Circuit Court for Baltimore City
Case No. 117360008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2453

September Term, 2018

JAMES LAMONT PARKER

v.

STATE OF MARYLAND

Berger,
Leahy,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: May 21, 2020

A jury in the Circuit Court for Baltimore City convicted James Parker, appellant, of second degree burglary, fourth degree burglary, malicious destruction of property valued under $1,000, and attempted theft of property valued between $100 and $1,500. Parker was sentenced to eight years of incarceration and ordered to pay a civil judgment of $1,293 on September 21, 2018. He timely noted his appeal and presents the following questions for our review:

> "1. Did the lower court err in admitting the prior consistent statement of the State's critical witness where Mr. Parker alleged that the witness'[s] accusation of guilt was always false, and the statement did not differ from the witness'[s] trial testimony?"
>
> "2. Did the lower court err in failing to adequately respond to a jury note which asked if Mr. Parker could be found guilty of second degree burglary if it 'believe[d] he entered but potentially did not do a breaking'?"

We resolve that the trial court did not err or abuse its discretion; therefore, we affirm the convictions.

BACKGROUND

Because Parker does not challenge the sufficiency of the evidence, our summary of the trial record is intended to provide context for the issues raised in this appeal, rather than a comprehensive review of the evidence presented. *See Holmes v. State*, 236 Md. App. 636, 643 (2018), *cert. denied*, 460 Md. 15 (2018).

Parker's two-day trial began on September 10, 2018. Dathan Watts, a contractor, testified that, sometime before 8:00 a.m. on November 28, 2017, he was on his way to a house that he was renovating, located at 4403 Liberty Heights Avenue in Baltimore. As he turned left off of Liberty Heights Avenue onto Eldorado Avenue, heading to the back

entry of the house, Watts "noticed Mr. Parker was coming out" of the adjacent property at 4401 Liberty Heights Avenue "with this heater." After identifying Parker in court, Watts explained that he knew Parker prior to the morning in question because Parker lived across the alley from 4403, and Watts had previously hired him to do "some odd laboring jobs[.]"

Watts testified that he observed Parker coming out of the building's door with a "Salamander heater," which had "two wheels on the back, and you can kind of move it like a wheelbarrow of sort." But Parker "was more dragging" the heater because one of the wheels was bent. Watts recalled that Parker "actually fled when he saw [Watts], because he knew [him]." Watts clarified that Parker "[k]ind of ducked" upon seeing him, "went back into the building temporarily," and "then by the time [Watts] pulled up in the yard next door, [he] saw where [Parker] was running across the grass away from the property."

Because Watts "had been acquainted with the owner" of 4401 Liberty Heights, he decided to take a closer look at the property. He saw a broken window on the "front half" of the building and noticed the open side door. Then, Watts "pulled the heater back in the building" and "secured the building as best [he] could." Watts did not call the police or the building's owner, but rather notified an employee of the beauty salon located in the building. About 45 minutes later, an officer came to Watts's next-door property and Watts described what he had observed. Watts testified that he was not sure if the police took "a picture of the tire tracks that w[ere] on the sidewalk" where the heater was dragged.

Baltimore City Police Officer Sean Marsh, who responded to the scene, testified that he "immediately notice[d] that the front window was broken out." Shortly thereafter,

the building's owner, Chiedeoziem Nwofor, arrived and showed Officer Marsh photographs of Parker, with whom Officer Marsh was familiar. In Officer Marsh's recollection, Nwofor told him that "Mr. Watts had seen Mr. Parker coming out of the side of the building." Consequently, Officer Marsh spoke to Watts and observed the unlocked door Watts described and "a trail leading out the door on the sidewalk." Officer Marsh explained that he did not call Crime Lab to the scene because the building was not a residence and "would be classified as vacant," and "the Crime Lab people have a policy of incidents in which [sic] they will respond out for[.]" The officer's body camera recorded his investigation, and a portion of the footage containing a statement made by Watts about the incident was played for the jury.

Chiedeoziem Nwofor, the owner of 4401 Liberty Heights, explained that the property consisted of "three apartments on top," "a beauty salon", and two other units that were being worked on. Nwofor testified that, when he arrived at the property that morning, he observed "a broken window" and damage to a glass door, "like a stone, or brick, or something hit the door." Nwofor also noticed "a skidmark of [] the dragging of the wheel for that heater" on the sidewalk outside of the door. He identified the "heat blower" from a photograph of the inside of the building. In addition, Nwofor itemized construction tools that were missing from the building.

Parker testified in his own defense, denying that he attempted to steal the heater in question or took any of the missing items. When asked if he knew what he was doing on November 28, 2017, Parker testified that he was probably at his home on Maine Avenue

watching television. Parker claimed that Nwofor was "after" him because Nwofor had previously accused him of theft, but those charges were dismissed. He agreed that he had worked for Watts, "off and on for about three or four months." Parker testified that his disabilities, including "leg trouble," "arthritis," "high blood pressure," "high cholesterol[,] and a bad back," prevented him from picking up more than ten pounds.

Following deliberations, the jury acquitted Parker of theft of property valued under $1,500, but found him guilty of burglary in the second degree, burglary in the fourth degree, malicious destruction of property having a value of less than $1,000, and attempted theft of property valued between $100 and $1,500. At his sentencing hearing on September 21, 2018, the court sentenced Parker to eight years of incarceration and ordered him to pay a civil judgment of $1,293. Parker timely noted his appeal to this Court.

We shall include additional facts as necessary to our discussion of the issues raised by Parker.

DISCUSSION

I. Prior Consistent Statement

Parker contends that the trial court erred in admitting the prior statement made by Watts on the body camera recording played for the jury. As we next explain, although Parker's challenge was waived, we exercise our discretion to address his contention and conclude that it does not merit the relief he seeks.

A. Relevant Record

On the first day of trial, Watts testified that he saw Parker leaving the building with the heater. During cross-examination, defense counsel challenged Watts's testimony, suggesting that Watts did not call police because he was the burglar:

> [DEFENSE COUNSEL]: **And you didn't call the police**?
>
> [WATTS]: I did not call the police.
>
> [DEFENSE COUNSEL]: But you believe that this man was stealing some kind of valuable thing out of this building?
>
> [WATTS]: At that time, I did believe that. And at that time, I had not noted the glass was broken . . . .
>
> [DEFENSE COUNSEL]: Okay. But you still didn't call the police?
>
> [WATTS]: No, I didn't.
>
> [DEFENSE COUNSEL]: How was it – how much longer was it [sic] did the police arrive?
>
> [WATTS]: Gosh. I'll – because like I want to say maybe about 45 minutes. Because the owner [of the building] came first and he was the one that put the call in. And . . . it wasn't long after that the police showed up once the owner called. So I'm going to say like 45 minutes to answer your question.
>
> [DEFENSE COUNSEL]: And – and but when the police got there, you had already put the item back into the building?
>
> [WATTS]: Yes, I had.
>
> [DEFENSE COUNSEL]: So you weren't concerned that your fingerprints would compromise the evidence on that item?
>
> [WATTS]: No. Because I saw him with it.
>
> [DEFENSE COUNSEL]: Well, that's what you say. **How do we know you didn't steal it?**

(Emphasis added). The State objected to the question, but the court overruled and permitted Watts to respond. He agreed, "That's true."

At the outset of the second day, the State moved *in limine*, asking the trial court to admit Officer Marsh's body camera footage. The prosecutor argued that such evidence was admissible to show "the damage that was done to the property[,]" including "the track marks created by the heater," as well as "the investigation that was p[er]formed" by the officer, "including discussion that he had with the witnesses who . . . have testified or will testify today." Defense counsel objected, asserting that the footage "needs to be redacted to exclude the statements of the witnesses that [] either have testified or are going to testify because what's on the camera is presumably the same thing that they testified to. And that's cumulative."

With regard to the witness who had already testified (Watts), the trial court decided to allow the statement in the body camera footage, provided that it was consistent with the statement made at trial. The court explained,

> **Only because there was an inference or a reference that this person, the person who testified could have been the one who actually stole the heater.** So therefore it becomes a statement which would . . . be consistent with the original statement that he gave.

(Emphasis added). With respect to the statement made by the individual who had not yet testified (Nwofor), the court opined that the statement in the body camera footage would be "cumulative and not have any probative value at this time because his – that individual's statement has not yet been impeached."

The State conceded that some of the footage should be redacted, "specifically mention of prior incidents between Mr. Parker and the owner of the property[.]" While those redactions were under discussion, defense counsel continued to challenge the admission of Watts's recorded statement, arguing that it should not come in "just because it would be a prior consistent statement . . . because he wasn't really impeached on anything that the prior consistent statement can cure." Defense counsel insisted, "I didn't accuse him of making a different statement. I basically accused him of lying." The prosecutor responded that, after "the accusation by defense yesterday . . . that he was lying and that he in fact was the perpetrator of this crime[,]" Watts's recorded statement "goes to his credibility" because Watts "made the same statement and the same set of circumstances" that he testified to at trial.

The trial court viewed the partially redacted footage from Officer Marsh's body camera, which was later transcribed for the record, outside of the presence of the jury. In the footage, the following conversation took place between Officer Marsh and a speaker, later identified as Watts:

> [OFFICER MARSH]: "You – you saw the guy do this?"
>
> [WATTS]: "I didn't actually see him break this window."
>
> [OFFICER MARSH]: "Okay."
>
> [WATTS]: "But I saw him coming out of that window. . . . I saw him coming – actually, what I saw when I was coming down the street, I saw him push against that door."
>
> [OFFICER MARSH]: "Okay."

> [WATTS]: "And I saw him, he had that Salamander heater in his possession."
>
> [OFFICER MARSH]: "Okay."
>
> [WATTS]: "Then that was outside the door. I put it back in the building."
>
> [OFFICER MARSH]: "Okay."
>
> * * *
>
> [WATTS]: "But he had helped me do work over here, so I am absolutely certain who it was."

In the recorded footage, Watts also provided the officer with his name, birth date, and address, and confirmed that he would be in the area that day.

The State argued that the recorded statement was admissible because Watts's testimony was "impeached" through "allegations by the defense that Mr. Watts both fabricated his testimony and was the true perpetrator of the crime." Further, the State contended that the "prior consistent statement so closely timed to the day of the incident [wa]s relevant as it pertains to Mr. Watts' credibility in court yesterday, and rebuts the accusation made by the defense that Mr. Watts was not telling the truth in court yesterday, and that he was in fact the person who stole the property." In response, defense counsel conceded that when a witness has testified inconsistently at trial, a prior consistent statement is admissible "to show that at one point the witness did give that same statement." Counsel argued, however, that Watts "did not give a[n] inconsistent statement, and [she] did not impeach him on saying anything different than anywhere else[,]" but "merely accused him of lying period just in general." Because Watt's prior "consistent statement doesn't fix that at all," counsel continued, the evidence was cumulative and "the State

really has no need to introduce that other evidence other than to bolster the credibility of their witnesses."

The trial court found that "the defense attempted to impeach the witness in this matter by accusing the witness of the theft in this case[,]" and, therefore, "a prior consistent statement is appropriate to be admitted into evidence." Because "all the other evidence" in the footage would be cumulative, however, the court ruled that the State could play only the portion of the body camera footage containing Watts's statement to Officer Marsh. During Officer Marsh's direct examination, the State played the admitted portion of his body camera recording for the jury, and introduced the video into evidence, without further objection.

B. The Parties' Arguments

Before this Court, Parker advances two reasons why the trial court erred in admitting Watts's prior out-of-court statement: (1) the statement was not substantively admissible as a prior consistent statement "offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive," under Maryland Rule 5-802.1(b); and (2) the statement was not admissible "for the non-substantive purpose of rehabilitating" Watts's trial testimony, pursuant to Rule 5-616(c)(2). Parker asserts that the statement was hearsay because it was "admitted without limitation and, thus, for the substance of its content." He contends Rule 5-802.1(b) does not apply because Watts's statement "was made after Mr. Watt[s]'s motive to testify falsely arose, and because that

statement – which repeated the accusations made at trial – failed to undermine Mr. Parker's attacks upon Mr. Watts'[s] credibility."

Parker then asserts that Watts's statement "was never received for th[e] limited purpose at trial" of rehabilitating his testimony, "nor was the jury every instructed to utilize the statement only for a limited, non-substantive purpose[.]" According to Parker, however, Watts's statement was not admissible to rehabilitate his testimony because "it was not sufficiently consistent with his trial testimony" or, in the alternative, "[a]ssuming that the statement was consistent[,]" because "it was too consistent; it did not detract from Mr. Parker's impeachment of Mr. Watts and merely rehashed his trial testimony."

The State counters that Parker's contention is not properly before this Court because Parker stated that he had no objection when the evidence was actually offered at trial. Furthermore, the State asserts that when the trial court considered the State's motion *in limine*, Parker did not challenge Watts's recorded statement on the same grounds now asserted in his appellate brief. To the extent preserved, the State argues, the trial court "soundly exercised its discretion" in admitting Watts's statement "for the purpose of rehabilitating Watts's credibility after defense counsel implied that Watts was actually the burglar[.]" According to the State, Watts's statement on the video" tended to refute the suggestion that Watts was actually behind the burglary." In any event, the State maintains, the admission of the statement was "harmless because the evidence was cumulative to other evidence admitted without objection."

We shall address the parties' contentions in turn.

C. Waiver of Objections

Parker concedes that when a trial court rules *in limine* that certain evidence is admissible, the party opposing its admission "must still note a contemporaneous objection when that evidence is offered to preserve any challenge to the admissibility of that evidence for appeal." *See* Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."). *See also Reed v. State*, 353 Md. 628, 638 (1999) ("When the evidence, the admissibility of which has been contested previously in a motion *in limine*, is offered at trial, a contemporaneous objection generally must be made pursuant to Maryland Rule 4-323(a) in order for that issue of admissibility to be preserved for the purpose of appeal."); *Wimbish v. State*, 201 Md. App. 239, 261 (2011) ("The requirement of a contemporaneous objection at trial applies even when the party contesting the evidence has made his or her objection known in a motion in limine[.]"), *cert. denied*, 424 Md. 293 (2012).

Because defense counsel admittedly did not object when the body camera footage was admitted into evidence, Parker invokes what he contends are "exceptions to this rule when such a procedure 'exalt[s] form over substance.'" Specifically, he maintains that "even where there is a 'lack of literal compliance' with the contemporaneous objection requirement, this [C]ourt will – in the exercise of its discretion – address the merits of the issue when there is 'temporal proximity between the ruling on the motion in limine' and the introduction of the challenged evidence."

The State responds that "this is not an instance of mere 'lack of literal compliance.'" To the contrary, the State notes, when the redacted video was admitted, the trial court asked, "Any objection, ma'am?" and defense counsel answered, "No, Your Honor." Further, the State asserts, "defense counsel articulated a specific basis for the initial objection; namely, Watts's prior statements were 'cumulative[,]'" and "[b]y offering a specific basis for the objection, any other grounds that may have existed were waived." The State asks this Court to conclude, therefore, that Parker waived his "appellate add-ons"; namely, that the prior statement was inadmissible hearsay due to the fact that it was made after Watts's motive to fabricate arose, and that Watts's prior statement was "not sufficiently consistent" with his trial testimony.

We agree with the State that defense counsel expressly waived any objection to the body camera footage. Generally, counsel's affirmative acquiescence to the admission of evidence effects a waiver of any prior objection. *See Jackson v. State*, 52 Md. App. 327, 332 (1982) ("[I]f a pretrial motion is denied and at trial appellant says he has no objection to the admission of the contested evidence, his statement effects a waiver[.]"), *cert. denied*, 294 Md. 652 (1982); *Erman v. State*, 49 Md. App. 605, 630 (1981) (concluding that the issue of the admissibility of a statement, for which the court had previously denied a motion to suppress, "ha[d] been waived in that, at trial, [appellant] specifically advised the trial judge that there was no objection to the admission of the statement").

Parker relies on *Watson v. State*, 311 Md. 370 (1988), and *Dyce v. State*, 85 Md. App. 193 (1990), to support his contention that we should address his challenge to the

admission of Watts's statement even in the absence of a contemporaneous objection. In *Watson*, the Court held that the petitioner, James Watson, "preserved his objection to the court's admission of his attempted rape conviction in spite of the fact that he did not object at the precise moment the testimony was elicited." 311 Md. at 372 n.1. The Court explained that the trial judge had "ruled prior to trial on the motion *in limine* to admit Watson's prior convictions," and "reiterated his ruling immediately prior to the State's cross-examination of Watson," during which the State elicited his prior convictions. *Id.* Accordingly, the Court determined, "requiring Watson to make yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance." *Id.* The Court noted, however, that "standing alone, Watson's objection to the trial court's pretrial ruling would be *insufficient* to preserve his objection for our review." *Id.* (emphasis added).

Similarly, in *Dyce*, we elected to "exercise our discretion under Md. Rule 8-131 and consider the issue" of whether the trial court erred in refusing to exclude evidence of the appellant's prior conviction, "notwithstanding the lack of literal compliance with Rule 4-323(a)." 85 Md. App. at 198. Our decision was premised on "the temporal proximity between the ruling on the motion *in limine* and the prosecutor's initial inquiry on cross-examination." *Id.* As we noted, "the unequivocal ruling on appellant's motion *in limine* and the prosecutor's inquiry as to appellant's prior criminal record, the first question posed on cross-examination, was separated only by appellant's direct examination." *Id.*

Because neither *Watson* nor *Dyce* featured an affirmative waiver like that in the instant case, those cases do not rescue Parker from the waiver. *Cf. Reed*, 353 Md. at 636 n.4 (noting that "*Watson* was limited to its specific circumstances"); *Washington v. State*, 191 Md. App. 48, 90 (2010) ("The *Watson* exception is a narrow one."). Rather, Parker's challenge is saved by our exercise of discretion under Maryland Rule 8-131(a) to consider it in the interests of "fairness and judicial economy." *Bible v. State*, 411 Md. 138, 150 (2009). We limit our review, however, to whether the trial court properly admitted Watts's statement on the body camera recording over defense counsel's objection on the basis that the evidence was "cumulative" and did not logically rebut the impeachment accusation that Watts was lying to frame Parker.

D. Challenge to Prior Consistent Statement

A trial court may permit the introduction of a consistent statement either to rehabilitate a witness's testimony, pursuant to Maryland Rule 5-616(c)(2), in which case the prior statement is not offered for the truth of the matter asserted; and/or, as an exception to the hearsay rule under Maryland Rule 5-802.1(b), in which case the statement may be considered as substantive evidence.[1] *See Thomas v. State*, 429 Md. 85, 96-97 (2012). The

[1] Maryland Rule 5-802.1 provides exceptions to the rule against hearsay for certain "statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement[.]" Pursuant to Rule 5-802.1(b), "[a] statement that is consistent with the declarant's testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive" is not excluded by the hearsay rule. Md. Rule 5-802.1(b). In order to be relevant, and admissible under Rule 5-802.1(b), "a prior consistent statement must have been made *before* the alleged fabrication or improper influence or motive arose." (continued)

"rules, however, become applicable only if the defendant's opening statement and/or *cross-examination* of a State's witness has opened the door to evidence that is relevant (and now admissible) for the purpose of . . . rehabilitation[.]" *Anderson v. State*, 420 Md. 554, 567 (2011) (citation and internal quotation marks omitted). Although the record is not pellucid, it appears that the trial court admitted Watts's consistent statement to Officer Marsh in order to rehabilitate Watts's impeached testimony under Rule 5-616(c)(2).

Maryland Rule 5-616(c)(2) provides that "[a] witness whose credibility has been attacked may be rehabilitated by . . . evidence of the witness's prior statements that are consistent with the witness's prior testimony, when their having been made detracts from the impeachment[.]" Md. Rule 5-616(c)(2). Prior consistent statements offered to rehabilitate a witness's credibility "are relevant not for their truth since they are repetitions of the witness's trial testimony"; rather, "[t]hey are relevant because the circumstances under which they are made rebut an attack on the witness's credibility." *Holmes v. State*, 350 Md. 412, 427 (1998). Thus, such statements "are not offered as hearsay and logically do not have to meet the same requirements as hearsay statements falling within an exception to the hearsay rule," including "the stringent premotive requirement of Md. Rule 5-802.1(b)." *Id.*

Holmes v. State, 350 Md. 412, 424 (1998) (emphasis added); *see also Thomas v. State*, 429 Md. 85, 107 (2012) ("Prior consistent statements are relevant, under Rule 5-802.1(b), only if they were made before the source of the fabrication or improper influence or motive originated.").

We have instructed that "there are three prerequisites to admission of a prior statement as rehabilitation: (1) the witness' credibility must have been attacked; (2) the prior statement is consistent with the trial testimony; and (3) the prior statement detracts from the impeachment." *Hajireen v. State*, 203 Md. App. 537, 555 (2012). The "nature of questioning or from suggestions of counsel in argument" can constitute impeachment, and "[a] witness may be impeached in various ways, including by a showing of a prior inconsistent statement or a claim of fabrication." *Id.* In regard to the third requirement, on which Parker bases his challenge, "[a] prior consistent statement 'must meet at least the standard of having some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'" *Thomas*, 429 Md. at 107 (quoting *United States v. Simonelli*, 237 F.3d 19, 27 (1st Cir. 2001)). Thus, the statement "must be more than a repetition of the trial testimony; the statement must, under the circumstances in which it was given, 'detract from the impeachment,' Md. Rule 5-616(c)(2), or 'rebut logically' the impeachment." *Hajireen*, 203 Md. App. at 557 (citing *Holmes*, 350 Md. at 426 n.3).

In our view, Watts's recorded statement was consistent with his trial testimony and admissible to rebut the attack on Watts's credibility because of the circumstances under which he described what happened. Watts's on-site narrative of the incident had "rebuttal value" beyond the "mere fact that [he] had repeated on an earlier occasion many of the statements [he] made at trial." *Id.* at 558. It showed that, although Watts did not call the police himself, he reported the incident to a tenant in the building and willingly reported it

to the police when they arrived shortly thereafter. Rather than avoid law enforcement, Watts provided the officer with his contact information and offered to meet with police again should the need arise. Watts's willingness to speak with law enforcement and provide his information rebuts logically defense counsel's accusation that he himself had stolen the heater. Moreover, as the State points out in its brief, "the close temporal proximity between the incident and the statement[] also made it less likely that Watts would have had the opportunity to concoct a story framing Parker for the crime."

Thus, in the present circumstances, a juror reasonably could conclude that it was less likely that Watts was lying and had framed Parker. *See Holmes*, 350 Md. at 427 (stating that prior consistent statements may be relevant and admissible "because the circumstances under which they are made rebut an attack on the witness's credibility"). We conclude that the trial court did not abuse its discretion in admitting Watts's statement on the body camera footage following defense counsel's attempt to impeach his testimony. *See Hajireen*, 203 Md. App. at 552.

II. Jury Note

In his alternative assignment of error, Parker contends that the trial court "erred in failing to adequately respond to the jury's note inquiring whether they could find Mr. Parker guilty even if they found [he] 'potentially' did not commit a breaking, *viz.*, a requisite element of the offense." The trial court decided it was best to answer the jury by reinstructing them as to the required elements of second-degree burglary. Parker asserts that the answer to this inquiry should have been "– as defense counsel suggested – a

resounding 'no.'" Parker maintains that "this error is not harmless" and "requires a vacatur of" Parker's conviction for second degree burglary. As explained below, we again conclude that Parker failed to preserve his claim of error, which in any event does not merit relief.

A. Relevant Record

About 50 minutes into its deliberations, the jury sent the following note to the trial court:

> PLEASE EXPLAIN BREAKING + ENTERING TERMINOLOGY
>
> IF WE BELIEVE HE ENTERED BUT POTENTIALLY DID NOT DO A BREAKING, IS THAT ENOUGH TO CONVICT? (OF SECOND DEGREE BURGLARY?)

In a second note, the jury asked, "Can we see the video again?"

The judge read both notes to the parties and expressed, "As to the first question, it's my intention to – to have – just to read to them the jury instructions regarding second degree burglary again." Defense counsel responded: "I think we should say no." The State requested that the jury receive a copy of the instruction, and that the court also re-read the instruction on fourth degree burglary. The judge told the parties that he would "rather not give [the jury] a copy of the instruction, because the jurors tend to obsess over the minutia of the instructions." He agreed to read the instruction for second degree burglary to the jury "slowly so they can make a determination as to what exactly it is." He further agreed to read the instruction for fourth degree burglary "just [] for the contrast."

The trial judge then repeated the pattern instructions on both second and fourth degree burglary, and replayed the video excerpt from the officer's body camera. About thirty minutes later, the jury notified the court it had reached its verdicts.

B. Parker's Challenge

In Parker's view, the trial court erred in failing to answer with "concrete accuracy" the jury's question about whether its belief that Parker "entered but potentially did not do a breaking [was] enough to convict" him of second degree burglary. He asserts that the court's response of rereading the instructions for second and fourth degree burglary "was neither helpful, nor did it provide clarity." The State counters that "[t]his contention should be rejected for two reasons." First, the State asserts, "Parker did not object to the manner in which the court ultimately chose to respond to the note, and he has therefore not preserved it as an issue for appeal." Second, the State contends that if the issue is addressed, the court did not abuse its discretion because the reinstruction "was a correct statement of the law" that appropriately "responded to the confusion evidenced by the jury's note[.]"

"The main purpose of a jury instruction 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). Under Maryland Rule 4-325(c), the trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Rule 4-325(a) provides that the court must instruct the jury "at the conclusion of all of the evidence and

before closing arguments[,]" but may give supplemental instructions "at a later time when appropriate." Supplemental instructions may include responding to a jury's questions during deliberations. *Appraicio v. State*, 431 Md. 42, 51 (2013); *see also Perez v. State*, 201 Md. App. 276, 282 (2011) ("An 'instruction' includes any 'communication from the judge to the jury made after the close of the evidence.'" (quoting *Lansdowne v. State*, 287 Md. 232, 243 (1980))).

When responding to questions posed by the jury, a trial court should "answer, as directly as possible," *Appraicio,* 431 Md. at 53, and "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). This Court reviews a trial court's decision to give supplemental jury instructions under an abuse of discretion standard. *See Perez*, 201 Md. App. at 282.

Because a trial court's duty to "instruct the jury as to the applicable law," pursuant to Rule 4-325(c), "does not apply to factual matters or inferences of fact[,] [i]nstructions as to facts and inferences of fact are normally not required." *Patterson v. State*, 356 Md. 677, 684 (1999). Indeed, the court "should avoid answering questions in a way that improperly comments on the evidence and invades the province of the jury to decide the case." *State v. Bircher*, 446 Md. 458, 465 (2016) (citing *Appraicio*, 431 Md. at 53). Consequently, "[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." *Appraicio*, 431 Md. at 53.

Objections to jury instructions, whether given at the close of evidence or during deliberations, are governed by Maryland Rule 4-325(e), which provides:

> (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.

And, as provided by Rule 8-131(a), ordinarily we "will not decide any other issue [than jurisdiction of the trial court] unless it plainly appears by the record to have been raised in or decided by the trial court[.]"

Here, the record shows that Parker's challenge to the trial court's supplemental instructions to the jury's note, assuming it was preserved, is without merit. After defense counsel argued initially that the court should answer the jury's question with "no[,]" the trial judge responded that he would re-read the pattern instructions. Defense counsel did not note any objection nor indicate that this would be insufficient. Nor did she object after the court gave those supplemental instructions, as is ordinarily required. Nonetheless, we will give counsel the benefit of the doubt, given the close proximity between the time defense counsel objected and when the jury was instructed. Although not on the record, defense counsel may have believed that another objection would have been futile. *See Gore v. State*, 309 Md. 203 (1987). Regardless, we hold that the trial judge did not abuse his discretion in re-reading the original instructions and in declining to respond "no" to the jury's question, as defense counsel proposed. The jury's question included assertions, such

as "potentially" and "enough," that could not be answered, as a correct statement of the law, with a simple "no." The court would not have been able to explain what is "enough" or what evidence could be "potentially" relevant without answering the question "in a way that improperly comments[ed] on the evidence and invade[d] the province of the jury." *Bircher*, 446 Md. at 465.

Here, the court properly repeated the approved pattern instructions, including the definitions of "breaking" and "entering." These instructions define second degree burglary as "the breaking *and* entering" of the building and identify as necessary elements of that offense "that there was a breaking" and "that there was an entry," that "the breaking *and* entering was done with the intent to commit theft[,]" and that "the defendant was the person who broke *and* entered." (Emphasis added). By contrast, the instruction for fourth degree burglary reread by the court noted that fourth degree burglary only requires the State to prove that the "defendant was in or on someone else's dwelling, or building, yard, garden, or other area belonging to the dwelling, . . . with the intent to commit a theft." Given that the jury was able to reach verdicts on all counts within the next thirty minutes, we are satisfied that the court's supplemental instructions were both legally correct and effective in resolving the confusion evidenced by the jury's note.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.