Circuit Court for Baltimore County
Case No. 03-K-17-0484

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2358

September Term, 2017

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RUFUS BERRY

v.

STATE OF MARYLAND

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Nazarian,
Leahy,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Leahy, J.

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Filed: January 29, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant Rufus Berry was tried before a jury in the Circuit Court for Baltimore County on various charges, including fourth-degree sexual offense, following events that took place during the early morning hours after Christmas in 2016. A woman who Berry met at a club that night testified that, after her drink was drugged, Berry took her back to his apartment and, among other things, tried to force himself on her, including kissing her on her neck. A DNA swab of the woman's neck confirmed the presence of Berry's DNA.

During jury deliberations, the jury sent a note to the court asking, in part, "Is kissing on the neck sexual contact?" The trial court had already instructed the jury on fourth-degree sexual offense and the definition of "sexual contact" as provided in Maryland Code (2002, 2012 Repl., 2017 Supp.), Criminal Law Article ("CL"), § 3-308(b) and § 3-301(e)(1). After conferring with counsel, the judge decided to refer the jury to their written instructions on fourth-degree sexual offense and sexual contact. The jury found Berry guilty of fourth-degree sexual offense and second-degree assault. Berry appealed and presents one question for our review:

> "Was it reversible error for the trial court, when confronted with a jury note penned during deliberations asking[,] "Is kissing on the neck sexual contact," not to provid[e] the jury with a supplemental instruction that the neck was not an intimate part of a female's body for purposes of . . . fourth degree sexual offense?

We hold that Berry failed to preserve this issue for our review because he did not substantially comply with Maryland Rule 4-325(e). Under the specific facts of this case, Berry failed to adequately state the grounds for his objection on the record and the circumstances do not suggest that it would have been futile or useless for Berry to renew his objection after the trial court instructed the jury.

## BACKGROUND

Because of the limited nature of the question presented, we provide only a brief recital of the facts that are necessary for context.

On January 30, 2017, a grand jury sitting in Baltimore County returned a five-count indictment against Berry, charging him with (1) attempted second-degree rape; (2) attempted second-degree sexual offense; (3) fourth-degree sexual offense; (4) false imprisonment; and (5) second-degree assault. During a four-day jury trial that ran from October 23 through 26, 2017, both the victim, "Ms. H.," and Berry testified offering competing versions of their interactions on the night in question. Altogether nine witnesses testified.

### Twas the Night *After* Christmas

Ms. H. testified first. She explained that some friends dropped her off at 4229 Club in Baltimore around 2:00 a.m., on December 26, 2016. When she arrived, she ordered a drink with two shots and stood by the bar. Berry approached and asked her to dance. She told him she "do[es]n't dance with anybody," and then set down her cup on the speaker and went to the bathroom. When she returned, she drank from her cup and then "felt like [she] couldn't even stand or be functional." She "was dizzy, couldn't hold [her] eyes open"; she "grabbed [her] pocketbook and [] jacket from the top of the speaker and [] stumbled out of the club."

Once outside, Ms. H. sat on the steps to the club because she could no longer stand. Two or three minutes later, Berry came out and asked her if she needed help, but she declined. Berry eventually picked her up and carried her to his car. Ms. H. asked Berry to

take her to a nearby gas station to get some tea, but he drove past it to his apartment. She blacked out on the ride, throwing up twice in Berry's car and again when they arrived at his apartment building.

Ms. H. related that, as Berry led her through the apartment, she "could feel something like pressed against [her]," which she could tell was Berry's erect penis. She ended up on the bathroom floor, throwing up again. She may have blacked out as she was lying on the bathroom floor, but her memory was unclear. Eventually she made it to Berry's bedroom, where she laid on the bed and blacked out again, maybe dozing off. When she came to, Berry was laying sideways with his leg draped over hers. When she awoke, she "believe[d] [her] bra was off, or he was already taking [her] bra off because [she] had money in [her] bra. And he took the money out [of her] bra and he put it [o]n the windowsill." (As Ms. H. would explain at trial, she was wearing two bras that night—something she commonly does; only the top bra was off when she woke up.) She also noticed that her "skirt was up a little bit." Berry was "either breathing on [her] or kissing on [her] neck." She testified that he was "touching [her] and doing stuff to [her] to make [her] uncomfortable." The smell of Berry's breath made her "kind of like snap out of it" and she started "being aggressive" and telling Berry "no" as he "was saying that he wanted some or that he wanted to do something[.]"

Ms. H. said she may have accused Berry of kidnapping after she said she was going to call somebody and he told her she "wasn't calling nobody." An altercation ensued. Berry grabbed her by her hair extensions while she fought with him and kicked him. Ms. H. eventually made her way out of the apartment, retrieved her cell phone and called 911.

When the police arrived on the scene, they took Ms. H. to the apartment where she had been and, afterward, to the police station. At the station, Ms. H.'s neck was swabbed for a DNA sample; a buccal swab of her cheek was also taken to collect her DNA for comparison.

Ms. H. told Detective Jessica Hummel, a special-victims detective with the Baltimore City Police Department, that Berry "had kissed along the side of her neck." Det. Hummel directed the crime lab to swab the portion of Ms. H.'s neck where Ms. H. said that Berry "had kissed her and put his mouth."

Police obtained a warrant to search Berry's apartment and vehicle and to obtain a sample of his DNA. The search of Berry's car revealed vomit inside the car. On the hill outside of Berry's apartment, police found Ms. H's hair extensions; her purse was on the street on the side of the building. Police arrested Berry and brought him to the station for questioning, which stopped once he requested an attorney. At that point, police had Berry take a buccal swab of his cheek to collect epithelial cells for a DNA test. Berry would stipulate at trial that "[t]he DNA profiles found on the swab taken from [Ms. H.]'s neck was found to match the DNA of [Ms. H.] and Rufus Berry."

At the close of the State's case, Berry moved for judgment of acquittal on the counts for attempted second-degree rape, attempted second-degree sexual offense, and fourth-degree sexual offense. The court granted the motion with respect to attempted second-degree sexual offense but denied the motion for the other two counts.

Berry had several character witnesses testify on his behalf before he took the stand himself to offer his own version of events. He explained that when he arrived at the 4229

Club, he got a drink and went and stood by the wall next to Ms. H, who, he said, leaned over and complimented the Santa hat he was wearing. Berry complimented her hat in response and asked her to dance, to which Ms. H. responded that she doesn't dance with anybody. Ms. H. then put her cup on the speaker and asked Berry to watch it as she went to the bathroom. When she came back she grabbed her drink and other belongings from the speaker and "just walked off."

Later, when Berry was leaving the club, he walked outside to find Ms. H. sitting on the steps. He asked her if she wanted to hang out, she agreed; he took her by the hand, helped her up, and they walked to his car. Ms. H. was vomiting out of the door to the passenger side of the car as Berry walked around to the driver's side. He tried to drive her to two gas stations to get her tea, per her request, but the stations were closed, so he drove to his apartment and said he'd just make her some tea when they got there.

When they arrived at his apartment, Berry made her some tea, and after bringing it to her, the two then began to kiss. Berry testified that he "was kissing her neck" but after about 10 minutes, Ms. H. felt nauseous and had to throw up again. Berry cleaned up immediately afterward and then went back into the bedroom, where he took off his top shirt and laid down on the bed with Ms. H., who was already asleep. He then went to sleep as well. Berry testified that once Ms. H. was asleep he did not kiss her, remove her bra, or touch her in anyway.

Berry woke to Ms. H. saying repeatedly that he needed to wake up and she needed to go home. Ms. H. complained that he wasn't helping her put on her boots, which sparked an argument and, according to Berry, caused Ms. H. to become aggressive with him.

During the argument, Ms. H. threatened to "call [her] people" and Berry told her not to call anybody to his house, scared about who might come. Berry then grabbed Ms. H. and began forcibly removing Ms. H. from his apartment as she resisted and kicked in an attempt to stay in the apartment. Berry says he bearhugged Ms. H. and dragged her out of the apartment building then ran back inside, got Ms. H.'s boots and purse, and set them down on the curb outside. Not knowing who Ms. H. was calling from outside his apartment, Berry woke his son, who had slept through the ordeal, and drove with his son to his mother's house. When he returned to his apartment the next morning, he was met by the police, who took him to the station for questioning.

**The Jury Note**

The defense rested at the end of the second day of trial. When proceedings began the next day, the court heard the parties' objections to jury instructions. Berry objected only to the form of an instruction on false imprisonment. Having resolved all the parties' objections, the court called in the jury and began its instructions. Relevant to the charge of fourth-degree sexual offense, the court instructed the jury as follows:

> The Defendant is charged with the crime of fourth-degree sexual offense. In order to convict the Defendant of a fourth-degree sexual offense, the State must prove, one, that the Defendant had sexual contact with [Ms. H.]; and two, that the sexual contact was made against the will and without the consent of [Ms. H.].
>
> Sexual contact means the intentional touching of [Ms. H.]'s genital or anal area or other intimate parts for the purpose of sexual arousal or gratification or for the abuse of either party.

Following jury instructions and closing arguments, the jury began its deliberations. Later that day, the jury sent a note to the court asking: "Did [Ms. H.] get subpoena? Is

kissing on the neck sexual contact? Was the DNA on her neck from her saliva or the skin on her neck?"

The trial judge passed the note to counsel to review and the following colloquy ensued:

> THE COURT: Counsel, I would suggest that the appropriate response would be to tell them that they have all the evidence that they are to consider. They are to rely on their own recollections of what that evidence is.
>
> [DEFENSE COUNSEL]: I would think that would be an appropriate answer to the first and the third.
> And then in answer to the second question, quote, Is kissing on the neck sexual contact, **the answer should be, No**, since the neck is not an [] intimate part of one's body. It's a fully exposed contact area.
>
> [THE STATE]: They have an instruction that explains (inaudible).
>
> THE COURT: **I [] would suggest that they rely on the instruction as to sexual [] contact, the fourth-degree – the definition in the [] fourth-degree sex offense.**
>
> [DEFENSE COUNSEL]: **Which says vagina, anus or other intimate areas**.
>
> THE COURT: **Or other intimate area, right**.
>
> [DEFENSE COUNSEL]: **That would be my request**.
>
> THE COURT: **Okay**. State?
>
> [THE STATE]: Your Honor, I think it's appropriate to -- I mean, all that's explained in the jury instructions. They can consult your instructions.
>
> THE COURT: Okay. Can we get the jury, please?
>
> * * *
>
> My response to you with regards to these questions is that you are to rely on your own best recollection of what the evidence is. You may refer to your notes as well as confer amongst each other, but you have all the evidence that you are to consider in this case.

> **With regard to, Is kissing on the neck sexual contact, I would suggest that you refer to the definition of sexual contact which is enclosed in the instructions of fourth-degree sex offense.**
>
> And that would be my response. Thank you so much. I return you to your deliberations.

(Emphasis added).

Jury deliberations continued into the next day until they ultimately returned a verdict, finding Berry not guilty of attempted second-degree rape or false imprisonment but guilty of fourth-degree sexual offense and second-degree assault.

Ten days later, on November 3, 2017, Berry moved for a new trial. He argued, in part, that there was no testimony that Berry touched any body part of Ms. Harris that could be deemed to be intimate under the meaning of sexual contact in CL § 301(e)(1). The State responded that Berry conceded in his motion that Ms. Harris testified that she woke up to find her bra was removed, which the jury could have believed happened if Berry placed his hands on or near her breasts and would support a conviction for fourth-degree sexual offense. On November 20, 2017, the circuit court denied Berry's motion for a new trial and sentenced him to time served for his conviction of fourth-degree sexual offense and three years in prison (with credit for 11 months of time served) for his conviction of second-degree assault. The court also required Berry to register as a Tier I sexual offender for his sexual offense conviction.[1]

[1] On December 13, 2017, Berry moved for a modification of his sentence in the circuit court, asking the court to hold his motion sub curia, that he not have to register as a sexual offender, and that the court suspend his sentence and allow him probation before judgment on the charge of fourth-degree sexual offense. The next day, he filed a motion for review of sentence in which he asked the court for the same relief. The circuit court,

Berry noted his timely appeal to this Court on December 8, 2017.

## DISCUSSION

### I.

### Preservation

The State asserts the issue on appeal is not preserved because Berry failed to comply with Maryland Rule 4-325(e), which requires parties to object after the court instructs the jury. Nor did Berry "substantially comply" with Rule 4-325(e), the State continues, because "he did not contest the instruction *at any point*," but instead acquiesced to the instruction by responding, "[t]hat would be my request," when the trial court suggested referring the jury to its previous instructions regarding "sexual contact." The trial court merely suggested a response and asked for input from the parties, "indicating a willingness to discuss the issue further." Consequently, the State posits, the record "does not show that an objection would have been 'futile or useless[,]'" as is required for this Court to find substantial compliance with Rule 4-325(e).

In response, Berry contends that he "absolutely preserved [his] objection" by requesting that the court's answer be "no, as kissing the neck is not an intimate part of the body, but rather a fully exposed area open to contact." He insists that "[i]t is of questionable merit to argue . . . that a statement of one's clear position on how the court should instruct the jury is not an objection to the court's decision to do the exact opposite." Further, he says, his failure to renew his objection does not render it

on January 27, 2018, convened a three-judge panel to consider Berry's motion, and denied his motion on March 26, 2018, leaving his original sentence unchanged.

unpreserved because he substantially complied with Rule 4-325(e) by "ma[king] the court aware that [he] did not agree with its proposed response to the jury's instruction, [he] proposed the instruction that [he] wanted, [he] gave the reasons for that instruction which the court rejected directly before giving the jury the response it chose over the defense's request." Even if he did fail to preserve the issue for appeal, Berry asks us to exercise our discretion to consider the propriety of the court's instruction under the plain error doctrine, given that "this case presents a singular, clear, novel question of whether the neck qualifies as an 'other intimate area' such that an unwanted kiss on that area can support a conviction for fourth degree sex offense."

Maryland Rule 4-325 tasks the trial court with instructing the jury. "An 'instruction' includes any 'communication from the judge to the jury made after the close of the evidence.'" *Perez v. State*, 201 Md. App. 276, 282 (2011) (quoting *Lansdowne v. State*, 287 Md. 232, 242 (1980)). A main purpose of the judge's instructions "is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict." *Chambers v. State*, 337 Md. 44, 48 (1994). Pursuant to Maryland Rule 4-325(a), the trial court may supplement jury instructions "when appropriate." *See Brogden v. State*, 384 Md. 631, 640-41 (2005). One type of supplemental instruction is a judge's response to a jury's question. *Appraicio v. State*, 431 Md. 42, 51 (2013).

We entrust the trial judge, in his or her sound discretion, to decide whether and how to supplement jury instructions, and we will not disturb the judge's determination "absent a clear abuse of discretion." *Sidbury v. State*, 414 Md. 180, 186 (2010). Ordinarily, a trial

judge abuses his or her discretion when it is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Atkins v. State*, 421 Md. 434, 447 (2011) (citation omitted). The Court of Appeals has ruled, however, that the trial judge's discretion to instruct the jury is more limited when responding to a jury question. *See Cruz v. State*, 407 Md. 202, 211 (2009); *see also State v. Bircher*, 446 Md. 458, 484 (2016) (Watts, J., dissenting) ("For good reason, supplemental jury instructions [] are held to a higher standard than initial ones are."). Indeed, "a trial court must respond to a question from a deliberating jury 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) (citation omitted). The trial judge's duty is to respond "as directly as possible." *Appraicio*, 431 Md. at 53; *but see Sidbury*, 414 Md at 195 (holding that "the trial judge did not abuse his discretion in responding, '[t]hat's not an issue for you to concern yourself with,' when faced with a question posed by the jury during deliberations concerning the consequences of a hung jury").

Still, the trial court's duty to respond is limited, under Maryland Rule 4-325(c), to "instruct[ing] the jury on the applicable law." The rule "does not apply to factual matters or inferences of fact. Instructions as to facts and inferences of fact are normally not required." *Patterson v. State*, 356 Md. 677, 684 (1999). "[W]hen the jury's question seeks guidance on how to find the facts, the judge's response must not 'invade the province of the jury.'" *Bircher*, 446 Md. at 466 (citation omitted). Accordingly, "[a] trial judge [] should avoid answering questions in a way that improperly comments on the evidence and invades the province of the jury to decide the case." *Id.* at 465.

Objections to jury instructions are governed by Maryland Rule 4-325(e):

> (e) **Objection.** *No party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury*, stating distinctly the matter to which the party objects and the grounds of the objection. . . . An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(Emphasis added). The purpose of this rule is "to give the trial court an opportunity to correct its charge if it deems correction necessary[.]" *Gore v. State*, 309 Md. 203, 209 (1987) (citation omitted).

In this case, Berry failed to strictly comply with Rule 4-325(e) because he did not object "promptly after the court instruct[ed] the jury." Md. Rule 4-325(e). That does not end our inquiry, however. The Court of Appeals reiterated recently that, although our courts prefer strict compliance with Rule 4-325(e), "an objection that falls short of that mark may survive nonetheless if it substantially complies with [the rule]." *Watts v. State*, 457 Md. 419, 427 (2018). In determining whether a party preserved its objection, "there is 'some play in the joints.'" *Id.* at 428 (quoting *Sergeant Co. v. Pickett*, 283 Md. 284, 289 (1978)). The Court in *Gore* set out several conditions that must exist for a party to be in substantial compliance with Rule 4-325(e):

> [T]here must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record[;] and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

309 Md. at 209 (citing *Bennett v. State*, 230 Md. 562, 568-69 (1963)).

This Court in *Horton v. State* recently determined that an objection substantially complied with Rule 4-325(e), after first deciding that Horton had not affirmatively waived the objection. 226 Md. App. 382, 414 (2016). The parties in *Horton* argued over the definition of an accomplice. *Id.* at 412. Horton's counsel urged the court to give the jury a "testimony of accomplice" instruction as to one of the State's witnesses, insisting that Horton could not be convicted based solely on the uncorroborated testimony of an accomplice and that the State's witness qualified as an accomplice. *Id.* The State retorted that its witness did not qualify as an accomplice because she lacked the requisite criminal intent. *Id.* The court took the parties' arguments under advisement overnight and, the next morning, explained that it would not give the instruction because it was not generated by the evidence. *Id.* at 412-13.

Horton did not renew his objection after the court instructed the jury, and his counsel responded affirmatively "to the court's post-instructions query of 'Counsel satisfied?'" *Id.* at 413. As an initial matter, we rejected the State's argument that counsel's response amounted to an express waiver, reasoning that the court posed its question following a clarifying supplemental instruction, "and, when read in context, [counsel's response] cannot be reasonably interpreted as a waiver of all previously argued objections to the instructions."[2] *Id.* We also held that Horton preserved his objection through substantial

[2] Berry's acquiescence (or conciliation) is not like counsel's affirmative response in *Horton* that this Court held was not an affirmative waiver. In *Horton*, the context suggested that counsel was responding to the judge's inquiry about a different instruction, 226 Md. App. at 413, and here, the record is clear that Berry's counsel was referring to the supplemental instruction at issue.

compliance because the conditions set out in *Gore* were all present: Horton clearly brought its request to the court's attention in open court; stated his reasoning on the record; gave the court "ample opportunity to consider the request," which the court did; and "the court's explanation of why the instruction would not be given was unequivocal and not likely to change if the exception was restated after the court gave its instructions." *Id.* at 414.

In this case, the jury's note presented three questions, only one of which is at issue on appeal: "Is kissing on the neck sexual contact?" As an initial response, Berry's counsel asserted, "the answer should be, No, since the neck is not an [] intimate part of one's body. It's a fully exposed contact area." The State seemed to respond that the jury already had instructions to explain sexual contact. Then, when the trial judge suggested that he instruct the jury to rely on the written instructions and the definition contained therein of sexual contact, Berry's counsel responded *by adding* that those instructions "say[] vagina, anus or other intimate areas." "Or other intimate area, *right*," the judge replied. (Emphasis added). Berry's counsel then confirmed, "*That would be my request*," and the court replied, "Okay." (Emphasis added). After this conciliation, Berry's counsel did not intimate any disagreement with the trial judge's decision to refer the jury to the definitions of sexual contact and fourth-degree sexual offense, nor did he lodge an objection on the record after the court so instructed the jury.

We cannot garner from this exchange anything that would have preserved the assignment of error Berry raises on appeal. Berry failed to substantially comply with Maryland Rule 4-325(e) for two main reasons: (1) the circumstances were not "such that a renewal of the objection after the court instructs the jury would be futile or useless" and

(2) Berry's counsel failed to accompany his objection with "a definite statement of the ground for objection." *See Gore*, 309 Md. at 209. We will address each in turn.

**A. The Futility of Renewing an Objection**

Rather than asserting to the trial judge, as he does on appeal, that the court's instruction "did not answer the jurors' question," the record indicates that Berry's counsel and the trial judge seemed to agree that the phrase "other intimate areas" responded to the jury's question. Berry's counsel read the statutory language to the court, the court repeated back the same language—noting its agreement—and counsel responded by saying, "That would be my request." At the very least, this demonstrates counsel's acquiescence if not agreement with the judge's proposed response.

This case presents a stark contrast to *Gore*, in which defense counsel argued to the jury during summation that the evidence was insufficient. *Id.* at 205. The trial court held a bench conference shortly thereafter and told defense counsel,

> You [defense counsel] told them it was insufficient for them to find that that was a handgun. I'm sorry, Tony, but I'm going to tell them when it's all over, when it gets ready to go to the jury, if there was insufficient evidence on any count, the law requires me to stop it and not send it to them. There is sufficient evidence if they believe beyond a reasonable doubt to make the finding.

*Id.* at 205-06. Defense counsel offered to clarify for the jury but the trial judge said, "I'm going to [clarify]. I can assure you, I'm going to do it." *Id.* at 206. When defense counsel said he objected to the court clarifying, the trial judge responded, "You can object all you want, but I'm going to do it." *Id.* The court, at the end of closing arguments, gave a supplemental instruction on sufficiency of the evidence without further objection by

defense counsel. *Id.* Gore appealed. The Court of Appeals considered the necessary conditions for substantial compliance with Rule 4-325(e) and concluded that defense counsel's objection during the bench conference was sufficient to preserve the issue for appeal. *Id.* at 209. By contrast, in the instant case, the trial judge instructed the jury in a way that seemed to satisfy Berry's counsel.

Berry cannot find support in our decision in *Horton*, a case in which defense counsel presented the trial court with a binary choice: to give a "testimony of accomplice" instruction or not. 226 Md. App. at 412. After considering the opposing arguments, the trial judge concluded that the State had the better argument and chose not to give the instruction. *Id.* at 412-13. It would have been futile for Horton to simply repeat his arguments at this point. In Berry's case, nothing in the record indicates that the trial judge was unwilling to re-consider his position or sustain any further objection to the instruction. *See Gore*, 309 Md. at 205-06. The jury's question touched on a factual determination and several legal issues. Rather than staking out a position as he does on appeal and insisting that the judge's response was improper, Berry's counsel seemed to agree that the language of CL § 3-301 could resolve the jury's confusion. The Court of Appeals has explained that conferences between trial judges and counsel over jury instructions often persuade counsel to abandon an objection. *Sims v. State*, 319 Md. 540, 549 (1990). Therefore, "[u]nless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost." *Id.* Alleviating the risk that the trial judge believes mistakenly that a party has abandoned its objection serves the ultimate

purpose of Rule 4-325, which is to allow the trial judge an opportunity to consider whether it's necessary to correct its instruction. *Gore*, 309 Md. at 209.

Considering that the trial judge instructed the jury in a way that, according to the colloquy in the record, appears to have satisfied Berry's counsel, we cannot say that the circumstances reveal that it would have been "futile or useless" for Berry's counsel to "object[] on the record promptly after the court instruct[ed] the jury." Md. Rule 4-325(e); *Gore*, 309 Md. at 209. Rather, the record suggests that counsel's response led the trial judge to believe that he abandoned any objection to the instruction. *See also Sims*, 319 Md. at 549.

**B. A Definite Statement of the Grounds for Objection**

Our conclusion that further objection by Berry's counsel would not have been futile or useless is bolstered by our determination that Berry's counsel failed to offer "a definite statement of [his] ground for objection" when the trial judge proposed a response to the jury's question. *See Gore*, 309 Md. at 209. In this case, counsel's failure to specify grounds for the objection is especially problematic because the jury presented the court with a fact-based question that touched on several aspects of the crime alleged. On appeal, Berry contends that the jury's question was purely legal, but the question lends itself to various interpretations.

Fourth-degree sexual offense, as proscribed by CL § 3-308, prohibits, in relevant part, "sexual contact with another without the consent of the other." Subtitle 3 of the Criminal Law Article defines "sexual contact" as follows:

(1) "Sexual contact", as used in §§ 3-307, 3-308, and 3-314 of this subtitle, means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party.
(2) "Sexual contact" does not include:
(i) a common expression of familial or friendly affect; or
(ii) an act for an accepted medical purpose.

CL § 3-301(e).[3] Synthesizing these provisions, fourth-degree sexual offense requires proof of (1) "an intentional touching" (b) "of the victim's *or* the actor's genital, anal, or other intimate area" (3) "for sexual arousal or gratification . . ." (4) "without the consent of the other." CL §§ 3-301(e); 3-308(1) (emphasis added).

Fourth-degree sexual offense can involve the intimate areas of the actor *or* the victim. The jury's question, therefore, could have focused on an intimate area of *Berry*—his mouth—or an intimate area of Ms. H.—her neck—or both.[4] Widening the lens through

[3] In 2011, the General Assembly amended the definition of sexual contact. Until that point, the definition included penetration of another individual's "genital opening or anus" by "a part of an individual's body, except the penis, mouth, or tongue." 2011 Maryland Laws Ch. 196 (H.B. 1128). The amendment expanded the definition of "sexual act" to include an act "in which an object or part of an individual's body penetrates, however, slightly, into another individual's genital opening or anus." *Id.* As a corollary to expanding the definition of sexual act, the statute removed such an act from the definition of sexual contact. *Id.*

[4] On appeal, Berry's argument assumes the jury's question, "Is kissing on the neck sexual contact?" was intended to explore only whether the neck is considered an intimate area under the applicable statute. But the jury's question was not so straightforward. The Court of Appeals in *Sidbury v. State* similarly rejected a defendant's reliance on a singular reading of a jury's note. *See* 414 Md. 180, 193-94 (2010). In that case, the jury asked whether Sidbury would go free "[i]f the jury is hung on the degree of murder (first or second)." *Id.* at 184. Sidbury suggested that the jury's note "indicated that the jury was convinced that he had committed second degree murder, but was concerned that he would 'go free' if a unanimous verdict on first degree murder could not be reached." *Id.* at 193. The Court of Appeals rejected this, reasoning that "[t]here [wa]s no indication that

which we view the jury's note even further, the question—which does not refer to the term intimate area—may not even have focused on the area of contact but rather the *mode* of contact, *i.e.*, "Is *kissing* on the neck sexual contact?" or "Does kissing on the neck count as contact done 'for sexual arousal or gratification?'" Responding to an inquiry concerning the mode of Berry's contact would have required the trial judge to invade the province of the jury and comment improperly on the evidence in the case. *See, e.g.*, *Patterson*, 356 Md. at 685 ("[I]nstructions as to evidentiary inferences normally are not [required upon request].").

Ample legal precedent in Maryland suggests that a trial judge should proceed cautiously when responding to a generalized jury question that does not focus on a discrete legal issue. The Court of Appeals reiterated in 2016 that "[t]rial judges walk a fine line when answering questions posed by jurors during the course of their deliberation." *Bircher*, 446 Md. at 462 (quoting *Appraicio*, 431 Md. at 44). The trial judge "should avoid answering questions in a way that improperly comments on the evidence and invades the province of the jury to decide the case." *Id.* at 465.

While not dispositive of the issue of preservation, those cases that have addressed the merits of a trial judge's supplemental instruction illustrate the difficulty that jury notes present and, in turn, the need for an objecting party to articulate specifically the grounds for an objection. *See, e.g.*, *Brogden*, 384 Md. at 635, 644 (error to instruct the jury that a defendant bears the burden of proving an affirmative defense he never raised; by doing so,

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Sidbury's interpretation that the jury was in agreement that he had committed second degree murder *was the only plausible one*[.]" *Id.* at 193-94 (emphasis added).

the trial judge "impose[d] a burden on [Brogden] that he never had"). For instance, the Court of Appeals in *Appraicio* upheld a trial judge's exercise of discretion in responding to a jury's note. 431 Md. at 45. Appraicio stood trial for second-degree assault based on his attack of his girlfriend; his counsel argued in closing that the jury should consider the lack of police testimony or a police report to support his then-ex-girlfriend's accusations. *Id.* at 47-48. The jury sent a note during deliberations asking whether it could "consider the fact that there was no police report in evidence or no police testimony or to what extent can we consider the lack of above." *Id.* at 48. Defense counsel asked the judge to instruct that the jury could consider the evidence or lack thereof in its decision, but the judge expressed concern over the difference between what the defense could argue and what the judge should instruct the jury. *Id.* at 49. Ultimately, the trial judge instructed the jury "to decide this case based on what is in evidence in this case. In making your decision, you consider the testimony from the witness stand, you consider physical items of evidence, and any exhibits that you have been given." *Id.* at 50. The jury convicted Appraicio of second-degree assault and he appealed, challenging the response to the jury's note. *Id.*

Ultimately the Court of Appeals affirmed, observing as follows

> The trial court here was right to be cautious concerning its response to the jury's question because too much commentary on the evidence can cross the line into being inappropriate. "[A] Judge, because of his high and authoritative position, should be exceedingly careful in any remarks made . . . and should carefully refrain, either directly or indirectly, from giving expression to an opinion upon the existence or not of any fact, which should be left to the finding of the jury."

*Id.* at 53 (quoting *Dempsey v. State*, 277 Md. 134, 149 (1976)).

In reaching its decision, the Court in *Appraicio* distinguished cases in which the jury asks a purely legal question. *Id.* The Court instructed, "[w]hen the jury's question seeks guidance on how to find the facts, [] the judge's response must be more circumscribed, so as not to invade the province of the jury. . . . '[I]nstructions as to facts and inferences of fact are normally not required.'" *Id.* (quoting *Patterson*, 356 Md. at 684). The Court explained that "[t]his is because an instruction regarding particular evidence 'may have the effect of overemphasizing just one of the many proper inferences that a jury may draw.'" *Id.* (citation omitted). [5]

*Perez v. State* also involved a jury's inquiry during deliberations over a charge of fourth-degree sexual offense. 201 Md. App. 276, 280-81 (2011). The jury's note in *Perez* concerned the definition of "against the will without consent" in the statute. *Id.* The jury

[5] The Court in *Appraicio* expressly distinguished the purely legal question posed by the jury's note in *State v. Baby*, 404 Md. 220 (2008). *Id.* Baby stood trial for rape and an assortment of other sexual offenses. *Id.* at 223-24. His victim testified that she agreed to have sex with Baby "as long as he stop[ped] when [she] told him to," which she instructed him to do almost as soon as he began but Baby didn't stop. *Id.* at 227-28. The trial court instructed the jury on first-degree rape. *Id.* at 233. During deliberations, the jury twice asked whether it constitutes rape if the woman withdraws consent after sex began. Both times, the trial judge referred the jury to their instructions, including the definitions of rape and consent. *See id.* at 235-262. The jury convicted Baby but the Court of Appeals reversed. *Id.* Regarding the jury instruction, the Court held that "the trial court should have directly addressed the jurors' confusion on the effect of withdrawal of consent during intercourse, rather than simply referring the jurors to the previously provided instructions on the elements of rape." *Id.* The Court reasoned that "[t]he jury's questions relating to the timing of withdrawal of consent certainly touched upon an issue central to its ability to determine whether Baby had committed the crime of first degree rape." *Id.* at 263. The trial judge's reference to the definition of rape already provided to the jury "was not sufficient to address either of the jury's questions as the definition makes no reference to the issue of post-penetration withdrawal of consent[,] which was central to the jury's questions." *Id.* at 263-64.

asked, "Where does exploitation or coercion fall? Is it against her will or not?" *Id.* at 281. The trial judge instructed the jury that "[c]onsent means actually agreeing to the act, rather than merely submitting as a result of threats or coercion." *Id.* On appeal, this Court determined that the jury's question "sought clarification of the applicable law, *i.e.*, the definition of consent." *Id.* at 284. Because the victim's consent "was central to the jury's decision in this case, and its definition was not fairly covered by any of the other jury instructions[,]" we determined that "the court was required to provide a supplemental instruction to resolve the jury's confusion." *Id.* We found no abuse of discretion in the trial judge's instruction given that it "was an accurate rendition of Maryland law." *Id.* at 286.

Unlike the jury note in *Perez*, which sought clarification as to a singular, discrete legal issue (*e.g.*, the definition of consent), the question in this case implicated several legal and factual issues, including the proper application of the evidence to the law. As we set out above, the jury's question ("Is kissing on the neck sexual contact?") may have focused on Berry's mouth, Ms. H.'s neck, or the act of kissing. This presented the trial judge with the dual risk of commentating on the evidence or emphasizing one possible inference over another. *See Appraicio*, 431 Md. at 53. Berry's counsel initially suggested that the judge respond by simply saying, "no." When the trial judge offered to redirect the jury to the legal definitions set out in his instructions, Berry's counsel—rather than objecting or stating any grounds for disagreement with the trial judge's chosen course—acquiesced, in seeming agreement that the definition of sexual contact covered the jury's question. Put simply, on the facts of this case, with no clear indication of what the jury may have meant

by its question, the lack of a definite statement of the grounds for an objection left the trial court without "an opportunity to correct its charge if it deem[ed] correction necessary[.]" *Gore*, 309 Md. at 209. Because Berry failed to substantially comply with Rule 4-325(e), we shall not consider the merits of his appeal.

Berry asks us to exercise plain error review,[6] but for the reasons set out above, it is clear that the trial judge in this case was prudent not to follow the initial suggestion by Berry's counsel and answer, "no," to the jury's question. Doing so would have risked invading the province of the jury. *See Bircher*, 446 Md. at 466. We cannot say, then, that the trial judge committed a "clear or obvious" error that is "not subject to reasonable dispute." *Newton v. State*, 455 Md. 341, 364 (2017). As such, it would be inappropriate for this Court to review Berry's unpreserved argument.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; APPELLANT TO PAY COSTS.**

[6] This past year we reiterated that plain error "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Winston v. State*, 235 Md. App. 540, 567 (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)), *cert. denied sub nom. Mayhew v. State*, 458 Md. 593 (2018), and *cert. dismissed,* 461 Md. 509 (2018). This Court may only review a plain error if: (1) the appellant has not "intentionally relinquished or abandoned" the error; (2) the error is "clear or obvious, and not subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights"; and (4) "the error affects the fairness, integrity, or reputation of judicial proceedings." *Newton v. State*, 455 Md. 341, 364 (2017).