>
> Q. Thank you. And what, if anything, did you do based on that information?
>
> A. Being that I had seen an individual known to me as Dorrien Allen in that area approximately 15 minutes earlier, I immediately got on the air and told,

> gave that information out and told 'em that a possible suspect was Dorrien Allen.

At about 4:45 p.m., on the afternoon of the shooting, Detective Joshua Fuller observed Dorrien Allen walking on the street. The officer detained Allen for questioning. During the recorded interview, the detectives asked Allen what he had done earlier in the day, and Allen responded that he had been home alone until 11:30 a.m. or so. But, during the same interview, when Allen was shown surveillance video recorded at the convenience store that morning, Allen admitted that he was one of the persons shown in the video. The detective's recorded interview of Allen was played for the jury.

Officer McLean later identified Dorrien Allen in a photo array. Officers canvassed the cemetery, where they found an orange jacket. Photographs recovered from Allen's cell phone showed him wearing the orange jacket. DNA samples taken from the orange jacket matched Allen and two other individuals. A black beanie cap which was also found in the cemetery did not lead to a DNA profile; technicians failed to find any genetic material on the cap. Allen did not testify at trial.

Allen and Hines were tried together and both were convicted of various offenses relating to the shooting of Gadsby and Adrian. Mr. Hines's appeal has been addressed in a separate opinion. *Tevin Hines v. State*, No. 2334, September Term, 2014. We shall include additional facts as pertinent to the issues on appeal.

I. Jury Instruction on Alibi

Allen contends that the Circuit Court for Baltimore City erred when it declined to provide the jury an instruction on alibi.[1] The State counters that Allen failed to produce sufficient evidence to generate an alibi issue, and therefore, no alibi instruction was required. The State observes that the victims were shot at approximately 10:45 a.m. on January 15, 2013, and that, "[s]hortly before the shooting, Officer Kevin McLean saw Allen and Hines going into a store near the scene of the murder." The State notes that, despite Allen's initial statement to the police asserting that he was at home until about noon on January 15, 2013, Allen also "agreed [during the same interview] that a store surveillance video showed him and another man entering the store as Officer McLean had testified." In the State's view, because "Allen himself acknowledges that his remarks regarding his alibi were false in the very same [recorded] statement, there effectively ceased to be any evidence of alibi to generate this instruction." We conclude that Allen produced sufficient evidence to require

[1]The record does not reveal any specific instruction that counsel for Allen proposed the circuit court read to the jury. Allen argues in his brief that he "had an absolute right to **an alibi instruction**." (Emphasis added.) Maryland Criminal Pattern Jury Instruction 5:00 (3d ed. 2013) ("MPJI-Cr") and the accompanying notes provide:

> You have heard evidence that the defendant was not present when the crime was committed. You should consider this evidence along with all other evidence in this case. In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the crime was committed and the defendant committed it.
>
> Notes on Use
>
> Use this instruction if there is an issue of alibi generated by the evidence.

the trial judge to give an alibi instruction, but we also conclude that the failure to do so in this particular case was harmless error.

Maryland Rule 4-325(c) provides: "[T]he court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" 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) (quoting *Gunning v. State*, 347 Md. 332, 351 (1997)). In deciding whether a trial court abused its discretion in granting or denying a request for a particular jury instruction, we consider "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Stabb*, *supra*, 423 Md. at 465 (citing *Gunning*, *supra*, 347 Md. at 351). The complaining party bears the burden of showing both error and prejudice. *Tharp v. State*, 129 Md. App. 319, 329 (1999).

For an instruction to be factually generated, there must be "some evidence" sufficient to raise the jury issue. *State v. Martin*, 329 Md. 351, 359–61 (1993) (upholding trial court's refusal to instruct the jury on imperfect self defense because the defendant did not satisfy the "some evidence" standard). In *Martin*, the Court described the following passage from *Dykes v. State*, 319 Md. 206, 216 (1990), as "instructive" as to the meaning of "some evidence":

> *Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says — "some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." **The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the**

> **contrary. If there is any evidence relied on by the defendant which, if believed, would support [his defense], the defendant has met his burden.** Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the [defense does not apply].

Martin, *supra*, 329 Md. at 359 (quoting *Dykes v. State*, 319 Md. 206, 216 (1990)) (bold emphasis added).

Some cases suggest that the defendant must produce or elicit or "introduce" the evidence of his claimed alibi. *See, e.g.*, *Pulley v. State*, 38 Md. App. 682, 689 (1978) (***"The defendant must**, of course, **have introduced*** sufficient evidence at trial to constitute an alibi in order for the rule to apply." (Emphasis added.)). But, in *Robertson*, *supra*, 112 Md. App. at 377, the defendant's claim of an alibi was based "almost entirely on the testimony of a prosecution witness," namely, a police officer who testified about statements the defendant had made regarding his whereabouts at the time of the murder. We ruled in that case that the trial court committed reversible error in denying Robertson's request for an alibi instruction. We concluded that, because a defendant does not bear the burden of persuasion on a claim of alibi, "upon timely request, he is entitled to a specific instruction on that issue if there is sufficient support for it in the record, regardless of which side actually places the evidence on that issue before the jury." *Id.* at 383. We stated: "We hold, therefore, that when the sole evidence of an accused's alibi is adduced by the government[,] a criminal defendant may, nevertheless, be entitled to an alibi instruction." *Id.* Where "the testimony of the defendant and other alibi witnesses, if believed, sufficiently established an alibi for the entire period

during which the crime was allegedly committed . . . the court's refusal to grant the defendant's request for a specific alibi instruction was reversible error." *Id.* at 387.

"In evaluating whether competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused." *Fleming v. State,* 373 Md. 426, 433 (2003). *Accord Brogden v. State*, 384 Md. 631, 650 (2005). This Court has explained: "The failure to instruct the jury on a theory of the defense that is supported by some evidence removes from the jury its duty to decide a particular question of fact and effectively encroaches upon the province of the jury" which "impinges upon a defendant's constitutional right to a jury trial." *Roberston*, *supra*, 112 Md. App. at 385–86.

In *Pulley*, *supra*, 38 Md. App. at 688, the Court of Special Appeals held that the trial court's refusal to grant appellant's request for an alibi instruction was error where the requested instruction correctly stated applicable law and the defendant's evidence, if believed, would have been sufficient to establish an alibi for the entire period during which the sequence of events related by the State's witness unfolded.

In *Smith v. State*, 302 Md. 175, 180–81 (1985), the petitioner, Rodney Smith, was charged with armed robbery and related offenses arising out of the robbery of a desk clerk at a Holiday Inn. Smith claimed he was in Texas when the robbery occurred, and his aunt testified on his behalf. Although she could not testify to his whereabouts on the day of the robbery, she testified that Smith returned from Texas five days after the robbery, providing some support for his alibi.

Smith himself testified, but the State argued that his testimony was so inconsistent and unreliable that it was within the limited scope of *Kucharczyk v. State*, 235 Md. 334, 337–38 (1964), which reversed a conviction on the ground that the prosecuting witness's testimony was "so contradictory that it lacked probative force and was thus insufficient to support a finding beyond a reasonable doubt of the facts required to be proven." The Court of Appeals rejected the State's contention that Smith's testimony should be disregarded as in *Kucharczyk*. Despite the inconsistencies in Smith's statement, the Court of Appeals concluded that Smith's testimony "flatly stating that he was in Texas when the crime was committed, was sufficient evidence to take the [alibi] issue to the jury." *Smith*, 302 Md. at 183.

Allen urges us to follow the majority rule articulated in *Smith* that holds "even the defendant's uncorroborated testimony may be enough to generate the issue," *id.* at 180. He observes that *Smith* held: "A defendant's testimony may not be totally disregarded merely because he is the defendant. His testimony must be weighed just as that of any other witness." *Id.* at 181. *Accord Robertson*, *supra*, 112 Md. App. at 377: ("an accused's testimony may not be disregarded entirely merely because he is a defendant or because there was contradictory evidence elsewhere in the case").

We agree with Allen's assertion that a defendant faces a "fairly low hurdle" to obtain a jury instruction on alibi. *Arthur v. State*, 420 Md. 512, 526 (2011). As Judge Wilner stated, "[t]he 'bottom line' is that, if a *prima facie* case is generated on a particular point of law, the defendant is entitled to a jury instruction on that point." *Wright v. State*, 70 Md.

App. 616, 620 (1987). In sum, "[t]o furnish support for an alibi instruction the evidence must tend to show that the defendant was elsewhere when the crime he is charged with was committed. To prove an alibi, 'the testimony must cover the whole time in which the crime by any possibility might have been committed . . . .'" *Robertson*, 112 Md. App. at 383–84 (citing *Floyd*, *supra*, 205 Md. at 581). *See also Dishman v. State*, 352 Md. 279, 292 (1998) ("The task of this Court on review is to determine whether the criminal defendant produced the minimum threshold of evidence necessary to establish a prima facie case[.]")

In response to Allen's arguments that he is entitled to relief pursuant to *Pulley*, *Smith*, and *Robertson*, the State urges us to "reassess *Pulley* in light of subsequent developments in the law, and hold that the alibi instruction is not mandatory when the jury is adequately instructed as to the State's burden of proof and the definition of 'reasonable doubt.'" The State cites *Ruffin v. State*, 394 Md. 355, 372–73 (2006) (holding that "the trial court is required to instruct the jury on the presumption of innocence and the reasonable doubt standard of proof which closely adheres to MPJI-CR 2:02"), and *Carroll v. State*, 428 Md. 679, 686–87 (2012) (holding that there was no error or abuse of discretion where trial judge did not instruct jury that the State bears the burden of proving each element of each charge beyond a reasonable doubt). In *Carroll*, the Court of Appeals stated: "[Jury] instructions are reviewed in their entirety," and "[r]eversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights and adequately covered the theory of the defense." *Carroll v. State*, 428 Md. 679, 689 (2012) (citing *Fleming v. State*, 373 Md. 426, 433 (2003)).

Although MPJI-Cr 5:00 does not offer substantially different protections to a criminal defendant than do the instructions on the burden of proof and presumption of innocence, we conclude that Maryland law continues to require a trial court to provide an alibi instruction when, as here, a defendant can point to "some evidence," even if uncorroborated, to generate the instruction. Allen's statement to the detectives during the recorded interview is not materially distinguishable from the statements in *Smith* and *Robertson*. (As noted above, the evidence of alibi in *Robertson* came in through the State's witness.)

In the instant case, in an interview with Baltimore City Police Department Homicide Unit Detectives Derek Carew and Joshua Fuller, Allen asserted that he had an alibi: he was at home, alone, at 639 Yale Avenue when Baltimore City Police Officer Kevin McLean received a report of a shooting at 10:47 a.m on January 15, 2013. Allen asserted that he remained home, alone, from around midnight the night before the shooting until around noon that day, when he left his house to record a music video at his friend "Mike's" house in the 300 block of Lyndhurst Avenue. During the same interview in which Allen provided his alibi, however, his defense was undermined when Detectives Carew and Fuller confronted him with video surveillance footage showing Allen at the Normandy Food Market, one block from the scene of the shooting. The video footage placed Allen within blocks of the murder approximately two-and-one-half hours before Allen claimed to have left his house on January 15, 2013.

The State presented the detectives' recorded interview of Dorrien Allen during the State's direct examination of Detective Fuller:

[Recording being played for the jury]

Q. [BY DETECTIVE CAREW]: All right. So you came home at 1:00 a.m. [the night before the shooting], where do you sleep in the house?

A. [BY MR. ALLEN]: There no where for me to sleep for real so I got to sleep like probably the living room floor or the couch.

Q. And where did you sleep last night?

A. On the couch.

Q. Who saw you come in?

A. Nobody.

Q. All right. And what time did you get up?

A. I got up probably like 11:30.

Q. 11:30 in the morning?

A. Yeah. Probably 11:30, 10:00, I got up, got myself together.

Q. All right. Well, 11:30 10:00.

A. Yeah.

Q. All right. 10:00 to 11:30. You're not sure what time it was?

A. No, sir.

Q. Okay. When you got up, what did you do?

A. I got myself together, brushed my teeth, washed my face, and I chill, just ate like a bowl of cereal and just left.

Q. Okay. So what time did you leave?

A. By that time I had looked at my phone, somebody had called, it was probably 12:00 something.

Q. Okay. Looked at your phone.

Q. [BY DETECTIVE FULLER]: I am sorry, that's 12:00 this afternoon?

A. Yes.

* * *

Q. [BY DETECTIVE CAREW]: Okay. And what time did you get a call from her?

A. Probably like 12:00.

Q. Okay. All right. So you're saying that you did not leave your house until 12:00 noon?

A. Yes.

Q. Okay. Where did you go?

A. I went to the studio.

Q. You went right to the studio?

A. Yeah, I had in my mind I was going there, so I was ready to hit.

Q. You went right from 639 Yale Avenue [Dorrien Allen's residence] right to —

A. Lyndhurst.

Q. To Lyndhurst. What address on Lyndhurst?

A. I don't know the address on Lyndhurst, I know it's like the 300 block.

Q. 300 block of Lyndhurst. And who lives there?

A. I know Mike live there and like I know he probably got the rest of the family household, I don't really pay attention.

* * *

Q. All right. So what time did you get to that house, the studio at the 300 block of Lyndhurst?

A. I don't know the time I got to the house, probably, I don't know, it's probably, you know, cuz by the time I was – I was probably getting to his house, I don't know what time it probably was, I don't know, it was probably going on 1:00 something, I don't know.

Q. And who did you see at the house?

A. What you mean who did I see at the house?

Q. When you went to the studio, who did you talk to or–

A. I was talking to Mike.

Q. Mike.

A. Me and Mike was the only one in there at the time, that's why me and him had left out and went to the store and that's how the officer had grabbed me, I was with Mike.

Q. Oh, when the officer grabbed you, you were with Mike?

A. Yes.

Q. What is Mike's real name?

A. I don't know his real name.

Q. All right. So that's all you did for the entire day. You left at noon, you went to Lyndhurst and then you came outside and the officers grabbed you?

A. Yeah, we was going to the store and —

Q. What store were you going to?

A. We was going to walk around to Normandy.

During the same interview, however, Allen identified himself in footage from a store security camera taken more than one hour before the shooting. That portion of the recorded

interview was also played for the jury as the direct examination of Detective Fuller continued:

> [Taped recording:]
>
> DETECTIVE FULLER: All right. Dorrien, I know it's hard to believe all the things so we are going to actually show you. All right. The time right now is 9:46 p.m., it's Tuesday, January 15, 2013. One moment before you get going, what's the date right there, man?
>
> MR. ALLEN: 15/13.
>
> DETECTIVE FULLER: 1/15/13? What does the time on here day (sic)?
>
> MR. ALLEN: 9:25.
>
> DETECTIVE FULLER: 9:25. Okay.
>
> (Whereupon, the taped statement was stopped.)
>
> [BY PROSECUTOR]:
>
> **Q: At that point, what if anything were you showing Mr. Allen?**
>
> **A: We were showing him the video from the store, State's Exhibit 6, the interior video. What I'm asking him to read is actually the date and time stamped from the video so the date and time of the video that he's looking at.**
>
> (Whereupon, the taped statement was resumed as follows.)
>
> **DETECTIVE FULLER: And who is that?**
>
> **(No response.)**
>
> **DETECTIVE FULLER: Who is this right here?**
>
> **MR. ALLEN: Me.**
>
> **DETECTIVE FULLER: All right. And what are you wearing?**

MR. ALLEN: An orange jacket.

DETECTIVE FULLER: An orange jacket. And what else are you wearing?

MR. ALLEN: The rest of my clothes.

DETECTIVE FULLER: The rest of the clothes that you have on right now?

MR. ALLEN: Yeah.

DETECTIVE FULLER: And including those tennis shoes right there too; right?

MR. ALLEN: They're my shoes.

DETECTIVE FULLER: All right. So that video right there shows that you were lying about what you had on today; right?

MR. ALLEN: About a jacket?

DETECTIVE FULLER: Yeah. That jacket is significant. That's your jacket?

MR. ALLEN: No.

DETECTIVE CAREW: That's a jacket you're wearing?

MR. ALLEN: That's not my jacket.

DETECTIVE CAREW: Okay. Then it somebody else's –

DETECTIVE FULLER: Okay. That's the jacket that you're wearing this morning? All right. Answer so I can understand you.

MR. ALLEN: Yes, sir.

DETECTIVE FULLER: Okay. What color is that jacket?

MR. ALLEN: Orange.

DETECTIVE FULLER: Where is that jacket now?

MR. ALLEN: I don't know, I had gave it to a person.

DETECTIVE FULLER: You gave it to a person?

DETECTIVE CAREW: You gave it to a person?

MR. ALLEN: Yeah, and he gave me this hoodie.

DETECTIVE FULLER: Well –

MR. ALLEN: He wanted to trade because he said it was a Columbia jacket.

DETECTIVE FULLER: Well, it's funny that you come up with that kind of a story after we talked to you about being specific when we were talking about something serious and I asked you serious questions and –

MR. ALLEN: But I don't know, I ain't never been through this before, sir, I don't know nothing about this stuff so –

DETECTIVE FULLER: Well, that's why we're showing you how important all this stuff is. But there you are in the orange jacket which is pretty significant but it's in the first part of your statement, you don't even admit to having the orange jacket at all. And if you had had a jacket and traded it off to somebody else, then why wouldn't you have told us that before we showed you the video? I told you I had it on video, didn't I?

MR. ALLEN: Uh-huh.

DETECTIVE FULLER: And we did have it on the video and you see it on the video on this little laptop right here; right?

DETECTIVE CAREW: Who is this gentleman you're with you? (sic)

MR. ALLEN: I don't know him. He just give me some change so I don't even know him.

DETECTIVE CAREW: You just walked to the store together and he gave you money?

(Whereupon, the taped statement was stopped in the courtroom.)

[BY PROSECUTOR]:

Q. And at that part of the video, what are you guys looking at?

A. [DETECTIVE FULLER] I'm indicating Mr. Hines on the video.

Q. And before, just like 30 seconds earlier, we're talking about where Mr. Allen is being shown the video and he identifies somebody as himself, who is he identifying?

A. Mr. Allen – you can see his face clearly on the video but Mr. Allen in the video wearing the orange jacket.

Q. That's who he identifies as himself?

A. Correct.

(Whereupon, the taped statement was resumed as follows:)

Q. [BY DETECTIVE FULLER] – basically outside of your house from earlier than 12:00 when you first said that you were home on Yale Avenue. So that blows you being at your house between 9:30 when you're obviously on the video at that store, that puts you out of your house before 9:30 when you're in the store on today's date earlier this morning; is that right?

A. [BY DORRIEN ALLEN] It's only a couple minutes earlier, so.

Q. A couple minutes? That's significant time. You're telling me noon before and now that's 9:30 so, you're out of your house by 9:30 and you're down in that area where we're interested in you being today. So what else did you do today that you haven't told us about?

A. Nothing. I was at the studio.

Q. All right. Well, you keep going back to that but that's –

Q. [BY DETECTIVE CAREW] So let me ask you a question, all these questions that we've asked you –

A. I'm cold, sir.

Q. [BY DETECTIVE FULLER] (Inaudible).

Q. [BY DETECTIVE CAREW] All the questions that we've asked you today, right? We've asked you a bunch of questions; right? Why specifically did you decide to lie to us about the time you were out and the jacket you were wearing? Why those two things if you have no idea what we're talking about, why are those the two things that you pick to lie to us about? What made you choose just randomly today those two things?

A. This is what I have on, sir.

Q. [BY DETECTIVE FULLER] But you specifically didn't want to the police to know about you wearing that specific jacket?

A. I don't know what you mean I didn't want the police to know about?

Q. Well, I asked you about specific things, I asked you about specific stuff, about specific pieces of clothing. I told you that we're investigating something very, very serious and I need you to sit up and look at me, put that down so that we can see each other. You're going to have to come to terms with what's happening. All right? That is not the only bit of evidence and stuff that we have, we have a whole lot. You are in the most trouble that you have ever been in your life and you got to tell the truth.

A. I don't know nothing else, sir, that's all I told you. And I told you, I was with Mike, we (inaudible) in the studio, that's it, sir. I don't know nobody else that live on Lyndhurst Street.

The above excerpted statements of Allen provided the basis for Allen's trial counsel to request a jury instruction on an alibi. When the trial court reviewed with counsel the instructions the court intended to give, the following discussion occurred:

THE COURT: . . . Then I'll get into the presence of a defendant on the scene and alibi – well, there's no alibi presented, is there? No.

[PROSECUTOR]: No, Your Honor.

THE COURT: No, I wasn't anticipating that —

[COUNSEL FOR ALLEN]: With respect to the fact, Your Honor, that in Mr. Allen's statement, he said that he was not there, did not have anything —

THE COURT: That does not constitute an alibi, that won't be given.

[COUNSEL FOR ALLEN]: Very good.

Following the trial judge's instructions, Allen's counsel excepted to the court's failure to give an instruction regarding alibi:

> **[COUNSEL FOR ALLEN]: I would also indicate, Your Honor, that Defense One [Allen] is taking exception to the failure of the Court to read the alibi instruction. There are facts in the statement that talk to Mr. Allen not being there, and the jury does have those facts.**
>
> **THE COURT: Very well. I am not satisfied that the defendant's assertion and then arguable abandonment of that assertion is sufficient to generate the instruction.**

(Emphasis added.)

During closing arguments, counsel for Allen made no reference to any possible claim of alibi.

We conclude that the trial court erred in ruling that there was insufficient evidence to warrant a jury instruction on alibi. There was some evidence which, if believed, could have supported a claim of alibi. But we are convinced that the trial court's error in failing to give an alibi instruction in this case was harmless beyond a reasonable doubt.

The harmless error test is "relatively stringent." *Dionas v. State*, 436 Md. 97, 108 (2013). As the Court of Appeals stated in *Dorsey v. State*, 276 Md. 638, 659 (1976):

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of — whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

The current pattern instruction on alibi — MPJI-Cr 5:00 — merely reminds the jury that, "[i]n order to convict the defendant, the State must prove, beyond a reasonable doubt, that the crime was committed and the defendant committed it." In light of the overwhelming evidence linking appellant to the crime, and the fact that the jury was properly instructed regarding the State's burden of proof, together with the fact that no claim of alibi was ever argued to the jury, we are able to declare a belief, beyond a reasonable doubt, that the omission of an alibi instruction in no way influenced the verdict, and as a result, any error was harmless.

II. Dismissal of a Juror

Allen contends that the Court abused its discretion by dismissing Juror Number Six and replacing her with an alternate. He asserts that: (1) Juror Number Six's purported reason for requiring an early dismissal was not meritorious; and (2) the circuit court's means of allowing Juror Number Six to meet her personal obligations by unnecessarily dismissing her from the jury, rather than continuing the trial until the next day, was "too extreme." We review the decision of the circuit court for an abuse of discretion, and we are satisfied that the trial court acted within its discretion. *State v. Cook*, 338 Md. 598, 620 (1995).

With respect to the qualifications to serve on a jury, Maryland Rule 2-512(b) provides: "All individuals to be impaneled on the jury, including any alternates, shall be selected in the same manner, have the same qualifications, and be subject to the same examination." The replacement of a juror in non-capital cases is governed by Maryland Rule 4–312(b)(3), which provides:

> [T]he court may direct that one or more jurors be called and impaneled to sit as alternate jurors. Any juror who, before the time the jury retires to consider its verdict, becomes or is found to be unable or disqualified to perform a juror's duty, shall be replaced by an alternate juror in the order of selection. An alternate juror who does not replace a juror shall be discharged when the jury retires to consider its verdict.

In *Diaz v. State*, 129 Md. App. 51, 59–60 (1999), this Court explained:

> The decision to excuse a seated juror and replace him or her with an alternate for reasons particular to that specific juror will not be reversed unless there is "a clear abuse of discretion or prejudice" to the defendant. *State v. Cook*, 338 Md. 598, 620 (1995). This standard of review exists for two reasons. First, "'the trial judge is physically on the scene, able to observe matters not usually reflected in a cold record. . . . [T]he judge has his finger on the pulse of the trial.'" *Id.* at 615 (*quoting State v. Hawkins*, 326 Md. 270, 278 (1992)). Second, a defendant is not entitled to a jury comprised of any particular group of individuals, but only to a jury that is fair and impartial. *Id.* at 614.

When ruling on Juror Number Six's request to be excused, the trial judge considered the circuit court's docket, the progress of the trial, and the reasons provided by Juror Number Six. The relevant colloquy was as follows:

> THE COURT: We have a note from Juror Number Six, have you seen it?
>
> [THE CLERK]: No, they have not seen it yet, Your Honor.
>
> THE COURT: Okay. Well, I [will] read it to you, it says, "Dear Judge", I guess it's to me, "I, 4183, have to be excused by 3:15 today. Thank you." What is our guesstimate about what we're going to do today?
>
> [PROSECUTOR]: If I were guessing I would think we're going to do the DNA Analyst, we've come to an agreement for the Latent Print Examiners, so we don't have to worry about them, and then it's the Detective and then after that, I guess instructions and if we are leaving by 3:15 –
>
> THE COURT: Well –
>
> [PROSECUTOR]: Oh, and I don't know if they have any witnesses, I am sorry.

THE COURT: Any defense witnesses. But in other words, we can go to the jury this afternoon?

[PROSECUTOR]: Possibly.

THE COURT: Expectations?

[COUNSEL FOR HINES]: It just depends on how long the Detective takes.

THE COURT: I understand. Now, if we don't go to the jury today, I have a collateral day tomorrow so we're going to have to work that out where we bring the jury in about 11:00, I'll clear out my docket by then and we'll go to the jury then. But if we can go today, it's much better.

[COUNSEL FOR ALLEN]: Is it possible, your Honor, to just close tomorrow and allow this juror to take care of the issue that has to be taken care of? As opposed to trying to artificially compress this?

THE COURT: Well, it would mean bringing the jury back at 11:00 tomorrow, maybe getting started at 11:30. I am going to limit you 45 minutes total for the State, 45 minutes for each counsel, hopefully it won't be that long, but then we're talking about two and a half hours to get finished with instructions. So if we bring them in at 11:30, I will work on the logistics about that. Let's just go as far as we can today, I will tell the juror that we will address any requests at lunchtime today. Okay?

[COUNSEL FOR HINES]: That's fine.

THE COURT: But if we're going to the jury this afternoon, obviously we'll see if she has a legitimate reason to be excused.

[COUNSEL FOR HINES]: Very good.

[PROSECUTOR]: Thank you, Your Honor.

THE COURT: And we'll go from there. All right. Let's bring them down.

(brief pause)

(Whereupon, the jury entered the courtroom at 9:52 a.m.)

Prior to announcing the recess for lunch, the court returned to the issue of how to respond to the note from Juror Number Six:

> THE COURT: We are going to do that, but I think we ought to address the juror right now because this probably is a logical time that we're going to have to send them to lunch. There's no reason for her to come back from lunch, this afternoon we're not going to finish with the Detective in any time possible to get her out of here at 3:15; right? Does anyone want to know what her reasons for her not being here?
>
> [COUNSEL FOR ALLEN]: I don't think that –
>
> [COUNSEL FOR HINES]: Oh, I don't care at all, Judge.
>
> THE COURT: I mean, if she says she can't be here, we will let her go and seat alternate number one.
>
> * * *
>
> [COUNSEL FOR ALLEN]: Your Honor, I'm not agreeing to unseat the juror, I am just agreeing to excuse the juror and continue the matter until tomorrow.
>
> THE COURT: No, that is not possible.
>
> [COUNSEL FOR ALLEN]: Well, we definitely –
>
> **THE COURT: Tomorrow morning I am going to do at some point, a collateral docket which for the record means violations of probation, I have no idea how many there are, but I am going to do them and this case is going to work around that. That does not mean that I am prepared to forfeit the entire afternoon here today in order to do that, somehow I am going to get this finished but it's not going to involve throwing away two and a half hours of good court time.**
>
> [COUNSEL FOR ALLEN]: Yes. Well, Mr. Allen is not excusing the juror, Your Honor.
>
> THE COURT: Very well. Let's hear what she has to say, but remember the decision is mine.
>
> [COUNSEL FOR ALLEN]: Okay.

THE COURT: Okay. Juror Number Six, may we see you for a moment?

(Whereupon, Juror Number Six approached the bench conference and the following ensued:)

[BY THE COURT] Okay. We got your note.

[A JUROR] Yes, sir.

Q. You have some place you have to be this afternoon?

A. Yes, sir.

Q. How important is it?

A. It's very important.

Q. Can you give me any kind of details about why it's important?

A. It's pertaining to my job.

Q. Okay. For your job?

A. Yes, sir.

Q. They need you back this afternoon for some sort of meeting?

A. I have to – I have to get my phone – I had to get a new phone, my phone broke and I need my phone from work and I have to be at the place by 4:30 to pick it up.

Q. Okay. Where is the place?

A. Right up the street by Lexington Market. And they close at 4:30 and I need my phone for my job.

Q. Okay. Let me discuss it with counsel and see what we can do.

A. Yes, sir.

(Whereupon, the juror returned to the jury box and the bench conference was resumed:)

> [COUNSEL FOR DORRIEN ALLEN] Again, Your Honor, Mr. Allen is not prepared to excuse Juror Number Six, we can work around her obligation to get her to where she needs to be and in no event is this matter going to be completed today. The material –
>
> **THE COURT: I would very much like to instruct the jury today before sending them home and do argument tomorrow. Under the circumstances, I don't think we can work our jury schedule around her situation which I think is legitimate and could not have been anticipated at the time we did voir dire, or we would have taken it into consideration. I am going to grant her request to be excused over any objections anyone has, and we're going to seat alternate number one right now. Alternate number one is going to go to Juror Number Six. Okay? And I'm going to excuse –**
>
> [MR. SMITH]: Just for the record, for Mr. Hines, whenever you let me put on the record, we will object to that and we could certainly go until 4:00, let her go up to Lexington Market which is two blocks from here before 4:30, if we are going to stop for the day anyway, then that would be a good time to just stop and finish it all up tomorrow morning.
>
> THE COURT: I do not expect we are going to be stopping by 4:00 today, I expect we're going considerably later than that we're going to take a luncheon break now and the State has not even finished its direct examination of the witness. 4:00 to get done what we need to get done today is unrealistic. Okay. Thank you very much.

(Emphasis added.)

Because the alternate juror who replaced Juror Number Six was selected according to the dictates of Maryland Rule 2-512, and was therefore equally as qualified to serve as was the original juror, we conclude that there was no abuse of discretion.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.