UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2201

September Term, 2014

DAVID CARNELL STRINGER

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Woodward, J.

Filed: September 22, 2015

Appellant, David Carnell Stringer, was convicted by a jury in the Circuit Court for Charles County of robbery, conspiracy to commit robbery, unlawful taking of a motor vehicle, and related offenses. The trial court sentenced appellant to fifteen years' incarceration for robbery, to a concurrent 15 years' incarceration for conspiracy to commit robbery, and to a consecutive two years' incarceration for unlawful taking of a motor vehicle. The remaining counts were merged for sentencing purposes. On appeal, appellant presents three questions for our review, which we rephrased for clarity[1]:

1. Did the trial court abuse its discretion in denying appellant's requests for a continuance?

2. Did the trial court abuse its discretion in failing to replace a juror or declare a mistrial?

3. Did the trial court abuse its discretion in giving the jury a supplemental instruction that was not a pattern instruction?

Finding no abuse of discretion, we affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

This case stems from a robbery that occurred in March 2003 outside of the Southern Maryland Bank in Waldorf, Maryland. The State did not identify appellant as a suspect in the robbery until 2013.

[1]Appellant's questions presented *verbatim* are:

1. Was it error to deny the defense request for postponement?

2. Should the court have declared a mistrial or replaced the juror who was sleeping, during critical testimony?

3. Should the court have given a jury instruction to which the defense objected?

At trial, the State called Herman Smith, who testified that he worked as a stock clerk for a store known as Waldorf Liquors, and had worked there for 10 to 15 years. On March 20, 2003, Smith drove his boss's car to a bank in Waldorf to make his daily bank deposits and to withdraw money for the store. When the money was ready, Smith drove through the bank's drive-through window, obtained two bags of money, and placed them on the floor of the car. As Smith drove away, a truck hit him from behind. There was a car in front of Smith that was so close to him that he was unable to pull away. Smith got out of the car to see what damage had been done when a "guy was running towards [him]," "grabbing at [him], you know, he said get out, get out, get out." Smith realized that he was being robbed and took off running back towards the bank and asked the teller to call the police.

Detective Jack Austin testified that, on September 24, 2013, he conducted an interview of appellant,[2] during which appellant admitted that he had been involved in the robbery. Appellant related that he and the other participants had learned of Smith's routine and that Smith "comes down there with money every morning." During the robbery, appellant was driving a 1993 Oldsmobile Cutlass, which they had stolen from a Park and Ride. The other participants, Douglas Robinson ("Douglas") was driving a stolen GMC truck that collided with Smith's vehicle, and Douglas's brother Tyrone Robinson ("Tyrone") was waiting down the street in a Ford Taurus Station Wagon. After Douglas "pushed [Smith] down," Douglas and appellant jumped into the Cutlass and met up with

[2] The audio tape of appellant's interview was played for the jury in open court.

Tyrone. Douglas told appellant that there was $63,000 in the money bag. Douglas gave $15,000 to appellant and $15,000 to Tyrone.

DISCUSSION

I.

On March 25, 2014, the parties appeared for trial. Later that day, appellant exited the courthouse and failed to return. The court subsequently rescheduled trial for July 28, 2014.

On that date, the parties appeared before the Honorable Hayward West. Defense counsel indicated that he intended to make "a continuance request." Judge West referred the parties to the Honorable Amy J. Bragunier.[3]

The parties then appeared before Judge Bragunier, and the following colloquy occurred:

> [DEFENSE COUNSEL]: [G]iven conversations with the court and the planning at this point I'm not necessarily prepared to go forward with the trial with [appellant]. Additionally, [I] went through voice mails this weekend while I was preparing. There is, Steven Cooper and his daughter as well, but those are attorneys from Maryland, Steven Cooper and his daughter left me voice mails, private attorneys, about, interested into getting into [appellant's] case. It is first going to be the [d]efense request to continue this matter to see if, if the private

[3] The parties agree that Judge Bragunier was the county administrative judge. *See* Rule 4-271(a)(1) ("[i]f a circuit court trial date is changed, any subsequent changes of the trial date may be made only by the county administrative judge or that judge's designee for good cause shown").

attorney will be entering this case and how they will handle it. Secondly, if it is not going to be a full continuance which I do believe is appropriate given the procedural background that we've had and also the recent background, request a, at least a one day continuance so as to not to render counsel ineffective. However, that creates the problem that the State has left [a] murder trial prepared downstairs so if were [sic] bumped even for a day that would have to go forward. So, it is a sort of no win situation from counsel's perspective for which would therefore indicate to me that the best solution would be to do a general continuance just to get perhaps a different attorney present and also not impede the flow of the judicial process with having, depending on which trial goes forward.

THE COURT: [Prosecutor].

[PROSECUTOR]: And the State objects to the continuance request. The State is prepared to go forward to trial. Based on the discussion that we had on Friday I did put a particular witness on call who's coming from out of state. But it's my understanding we can alert him today to come up so he can be here tomorrow to testify….

THE COURT: Okay.

[PROSECUTOR]: What I recommend doing is that we pick a jury for [appellant's] case. And if [defense counsel] needs the afternoon to do some additional preparations we can start with openings and witness testimony in the morning and go with it that way....

THE COURT: Can counsel approach please.

[PROSECUTOR]: Yes Your Honor.

(WHEREUPON COUNSEL APPROACH THE BENCH AND THE FOLLOWING OCCURRED.)

* * *

[DEFENSE COUNSEL]: I'm sort of unprepared. I mean I prepared this trial once before. There has been some supplemental discovery[.]

* * *

THE COURT: Okay, we'll plan to go forward on [appellant] today, pick a jury. If you want to start witnesses tomorrow that'll give you chance to get together so ...

[PROSECUTOR]: That give[s defense counsel] some time and then we'll get things arranged for our witness from Virginia.

* * *

THE COURT: Okay. All right, so we'll go, I'll deny the motion.

(WHEREUPON COUNSEL LEFT THE BENCH.)

THE COURT: So I'll deny the motion for postponement on [appellant].

[PROSECUTOR]: And Your Honor just for the record so that [appellant] is clear. I want to make sure as to whether or not he's actually making a request to discharge counsel because he brought up the possibility of hiring new counsel.

* * *

THE COURT: And are you at this point satisfied to go forward with [defense counsel] representing you or are you asking the

Court to consider a request to discharge counsel?

[DEFENSE COUNSEL]: So do you understand all that and you wish to go forward as it is?

* * *

[APPELLANT]: Yes.

THE COURT: Yes, you wish to go forward with [defense counsel] representing you.

[APPELLANT]: Yes.

The parties then returned to Judge West, and the following colloquy occurred:

[DEFENSE COUNSEL]: I want to make sure [appellant's] wishes are heard. At this point the continuance has been denied.

THE COURT: Appellant has wishes?

[DEFENSE COUNSEL]: He still wants a continuance. I'm not sure, it was happening with me representing him for a second but then ...

* * *

THE COURT: Do you want, before you say anything, you can run it by your attorney if you like, but is there something you'd like to say?

[APPELLANT]: Yes.

THE COURT: Go ahead.

* * *

[APPELLANT]: I've got some witnesses that I want to call.

THE COURT: Okay. You want a continuance to call some witnesses?

[APPELLANT]: Right.

THE COURT: The witnesses cannot be here tomorrow?

[APPELLANT]: I mean I have to give him the names of them. Don't I?

[DEFENSE COUNSEL]: Yep.

THE COURT: All right, so hold on, hold on. Prior to this date you haven't given him the names of these witnesses?

* * *

[APPELLANT]: I didn't have everything I needed then. I've got them now. I've got the addresses and everything now.

* * *

THE COURT: [T]his is your second, this is your second time before a [j]udge, right. In other words, if you had witnesses, whose names you could have given to [defense counsel], you should have given them to him before that last trial date.... And you could have given it to him at any point after that date. And you were just before the Administrative Judge twenty minutes ago, I would guess thirty minutes ago, I don't know. And she heard your continuance request, right? So I can't send you back up there to request a continuance again based on the same information. I don't see what the basis would be. I just want to make sure that if you had one that you said it. I don't want you to say I didn't hear you or, do you follow me[?]

[APPELLANT]: Uhm hum.

THE COURT: All right. So is there any additional reason or is that the reason?

[APPELLANT]: That's all. That's the reason.

The parties then selected a jury, after which the court recessed for the day. The following day, the parties gave opening statements, and the State called its first witness.

Appellant contends that Judge Bragunier abused her discretion in denying appellant's first request for continuance, and that Judge West erred in denying appellant's second request. The State counters that both judges acted within their discretion.

We have stated that '"[t]he decision of whether to grant a request for continuance is committed to the sound discretion of the court.'" *Davis v. State*, 207 Md. App. 298, 308, *cert. denied*, 429 Md. 529 (2012) (citation omitted). "A trial court's ruling on a continuance will not be disturbed absent an abuse of discretion, which was prejudicial to the party requesting the continuance." *Id.*

With respect to the trial court's denial of appellant's first request, we conclude that there is no evidence of prejudice to appellant. Appellant unequivocally stated that he was not moving to discharge defense counsel, and that he desired to go forward represented by defense counsel. When the parties reconvened following the selection of the jury, defense counsel did not indicate that he was unprepared to go forward or request additional time to prepare. Hence, the court did not abuse its discretion in denying the first request.

With respect to the court's denial of appellant's second request, we have stated that when a party requests a continuance to secure evidence of absent witnesses,

> the party that requested the continuance must show: (1) that he had a reasonable expectation of securing the evidence of the absent witness

> or witnesses within some reasonable time; (2) that the evidence was competent and material, and he believed that the case could not be fairly tried without it; *and* (3) that he had made diligent and proper efforts to secure the evidence.

Id. (citation and quotation marks omitted).

Here, appellant did not state that he had a reasonable expectation of securing evidence of absent witnesses within some reasonable time. Appellant also did not contend that the evidence was competent and material, or that he believed the case could not be fairly tried without it. Finally, appellant did not show that he had made diligent and proper efforts to secure the evidence. Hence, the court did not abuse its discretion in denying the second request.

Appellant contends that the "denying of a pretrial motion for postponement is exclusively within the discretion of the Administrative Judge or his designee, and not the trial judge." We disagree. The Court of Appeals has stated "unequivocally [ ] that any circuit court judge may deny a motion to postpone in a criminal case." *Howard v. State*, 440 Md. 427, 435 (2014). *See Jones v. State*, 403 Md. 267, 302 (2008) (holding that a circuit court judge–who was neither a county administrative judge nor that judge's designee—"properly exercised [his] discretion … to deny [the defendant] a postponement of his trial"). Hence, Judge West had the discretion to deny appellant's second request.

II.

At trial, Detective Austin testified that, during his investigation, he collected samples of DNA from appellant, Douglas, and Tyrone. Later, the State called Richard Brown, a former employee of the Charles County Crime Lab. Brown testified, that when

he processed two vehicles connected to the robbery, he discovered and collected a cigarette butt.

The State also called Molly Rollo, a forensic scientist for the Maryland State Police. Rollo testified that she "subjected" the cigarette butt "to DNA analysis," and concluded the following:

> [W]e got a partial DNA profile so we had results at twelve of the fifteen locations that we tested. And this included at least two individuals. However, for this sample I was able to identify and distinguish a major contributor at five of the locations. So that means that at five of the different locations I was able to identify the markers belonging to that person who's contributing more of their DNA.... So at these five locations where I was able to distinguish the major contributor, [appellant] matches these five locations. So the probability of selecting a random individual having a DNA profile matching this same DNA profile at these five locations is 1 in 1.5 million in the Caucasian population or 1 in 2.4 million in the African American population…. The additional seven locations where we obtained data I was able to say that [appellant] is consistent with the DNA that we obtained at those locations. But because I wasn't able to identify clearly if that person was the major contributor, they weren't used in our statistical calculation.

During cross-examination, the following colloquy occurred:

[DEFENSE COUNSEL]:	Okay. And final thing. There have been, I don't know, hundred [sic] of thousands, millions of people who have had their DNA taken at different points, right?
MS. ROLLO:	Correct.
[DEFENSE COUNSEL]:	But all these people aren't in the system where you get your one and two point however million, right?
MS. ROLLO:	Correct. The statistic is based on a sample population and doesn't

include everyone that's ever been tested.

[DEFENSE COUNSEL]: And that simple [sic] population is actually quite small.

MS. ROLLO: Correct.

[DEFENSE COUNSEL]: How many? Was it three hundred, I'm not sure for your data, do you have . . .

MS. ROLLO: I don't have the exact numbers but it's probably around two hundred and fifty individuals.

[DEFENSE COUNSEL]: So two hundred and fifty individuals is the sample size that you use when you make calculations into the millions.

MS. ROLLO: Correct.

Later, the parties approached the bench, and the following colloquy occurred:

THE COURT: By the way, stop for a second. Look at our juror.

[DEFENSE COUNSEL]: Yeah, I've been watching him.

THE COURT: Do you see him.

[PROSECUTOR]: I haven't been.

THE COURT: Look at him right now. He's been sort of, right now. That's how he's been for like ten minutes.

Following cross-examination, the court excused the jury, and the following colloquy occurred:

[DEFENSE COUNSEL]:	May I have the Court's brief indulgence on this matter?
THE COURT:	Yes. The door is shut. Okay, let me ask Reese. Reese. Do you think he was asleep [?] It was hard to tell.
COURTROOM BAILIFF:	I know he was asleep.
THE COURT:	He was.
COURTROOM BAILIFF:	Yeah.
THE COURT:	This morning or just now?
COURTROOM BAILIFF:	Just now is all I saw.
THE COURT:	Okay.
COURTROOM BAILIFF:	I know he was because the guy next to him nudged him.
THE COURT:	Uhm hum.
COURTROOM BAILIFF:	While they were up here.
THE COURT:	Uhm hum.
COURTROOM BAILIFF:	And he was like, he said what, he said I just [sic] making sure you stayed awake. And then he goes oh, I'm just waiting for them to finish, and they were up here for just a second you know. * * *
[DEFENSE COUNSEL]:	Can we, can we bring the kid in and ask him?
THE COURT:	We could ask him.
	* * *

THE COURT:	It maybe [sic] that I have to step away for a split second but when a juror needs to be excused after the jury is swear [sic], this is in a criminal case, we have four choices.... You could declare a mistrial. With the consent of both parties you could proceed with eleven jurors. We could replace the juror with an alternate. Obviously we have two alternates here. And then the fourth one wouldn't apply.... So the question here is, does the juror need to be dismissed? And if the juror needs to be dismissed how are we going to do it.
	* * *
[PROSECUTOR]:	If we ultimately decide that he needs to be dismissed or we're going to seat an alternate.
THE COURT:	Yep.
[PROSECUTOR]:	I would ask that we just do that at the end. You know, maybe at the end of the day.
	* * *
THE COURT:	Right. Do you agree with this part [defense counsel]?
[DEFENSE COUNSEL]:	Yes, Your Honor, I do agree. I believe [appellant] would like to lodge an objection to my request. Just for the record. Nobody else hears this so it doesn't matter right now. So you can go ahead and tell him.
	* * *

	You believe the remedy here should be a mistrial.
THE COURT:	To be a what?
[DEFENSE COUNSEL]:	Declaring a mistrial.
THE COURT:	Okay. We're not there.
	* * *

(WHEREUPON JUROR NUMBER 67 WAS BROUGHT INTO THE COURTROOM.)

	* * *
THE COURT:	Good. All right. Juror 67, we are concerned or we just want to make sure, have you been alert for this whole case?
JUROR:	Not all of it.
THE COURT:	Are you okay?
JUROR:	Yeah, I'm okay.
THE COURT:	When you say not all of it, tell me what you mean.
JUROR:	Like I missed the, when she was talking about the two hundred and fifty number.
THE COURT:	Okay, and when you say you missed it, what happened?
JUROR:	Whatcha you mean?
THE COURT:	Like what caused you to miss it?
JUROR:	Oh, I was tired, I dozed off.

THE COURT:	You were tired and dozed off.
JUROR:	Yeah.
THE COURT:	And you dozed off. Do you know, did you only doze off during the last witness[?]
JUROR:	Yeah, that was it.
THE COURT:	What about this morning?
JUROR:	No, I was straight this morning.
THE COURT:	You were okay this morning?
JUROR:	Yeah.
THE COURT:	Did anyone, if you remember, have to like nudge you or kind of make sure you were awake?
JUROR:	No.
THE COURT:	Okay. All right. Anything?
[DEFENSE COUNSEL]:	No questions from me.
[PROSECUTOR]:	No, Your Honor.
THE COURT:	Okay. All right. Juror numbers 67 make sure, you have to make sure that you stay awake and focused, okay. I'm not saying you're not focused but you can't doze off, okay?
JUROR:	All right.
THE COURT:	All right, we're going to take you back. Don't say anything to anyone in the room about why you came in or anything like that.

JUROR: All right.

THE COURT: We're going to send you back to the room. Okay.

JUROR: Okay.

THE COURT: All right. Mr. Bailiff.

(WHEREUPON THE JUROR WAS TAKEN OUT OF THE COURTROOM.)

[DEFENSE COUNSEL]: The [d]efense's position that he stayed, was aware for the entire morning testimony as to the actions in the case and he was aware through 90 percent of the testimony of this witness and even knew the subject matter of the one issue that he did start dozing with but I don't believe that should disqualify him for being able to make judgment in this case. Again, I'd like, well depending on what the Court does, I believe [appellant] would like to make a different suggestion on the record.

* * *

[PROSECUTOR]: If I could just chime in, it's [Defense Counsel]'s decision. This is a tactical choice at this point.

* * *

Either the Defense is objecting or they're not.

THE COURT: Right, and I'm not sure exactly.

[DEFENSE COUNSEL]:	The Defense is not objecting to this juror. The Defense wants him on but for the record, for [appellant's] desires for any potential appeal purposes he would like to put his wishes on the record. The defense perspective is we want this juror on the panel and we're prepared to go forward.
	* * *
[PROSECUTOR]:	If [Defense Counsel] has one position and [appellant] has another…
THE COURT:	I understand.
[PROSECUTOR]:	He's not going to preserve it for appeal if [appellant] is disagreeing with what [Defense Counsel] is doing.
THE COURT:	Right.
[PROSECUTOR]:	And I want [appellant] to make sure he understands that . . .
[DEFENSE COUNSEL]:	I know the issue won't be preserved for appeal but perhaps an ineffective claim against me based on his desires. I, I, it is my trial strategy, and my opinion. I do not believe this member should be removed from our panel.

The court did not take any further action on the matter.

Appellant contends that, because Rollo was "a critical State's witness," the trial court "should have either replaced the juror or granted [a]ppellant's request for a mistrial."

The State counters that the contention is waived, because defense counsel announced his desire, for tactical reasons, to keep the juror on the panel.

We agree with the State. The Court of Appeals has stated:

> There is no right vested in a defendant who has effectively waived the assistance of counsel to have his responsibilities for the conduct of the trial shared by an attorney.... Nor is there a right bestowed upon a defendant who has not effectively waived his entitlement to the assistance of counsel to share the responsibilities for the management of the trial with his attorney. **As we have noted, the right to counsel and the right to defend *pro se* cannot be asserted simultaneously. The two rights are disjunctive. There can be but one captain of the ship, and it is he alone who must assume responsibility for its passage, whether it safely reaches the destination charted or founders on a reef.** This does not mean that a defendant who has ineffectively waived the assistance of counsel cannot in any way participate in the conduct of the trial. Nor does it follow that a defendant appearing *pro se* may not have a lawyer participate to any extent in the trial. Such participation may be permitted in the discretion of the presiding judge under his general power to control the conduct of the trial. But in either case the participation never reaches the level of "representation" nor does the participant attain the status of "co-counsel." When a defendant appears *pro se*, it is he who calls the shots, albeit, perhaps, with the aid, advice and allocution of counsel in the discretion of the trial judge. **When a defendant is represented by counsel, it is counsel who is in charge of the defense and his say as to strategy and tactics is generally controlling**, but again with such participation by the defendant as the trial judge deems appropriate.

Parren v. State, 309 Md. 260, 264-65 (1987) (emphasis added) (citations omitted).

Here, appellant was represented by counsel, and did not effectively waive his entitlement to the assistance of counsel. Defense counsel was in charge of the defense, and his say as to strategy and tactics was controlling. Appellant's request for a mistrial did not reach the level of "representation," nor did he attain the status of "co-counsel." Hence, appellant's contention is not preserved for our review.

III.

During deliberations, the jury sent the court a note in which they asked: "Can we use the confession alone? What else must we consider?" The prosecutor requested that the court give the jury the following instruction:

> An extrajudicial confession of guilt by a person accused of crime, unsupported by other evidence, is not sufficient to warrant a conviction. Rather, the extrajudicial confession must be supported by evidence, independent of the confession, which relates to and tends to establish the facts that are necessary to show that a crime has been committed. But it is not necessary that the evidence independent of the confession be full and complete or that it establish the truth of the facts that are necessary to show that a crime has been committed beyond a reasonable doubt or by a preponderance of proof. Rather, the supporting evidence may be small in amount and is sufficient to establish the facts that are necessary to show that a crime has been committed if, when considered in connection with the confession or admission, it satisfies the trier of fact beyond a reasonable doubt that the offense charged was committed and that the accused committed it.[4]

[4] The prosecutor stated that the proposed instruction was based on an excerpt of *Cox v. State*, 421 Md. 630 (2011), in which the Court of Appeals stated:

> [I]t is, of course, well settled that an extrajudicial confession of guilt by a person accused of crime, unsupported by other evidence, is not sufficient to warrant a conviction. Rather, the extrajudicial confession must be supported by evidence, independent of the confession, which relates to and tends to establish the *corpus delicti*, *i.e.*, the facts that are necessary to show that a crime has been committed. But it is not necessary that the evidence independent of the confession be full and complete or that it establish the truth of the *corpus delicti* beyond a reasonable doubt or by a preponderance of proof. Rather, [t]he supporting evidence . . . may be small in amount and is sufficient to establish the *corpus delicti* if, when considered in connection with the confession or admission, it satisfies the trier of facts beyond a reasonable doubt that the offense charged was committed and that the accused committed it.

(continued…)

Defense counsel objected, stating:

> I believe that what we are doing is getting a little bit beyond first, what they're [sic] question, we're reading into their question. Also getting well beyond the pattern jury instructions and getting into case law. Where we're not necessarily, you know, going through and reading, you know, giving a full dissertation of all the case law on a particular subject.

Defense counsel requested that the court respond with only the pattern instruction on "what constitutes evidence," and to answer the jury's first question: "No. This is the evidence in the case." Alternatively, defense counsel requested that the court give the jury only the first two sentences of the proposed instruction. The court overruled defense counsel's objection and gave the jury the proposed instruction, with the following additional sentences: "In addition, please review [Maryland Criminal Pattern Jury Instruction] 3:00 – What Constitutes Evidence. For purposes of this case, extrajudicial means something that happened outside of a courtroom."

Appellant contends that the trial court should not have allowed the State's request to embellish upon the pattern instructions already given. The State counters that the court acted within its discretion in providing an answer to the jury's question that was a correct statement of law and addressed the confusion indicated by the query.

"We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard." *Appraicio v. State*, 431 Md. 42, 51 (2013). Further, "trial courts have a duty to answer, as directly as possible, the questions posed by jurors." *Id.* at

Id. at 657 (citations and quotation marks omitted).

53. A "court must respond . . . in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case." *State v. Baby*, 404 Md. 220, 263 (2008).

Here, the jury's request involved an issue central to the case, specifically the sufficiency of the evidence. The only confusion evidenced by the query was whether appellant's statements to Detective Austin alone were sufficient to convict. The court's response clarified the confusion and answered, as directly as possible, the jury's request. Hence, the court did not abuse its discretion in giving the jury the instruction in question.

Appellant contends that, where possible, the trial court should defer to the pattern jury instructions. We agree. *See Yates v. State*, 202 Md. App. 700, 723 (2011) (stating that "[t]his Court has recommended that trial judges use the pattern instructions"), *aff'd*, 429 Md. 112 (2012). Here, however, there was no pattern instruction that would have clarified the confusion evidenced by the jury's query. Thus the court was not required to defer to the pattern instructions.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.