UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2304

September Term, 2013

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JEFFREY EDWARD ALLEN

v.

STATE OF MARYLAND

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Graeff,
Kehoe,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

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Opinion by Graeff, J.

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Filed: July 31, 2015

After a third trial, Jeffrey Edward Allen, appellant, again was convicted by a jury in the Circuit Court for Charles County of first degree felony murder. The court sentenced appellant to a term of life imprisonment.

On appeal, appellant raises a single question for our review:

Did the circuit court err in refusing to instruct the jury on self-defense?

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

## FACTUAL AND PROCEDURAL BACKGROUND

On October 24, 2001, appellant contacted the police and informed them that he had stabbed John Butler. He said, however, that he stabbed Mr. Butler in self-defense. Mr. Butler died from the wounds.

As a result of Mr. Butler's death, appellant was charged with first degree felony murder, first degree premeditated murder, second degree murder, robbery with a deadly weapon, robbery, theft, and two counts of carrying a weapon openly with intent to injure. In 2002, he was convicted by a jury on all counts except first degree premeditated murder, for which he was acquitted. The court sentenced appellant to life imprisonment, without the possibility of parole, for the felony murder conviction, and it imposed concurrent sentences of thirty years for second degree murder, twenty years for robbery with a dangerous and deadly weapon, and three years for each count of openly carrying a weapon with intent to injure. The remaining convictions were merged.

On appeal, this Court vacated appellant's felony murder conviction on the ground that the trial court erroneously instructed the jury that, in order to convict appellant of the crime of felony murder based on robbery, the jury need not determine when the intent to

commit the underlying felony had occurred. *Allen v. State*, 158 Md. App. 194, 246-47 (2004). We affirmed the remaining convictions. *Id.* at 251. The Court of Appeals affirmed in *State v. Allen*, 387 Md. 389, 404-05 (2005), holding that a defendant is guilty of first degree felony murder only if the defendant's intent to commit the predicate enumerated felony arose prior to, or concurrent with, the conduct resulting in death.

In 2008, appellant was retried by a jury on the first degree felony murder charge, and he again was convicted and sentenced to life imprisonment. Appellant appealed a second time, arguing that the trial court's instruction to the jury that it did not need to determine whether the State had proven the armed robbery, the underlying felony, to convict him of first degree felony murder, collaterally estopped him from challenging an element of the crime of felony murder. *Allen v. State*, 192 Md. App. 625, 633 (2010). We agreed and reversed appellant's felony murder conviction and remanded for a new trial. *Id.* at 637-38, 653. The Court of Appeals again affirmed *State v. Allen*, 423 Md. 208 (2011).

In November 2013, appellant was tried by a jury for the third time. The jury again convicted him of first degree felony murder, and the court sentenced him to life imprisonment. The counts of second degree murder, robbery with a deadly weapon, robbery, and theft merged for sentencing purposes, and the two concurrent three year sentences were imposed on the weapons counts.

As relevant to this appeal, the following evidence was adduced at appellant's third trial. Walter Carter testified that, on October 24, 2001, he was driving to his home in Nanjemoy, Charles County, when he saw a shirtless, black male in the middle of the street waving him down. The man was near a white vehicle that was in a ditch and had what Mr.

Carter thought was red paint on his jeans. Mr. Carter pulled over, and the man jumped into his truck and asked him to take him to a fire department.

While Mr. Carter was driving to the fire department, the man stated that he had been in a fight. He stated that two guys had picked him up at a club in D.C. and brought him to a house in Charles County. When the two men found out that the man "didn't go that way," the man "had to fight his way out of it."

The fire station was closed when Mr. Carter got there, so he took the man to the Ironsides Store. The man said that he had to make a phone call, so Mr. Carter let him out at the store and started back toward his home. Mr. Carter saw the police at the location where the white car was stuck, and he told them that the "guy left his car in the middle of the street."

Karen Robertson was working as a 911 call operator on October 24, 2001. She received a phone call from a man who identified himself as appellant. A recording and transcript of the call were entered into evidence, and the call was played for the jury. On the recorded call, appellant stated that he was with a man the night before, and the man tried to get him to do "things that [he] didn't want to do with him," and when the man "came at" him, appellant "cut him." Appellant stated that he was at the Ironsides Store, and he wanted a police officer to come talk to him. Appellant further stated that when he woke up in the morning, he told the man that he had to go, but the man told appellant that he was not taking him home, so appellant grabbed the keys and went toward the car. When the man "came at" appellant, appellant was scared because he "didn't know what he was

gonna do," so he grabbed a knife and stabbed the man. Appellant stated that he left the man at the house and ran.

Captain Cecilia Johnston, a member of the Charles County Sheriff's Office, received a call on October 24, 2001, to respond to Ironsides Store. When she arrived, she saw appellant "flagging" her down. Appellant was wearing jeans and the waistband of his white underwear could be seen above the waist of the jeans. He did not have a shirt on. The blue jeans and the waistband of his underwear had what appeared to be blood on them.

As Captain Johnston approached appellant, she asked if he was injured. Appellant responded that he was not. He told her that he had been in a "shack on a hill," and he wanted to go home, but the man would not take him home, so appellant reached for the car keys, and the man came at him. Appellant then picked up a knife and stabbed the man. Appellant was scared, so he left in the man's white car. After the car got stuck in a ditch, someone picked him up and took him to the Ironsides Store, where he called police.

After Corporal Jonathon Burroughs and Captain Danny Gimler joined Captain Johnston on the scene, Corporal Burroughs spoke with appellant and took him back to his police cruiser. The three police officers then drove in separate cars, appellant with Corporal Burroughs, in an attempt to locate the house where the man had been stabbed. They located the house, which Captain Johnston described as a small "cinderblock shack" on a dirt road on a farm.

Corporal Burroughs testified to his conversation with appellant at the scene. Appellant stated that he had gone home from D.C. with a man the night before, stayed the night at the man's house, and when he got up the next morning and told the man he wanted

to leave, the man refused to take him. Appellant then grabbed the man's car keys, and when the man approached him and "threw his hands up . . . in a fighting stance," appellant picked up a knife and stabbed the man repeatedly. Appellant stated that he did not know if the man was dead or alive. Corporal Burroughs placed appellant in handcuffs for safety purposes and told appellant that the police were going to attempt to locate the victim. As they approached the shack, appellant motioned toward it and said that was it.

When Corporal Burroughs approached the shack, he and another officer knocked on the door, but nobody answered. The officers looked through the windows, but they were unable to see inside, so they opened the unlocked door and went inside. The first thing Corporal Burroughs saw upon entering the house was a wall "completely covered" in what he believed to be blood spatter. There was also what appeared to be blood on the other walls, ceiling, and carpet. Corporal Burroughs stated that the blood was everywhere. Corporal Burroughs located Mr. Butler on the floor, on a blanket, propped up against a couch. Mr. Butler was completely nude and covered in blood. He had very large gaping wounds, and Corporal Burroughs determined that Mr. Butler was deceased. There was a knife next to Mr. Butler. After securing the scene, Corporal Burroughs transported appellant to a nearby farm stand to meet with detectives, uncuffed him, and wrapped him in a blanket.

Cinnamon Lewis, Mr. Butler's close childhood friend, saw Mr. Butler every day in 2001, including on the evening of October 23, 2001. Cinnamon, Mr. Butler, and a friend, were drinking, talking, and "having a good time," when they received a call that a close friend of theirs had passed away. Cinnamon's cousin, James Owens and Mr. Butler

decided to go into Washington D.C. to "blow off some steam." Mr. Butler drove in his white Honda, and they arrived in D.C. at approximately 10:00 p.m.

The three went to an area known as "the Stroll," a place Cinnamon described as "where gay men go and meet other gay men." They were "cruising" the street trying to meet people when appellant walked up and showed interest in Cinnamon, asking Cinnamon's name and beginning a conversation. Cinnamon had a boyfriend and advised appellant of that fact. At that point, Mr. Butler and appellant began having a conversation, and Mr. Butler told appellant that he usually did not dress the way he was dressed, i.e., in "regular male attire," and his name was Jolisa. Appellant and Mr. Butler showed interest in each other, and as the night was coming to an end, appellant got into the car. The group of four drove back to La Plata.

During the drive, the group had a "very friendly" conversation, and appellant never protested or argued about heading toward Charles County. At approximately 2:00 a.m., the group arrived at Cinnamon's house, at which point, Mr. Butler asked Mr. Owens if he wanted to go back to Mr. Butler's house. Mr. Owens responded that Mr. Butler had company, so he would let them have privacy.

Cinnamon and Mr. Butler previously had decided that Mr. Butler would pick Cinnamon up at 9:00 a.m., and they would go to the funeral. The group also had discussed that appellant would stay the night with Mr. Butler, and when Mr. Butler went to pick up Cinnamon for the funeral, appellant would stay at Cinnamon's house until after the funeral, at which time Mr. Butler would take him back to D.C. Mr. Butler never showed up in the morning to pick up Cinnamon.

Lieutenant Michael Almassy was the lead investigator in the case. After receiving a call about the stabbing, Lieutenant Almassy met with officers and transported appellant to police headquarters, where appellant gave voluntary statements, both oral and written. Appellant stated that, on the night of October 23, 2001, he was walking in the area of 5th and H Streets in D.C., an area where men would go to find male sexual partners, when he heard somebody call to him. He looked up and saw what he thought was a female calling to him from the passenger window of a vehicle. After the vehicle made a U-turn and pulled up next to him, appellant saw that the person that called to him, who identified herself as Cinnamon, was actually a male dressed as a female. Cinnamon asked if he wanted to come "hang[] out" and "chill[]" with them. Appellant got into the vehicle and sat in the rear driver's seat, behind Mr. Butler. There was another male in the rear passenger seat at that point, behind Cinnamon.

After appellant got into the vehicle, they drove a short distance and then Cinnamon began hollering to another individual walking down the street. They pulled over and Cinnamon got out and made contact with that person. After a few minutes, Cinnamon got back into the vehicle, and the individual she made contact with got into the rear passenger seat. The person who was originally in the rear passenger seat moved over into the center. At that point, they began to drive back toward Charles County.

Once back in Charles County, the group continued to Cinnamon's house, and the two males that had been in the back seat with appellant got out. Cinnamon also exited the vehicle, and appellant moved to the front passenger seat. Mr. Butler and appellant then drove to Mr. Butler's residence.

Once they arrived at Mr. Butler's house, Mr. Butler and appellant drank beer and smoked cigarettes. Mr. Butler told appellant to make himself comfortable, so appellant took off his clothing except for his underwear. At that point, appellant asked himself "what the hell am I doing." He took a few more sips of his beer and then laid down on Mr. Butler's bed next to Mr. Butler. Appellant began to doze off but awoke to Mr. Butler's hand on his penis. After appellant told Mr. Butler to "go ahead," Mr. Butler performed "oral sex" on appellant. Mr. Butler then had anal sex with appellant. After that, appellant fell asleep.

When appellant woke up at approximately 9:00 the next morning, he reminded Mr. Butler of the funeral that morning. Mr. Butler stated that he did not think he was going. Appellant advised that he was ready to leave, but Mr. Butler told appellant to go drink a beer. Appellant opened the refrigerator, saw a rat inside, and decided it was time to go. Appellant told Mr. Butler that he needed to take him home, but Mr. Butler ignored him. At that point, appellant picked up Mr. Butler's keys and jingled them, stating that he would drive himself. Appellant heard Mr. Butler tell him to wait, and he then heard "fidgeting." According to appellant's statements, read into evidence, the following then transpired:

> I started back to the room he was in. As I approached the entrance I saw him coming at me or coming towards me with [a] blanket draped over; at first I said his left hand but I think now I think about it it was his right hand.
>
> He had it draped over his shoulder with his left hand he was holding the blanket and I guess like trying to hold his robe closed.
>
> And he had his right hand partially raised with a bit of the blanket bunched under his arm pit.

As I saw that I reached up and grabbed the knife off the, off the refrigerator.

I proceeded to push him back and he fell down onto his bed.

I swung the knife. I don't know if I cut him or stabbed him with the knife; I don't know what.

After that I just started swinging the knife.

He cursed at me a few times calling me a few mother fuckers.

I remember that he wrestled his way up over the corner towards where I saw the door handle. I remembered that it was a door because that's the way the police officers went into the house.

From the corner he wrestled back over to the other couch where he fell.

I swung the knife again, once, maybe twice; I don't know and he grabbed it.

I heard a popping sound. I paid it no attention. But at that time he had taken the knife from me.

I told [him] to give me the fucking knife or give it to me mother fucker or something like that. I don't remember what I said.

He didn't say anything to me as I started to feel for the knife down around the area where I had last swung it.

I grabbed the handle and I may have stabbed him once or twice and he tried to wrestle his way up.

That's when I stuck it in his neck. I remember that and he twitched.

I pushed him away from me, ran towards the telephone, then I ran towards the kitchen, picked up; picked the keys up off the floor, ran out of the house, got in the car and left.

Appellant stated that Mr. Butler did not threaten him, and appellant did not see a weapon in Mr. Butler's hand when he approached. Lieutenant Almassy asked appellant

how he felt about having intercourse with Mr. Butler, to which appellant responded: "I ain't never done nothing like this before in my life and I don't know why I did it this time." Lieutenant Almassy then asked appellant if he was embarrassed about having a sexual relationship with Mr. Butler, to which appellant responded, "no, not so much embarrassed about it just that happening brought me to here. It was something I had been contemplating. It was that leap and here I am." In his post-arrest statement, appellant said that he did not know whether Mr. Butler had a weapon under the blanket. He also described holding Mr. Butler down while stabbing him.

Appellant stated that he had "no idea" how many times he stabbed Mr. Butler, and that he "was just swinging [his] arm in fear." He stated that he stabbed Mr. Butler "all over." When he was driving away from Mr. Butler's house, he was scared and hoping that he did not kill Mr. Butler. He did not know where he was going, but he was looking for a police car when he lost control of the car.

Dr. Joseph Pasterner, a former Assistant Medical Examiner for the State of Maryland and an expert in forensic pathology, conducted Mr. Butler's autopsy. He testified that Mr. Butler had 19 stab wounds, including stab wounds to his left lung, his right lung, and his liver. Mr. Butler's blood alcohol level was .05% and was negative for drugs, although his urine showed cocaine metabolites, indicating cocaine use a day or two prior to his death. There were spermatozoa present in Mr. Butler's anal region. Dr. Pasterner testified that wounds on Mr. Butler's left hand were consistent with defensive wounds. He agreed, however, that the wounds could be consistent with offensive wounds,

if he had been reaching for a knife. Dr. Pasterner opined that the cause of death was multiple stab and cutting wounds, and his manner of death was homicide.

A transcript of appellant's testimony at his first trial was read to the jury. Appellant testified that, on October 23, 2001, he had been drinking and became intoxicated. A few days earlier, appellant had lost his job at McDonald's. After his fiancée told him he could not stay with her, he began walking toward the area of 5th and H Streets looking for a shelter. As he was walking, someone hollered at him from a car window. Appellant thought the person, Cinnamon, was a woman. After some conversation, the woman asked if appellant wanted to come to Charles County to "hang out"; there was no discussion of sex. Appellant agreed and got into the vehicle.

When they arrived in Charles County, Cinnamon and two other men got out of the vehicle at Cinnamon's house. Appellant continued with Mr. Butler to Mr. Butler's "shack," arriving at approximately 2:00 a.m. Mr. Butler turned the television on and then went back outside for 15-20 minutes. Appellant, who had been sitting on the couch, got up to see what appellant was doing. He saw a "light flickering like someone was smoking coke." Mr. Butler told appellant to go back inside, and when Mr. Butler returned inside, he gave appellant a beer. Mr. Butler then laid down on the bed where appellant was sitting and told him to get comfortable. Appellant took his clothes off, except for his underwear, and he sat on the side of the bed sipping his beer.

Appellant and Mr. Butler had consensual sexual relations that night, and appellant then fell asleep. He testified, consistent with his statement to the police, that when he woke up, he asked Mr. Butler to take him home, and Mr. Butler ignored him. Appellant thought

that if he "shook" Mr. Butler's keys, "it might persuade him to get up," he did so, telling Mr. Butler that if he would not get up and take appellant home, appellant would drive himself. He testified that he had no intention of actually taking the car.

As appellant shook the keys, he heard something being knocked over in the other room and Mr. Butler telling him to "wait a minute, damn it." Mr. Butler emerged from the room with his right arm in the air. Appellant was startled, and he dropped the keys and grabbed a knife he saw on the refrigerator. As Mr. Butler came toward him, appellant "sort of simultaneously pushed him and swung the knife at the same time." He described what happened next as follows:

> A. Well, I started pushing him back and we fell to the floor and as we were falling I was still swinging the knife and I fell on top of him.
>
> When we hit the floor Mr. Butler pushed me up off of him.
>
> Q. Okay.
>
> And when he pushed you, pushed you off him where did you end up and where did Mr. Butler end up?
>
> A. Well, I was; Mr. Butler was between the door and myself and we were facing each other.
>
> Q. Okay.
>
> And when the two of you were facing each other at that point what, if anything, did Mr. Butler do?
>
> A. What he did was he started coming towards me and I started again swinging the knife.
>
> Q. And what did Mr. Butler do?

A. What happened he started coming towards me and he sort of like gave me a brush out of the way and he ran towards a couch; towards the other couch in the living room.

And I looked at him. I was following him and I saw a knife on the floor and that is what he was going after.

So I ran over behind him and I put and how can I say it, he went for the knife and I --.

Q. What did you do with regard to his arms?

A. Well, I was trying to get to him to hold his arms, trying to get him from raising the knife up at me.

Q. Were you able to do that?

A. Yes, Sir.

Q. When you stopped moving the knife that you had what, if anything, occurred?

A. Well, what happened while I was holding onto his arms I am asking him, you now, what is wrong with you? What is going on? And he was continuing to try to wrestle his way up and, you know, he almost did. And I started swinging the knife again.

Q. Did he grab the knife from you at any time?

A. I had stopped, you know, and I continued to ask him what the . . . ; asking him what is going on and I stopped and he grabbed the knife from me.

Q. Did he; did he get it from out of your hands?

A. He took it out of my hand.

Q. How were you able to recover the knife?

A. I held one arm down; one of his arms down, and I reached in the area to where I thought the knife was.

Q. Okay.

And did you retrieve the knife?

A. Yes, Sir.

Q. And after that incident what did you do?

A. Well, I reached down and I felt; I grabbed the knife and was trying to pull the knife up and I heard something; something pop like, and you know, I heard it.

I paid attention to it but then Mr. Butler was like trying to, I guess I am going to call it wrestle his way up at me again.

And I didn't know if he had the other knife in his hand or what and, you know, I swung the knife again.

I started swinging the knife again.

Appellant testified that he then got up and went to find a telephone, but he remembered that the telephone did not work. Appellant ran into the kitchen, picked up the car keys, ran out of the house, and drove off. He did not know where he was going, but he was looking for a police officer or somebody who could help him. He may have been driving too fast, and he ended up losing control of the car and running it into a ditch. He got out of the car and waved down a man in a black truck. Appellant got into the man's truck and ultimately ended up at the Ironsides Store, where a person in the store called police for him. After the police took appellant back to Mr. Butler's house, appellant learned that Mr. Butler was dead. Appellant testified that he would not have stabbed Mr. Butler if Mr. Butler had not attacked him, and he did not intend to kill Mr. Butler.[1]

[1] On cross-examination, appellant testified that, when the stabbing occurred, he was not under the influence of drugs or alcohol. He stated that he had been drinking beer, and he had used crack cocaine, marijuana, and PCP in the days prior to (continued . . .)

Appellant agreed that his statement to Lieutenant Almassy that Mr. Butler was his first homosexual experience was not accurate; he had two previous homosexual experiences. He testified that, when Mr. Butler approached him with his arm raised and the blanket over him, appellant feared for his life, but he never saw a weapon. He acknowledged that he did not reference a second knife in his statements to police.

On cross-examination, the prosecution established that, as Mr. Butler approached, he was in the living room and appellant was in the kitchen. The following then occurred:

> Q. And the doorway outside was to your back?
>
> A. Yes, it was.
>
> Q. And there wasn't anything standing between you and that door way was there?
>
> A. Nothing at all.
>
> Q. Instead your reaction was to drop the keys, right?
>
> A. Yes.
>
> Q. And to reach up onto this refrigerator for a knife?
>
> A. Right.
>
> ***
>
> Q. . . . Now, as Mr. Butler was going towards that door he was no longer posing a threat to you was he?
>
> A. Mr. Butler never headed towards a door.
>
> Q. Did there come a time that he went from the door; from the area near the door over to the couch?

(. . . continued) the stabbing. On the morning and into the afternoon of October 23, he drank 6 ounces of Jack Daniels, smoked a joint laced with cocaine, and smoked three PCP-laced cigarettes.

A. Yes, Sir.

Q. And I think you described it earlier that he brushed past you.

A. Pushed past me; yes, Sir.

Q. And he continued on past you, correct?

A. Yes he did.

Q. So at this point in time you were closer to that living room door than Mr. Butler is?

A. At one point in time, yes, I was closer to the door than him.

Q. In fact at the moment and time that he pushed past you and walked behind you, you now had a clear shot to that door leading outside from the living room?

A. Yes, Sir.

Q. Did you go out that door?

A. No, Sir, I didn't go out that door.

Q. Did you make any attempt to go out that door?

A. No, Sir, I didn't.

Q. In fact, you turned around and then proceed back to follow Mr. Butler over to the couch. Isn't that right?

A. I didn't do that until after I looked around and I saw what Mr. Butler; what I thought Mr. Butler was going after which was the knife that I saw on the floor.

***

Q. You did not get up and run out the door?

A. No, I didn't.

> Q. And there was nothing blocking you from getting up and running out the door?
>
> A. The thought that he has a knife; well no, Sir, nothing was in my way stopping me from going out the door.

**DISCUSSION**

Appellant's sole challenge to his convictions is that the trial court erred in refusing to give the jury an instruction on self-defense.[2] Although appellant makes clear that he "does not maintain that self[-]defense is a defense to felony murder," he contends that "the principles enunciated in the self[-]defense jury instruction were necessary to inform the jury's evaluation of [his] intent with respect to the robbery count, the felony count supporting the felony murder charge." In support, appellant argues:

> The State contended that appellant first formed the intent to steal Butler's car and then stabbed Butler to carry out the theft of the car. Appellant's counsel argued to the jury that appellant did not have the intent to steal the car and that he stabbed Butler in response to Butler "coming at" him with his arm raised under a blanket which appellant believed signified that Butler was armed and intended to harm appellant. In arguing that appellant intended to steal the car before appellant and Butler engaged in a physical confrontation and, the State appealed to the jury to reject appellant's self[-]defense claim.

Appellant asserts that, because his "self-defense claim was inextricably intertwined with the jury's determination of his intent with respect to the robbery," the court erred in refusing to give the instruction.

[2] Appellant requested both Maryland Pattern Jury Instructions – Criminal ("MPJI-Cr") 417.2 ("First Degree Premeditated Murder, Second Degree Specific Intent Murder and Voluntary Manslaughter (Perfect/Imperfect Self-Defense)") and MPJI-Cr 5:07 ("Self-Defense").

The State responds in two ways. Initially, it argues that appellant's claim of error is not preserved for this Court's review for the following reasons: (1) appellant did not object when the court denied his request or after the court gave its instructions; and (2) appellant's claim on appeal, that the "self[-]defense jury instruction [was] necessary to inform the jury's evaluation of [his] intent with respect to the robbery count," was not argued to the trial court.

Moreover, the State argues that appellant's claim fails on the merits because there was no evidence that he "retreated, attempted to retreat, or was unaware of an avenue of retreat," and therefore, a self-defense instruction was not generated by the evidence. It further argues that the instructions given by the court fairly covered appellant's theory of defense.

## I.

## Proceedings Below

A lengthy discussion ensued between the court and counsel regarding defense counsel's request for a self-defense jury instruction. The court noted that such an instruction had not been given in the previous trials, and it questioned defense counsel regarding the requirement of a reasonable effort to retreat prior to being entitled to a self-defense instruction. The following then ensued:

> [APPELLANT'S COUNSEL]: Well, I think in light of the small confines of that house and the second knife, I think that those two things together make it, make it challenging --.
>
> THE COURT: Well, didn't he in several ways say there's a point when he's closer to at least one of the doors than the other guy is. Even if the other guy

> is making a bee-line for a knife on the floor is there any logic behind the notion that he couldn't have taken advantage of that door and retreated?
>
> [APPELLANT'S COUNSEL]: Well, I think that in light of how small it is, the second knife, I think that makes it a jury question for the jury to decide whether he could have made it to that door before the second knife was picked up and whether that was a rational thing to do or not.
>
> I don't think that the [c]ourt should make that decision. I think those 12 individuals should.

The court indicated that it would research the issue that evening. The next morning, the court denied the request for a self-defense instruction, giving a long explanation of its reasoning, including its conclusion that self-defense does not apply to the charge of felony murder. Appellant's counsel did not make any response to the court's decision.

Subsequently, the court instructed the jury regarding the elements of the offense of felony murder. It specifically instructed that, "[t]o convict the Defendant of felony murder the State must prove that he had the intent to rob before or at the same time as the fatal act occurred." Consistent with its ruling, the court did not give an instruction on self-defense.

At the conclusion of the court's instructions, defense counsel asked to approach the bench, and the following occurred:

> [APPELLANT'S COUNSEL]: With regard to the binding nature of the instructions I don't think that the [c]ourt specifically said that the duty; that the jury has a duty to apply the law.
>
> So I would ask you to read that instruction once more.
>
> We object to the 201, duty to deliberate.
>
> We, if I could have the [c]ourt's indulgence.
>
> We would ask the [c]ourt to re-instruct on direct and circumstantial evidence and just read it straight with no examples . . . .

With respect to the crimes I guess I've already made the record. I think the [c]ourt's already said I made the record.[3]

THE COURT: You did.

[APPELLANT'S COUNSEL]: With regard to the crimes that we (inaudible).

THE COURT: Yeah.

Yeah.

[APPELLANT'S COUNSEL]: Okay.

That's it.

That's all.

[3] The previous day, during discussions regarding the applicable jury instructions, the State argued that the jury did not need to be instructed on all of the crimes for which appellant was charged, as this trial involved only the charge of felony murder. The State requested that the court solicit a verdict only on first degree murder, but with a jury instruction on robbery. Appellant's counsel asserted that an instruction should also be given on the charge of second degree murder, stating that appellant's theory was "that Mr. Butler created the confrontation [when] [h]e came at" appellant, and appellant "may have defended perfectly or imperfectly." Counsel stated that, given this theory of the case, they wanted "the [c]ourt to give the theft, the motor vehicle taking, the second degree specific intent and the voluntary manslaughter because that's, that's the straight road of the Defense theory."

The court ruled, in addition to ruling that it would not give a self-defense instruction, that the jury should only be "instructed with regard to the law pertaining to robbery which is the predicate for the first degree murder charge which in turn is the only charge before this jury," noting that appellant's counsel had "made [her] record," but the "only verdict we're gonna solicit from this jury is guilty or not guilty on the first degree felony murder charge period."

## II.

## Preservation

Maryland Rule 4-325(e) provides that "[n]o 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." (Emphasis added). Thus, the Rule "plainly requires an objection after the instructions are given, even though a prior request for an instruction was made and refused." *Braboy v. State*, 130 Md. App. 220, 226-27 (2000) (citing *Johnson v. State*, 310 Md. 681, 686 (1987)). "A principal purpose of Rule 4-325(e) 'is to give the trial court an opportunity to correct an inadequate instruction' before the jury begins deliberations." *Alston v. State*, 414 Md. 92, 112 (2010) (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)). With respect to the Rule's requirement that an objection be made after the instructions are given, even if an objection was previously made, the Court of Appeals has explained that

> [t]here are good reasons for requiring an objection at the conclusion of the instructions even though the party had previously made a request. If the omission is brought to the trial court's attention by an objection, the court is given an opportunity to amend or correct its charge. Moreover, a party initially requesting a particular instruction may be entirely satisfied with the instructions as actually given.

*Johnson*, 310 Md. at 686.

Here, although appellant requested the self-defense instruction, he did not object the following day when the court ruled that it would not give the instruction, nor did he object

after the court instructed the jury and did not include an instruction on self-defense. Under these circumstances, appellant's claim of error is not preserved for our review.[4]

**III.**

**Entitled to Instruction**

Even if appellant's argument was preserved, we would find it to be without merit. An instruction is proper when: "'(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given.'" *Hoerauf v. State*, 178 Md. App. 292, 321 (2008) (quoting *Thompson v. State*, 393 Md. 291, 302 (2006)). The instructions given must "'sufficiently protect the defendant's rights and adequately cover[] the theory of the defense.'" *Carroll v. State*, 428 Md. 679, 689 (2012) (quoting *Fleming v. State*, 373 Md. 426, 433 (2003)).

This Court has explained what the record must show for an accused to generate the issue of self-defense:

> (1) The accused must have had reasonable grounds to believe himself . . . in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
>
> (2) The accused must have in fact believed himself . . . in this danger;
>
> (3) The accused claiming the right of self[-]defense must not have been the aggressor or provoked the conflict; and

[4] Moreover, we note that appellant's argument on appeal is that the self-defense instruction was "necessary to inform the jury's evaluation of [his] intent with respect to the robbery count." Because appellant did not make the argument he now makes on appeal to the trial court, we need not decide it. *See* Md. Rule 8-131(a) (An appellate court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court.").

> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.

*Johnson v. State*, ___ Md. App. ___, No. 158, Sept. Term, 2014, slip op. at 21 (filed May 28, 2015) (quoting *Haile v. State*, 431 Md. 448, 472 (2013)). There is an additional requirement; which can be referred to as the "retreat rule," requiring that an individual must make all reasonable efforts to withdraw before resorting to deadly force. *Redcross v. State*, 121 Md. App. 320, 328 & n.4, *cert. denied*, 350 Md. 488 (1998). This rule has been explained as follows:

> "[I]t is the duty of the defendant, when defending himself outside [his own] home, to retreat or avoid the danger if the means to do so are within his power and consistent with his safety. Where, however, the peril is so imminent that he cannot retreat safely, he has a right to stand his ground and defend himself."

*Id.* at 329 (quoting *Lambert v. State*, 70 Md. App. 83, 92 (1987)).

Appellant correctly recognizes that self-defense is not applicable to a charge of felony murder.[5] Even if this Court was inclined to indulge appellant that there was an exception to this rule under the circumstances of this case, a self-defense instruction was not warranted here because there was no evidence that appellant retreated or attempted to retreat. To the contrary, the evidence indicated that appellant had at least two opportunities to retreat, but instead, he decided to pick up a knife and stab Mr. Butler 19 times. Thus, even if the issue was properly preserved, we would hold that a self-defense instruction was

[5] *See Sutton v. State*, 139 Md. App. 412, 454 (2001) ("It has been established that self-defense is not a defense to felony murder.").

not generated by the evidence, and the court properly declined to give the requested instruction.

**JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.**