Circuit Court for Montgomery County
Case No.: 106111C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2503

September Term, 2019

JOSE D. RAMOS

v.

STATE OF MARYLAND

Fader, C.J.,
Ripken,
Kenney, James A., III
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: September 16, 2021

*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.

Following a 2007 trial in the Circuit Court for Montgomery County, a jury found Jose D. Ramos, appellant, guilty of first-degree premediated murder. The court sentenced him to life imprisonment. No appeal was timely noted. In post-conviction proceedings, the circuit court determined that appellant had been denied his right to effective assistance of counsel and awarded appellant post-conviction relief in the form of the right to note a belated direct appeal. On the belated appeal, appellant raises the following claims, which we have re-worded:

1. Did the trial court err by not giving appellant's proposed jury instruction for first-degree murder, and, instead, giving the pattern jury instruction for that offense?

2. Did the trial court make a plain error in its first-degree felony murder instruction?

3. Did the trial court make a plain error in permitting the State's closing argument?

For the reasons that follow, we shall affirm.

BACKGROUND

In the early morning hours of September 1, 2006, two Montgomery County Police Officers were approached by two men in a white minivan. The men from the minivan told the police officers a person was being beaten by someone with a baseball bat. As the officers approached the beating, one of them identified appellant, who was wearing a white t-shirt and jeans, as the man with the bat. Upon making eye contact, appellant ran towards a white car that was in the process of leaving the scene and unsuccessfully attempted to enter it. After the car drove away, one of the officers chased appellant, who ran into a nearby apartment complex. Appellant was soon found hiding in a dumpster. He was not

wearing a shirt. Behind the dumpster, the police found appellant's wallet and a white t-shirt.

The victim, who had been savagely beaten, was initially tended to by the other of the two officers approached by the men in the white minivan. He later died at the hospital from his grievous injuries. Personal items, such as a cell phone, a hat, sunglasses, and a wallet were found on the ground near where the victim, whose pockets were empty, had been beaten. A knife was also found on the scene.

At trial appellant pursued a defense theory of mistaken identity which was largely centered around the fact that no forensic evidence tied appellant to the bat. In addition, the defense focused on impeaching the credibility of the police officer who identified appellant as the man with the bat.

Additional facts will be addressed in the Discussion as they become relevant.

DISCUSSION

First-Degree Murder Instruction

At trial, the defense requested that the court give a "special" first-degree murder instruction. The trial court declined to give appellant's requested instruction stating:

> First of all, with respect to this requested instruction, there's recent law with respect to deviating from the patterned [sic] instructions. And I think the language is clear, unequivocal that, it even referenced *Mattel*,[1] I believe, that what it says is what's to be given. And our artistic license is very, very

[1] It is not clear to this Court what authority the trial court referred to.

> limited according to the Court of Appeals. So, I will file this.[2] I decline to give it.
>
> However, that does not mean you can't argue the fact at issue. Okay?

After discussing the verdict sheet and other matters, the court reassured appellant that he "need not restate [the] objection to me giving Ms. Taylor [sic] instruction. I indicate [sic] already I won't give it so your objection is preserved with respect to that."[3] When later instructing the jury, the court gave both a first-degree premeditated murder instruction, and a first-degree felony murder instruction, which did not deviate in substance from the pattern instructions for those offenses. The parties do not contend otherwise.

Appellant makes three cascading arguments about the foregoing. First, he claims that the trial court abused its discretion, by failing to exercise its discretion, when choosing to give the jury the pattern first-degree murder instruction. Second, he claims that, because a copy of the requested first-degree murder instruction cannot be located, he is entitled to a new trial because he has been deprived of meaningful appellate review. Third, he claims that he is entitled to nothing less than a limited remand for fact-finding regarding the content of the requested first-degree murder instruction.

[2] It appears from this statement, and from others, that the court had a copy of appellant's written proposed first-degree murder instruction. The parties both tell us that they cannot find a copy of that written instruction. Our review of the available appellate record also has not located it.

[3] It is clear from context that the court was referring to appellant's requested first-degree murder instruction as appellant requested no other instructions which the court declined to give.

This Court reviews the trial court's decision to give or refuse a jury instruction for abuse of discretion. *Nicholson v. State*, 239 Md. App. 228, 239 (2018).

> [A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling. The decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.

Gray v. State, 388 Md. 366, 383 (2005) (citation and quotation omitted).

Maryland Rule 4-325(c) states as follows:

> The 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[.] The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

That Rule requires a court to give a requested instruction that (1) correctly states the law, (2) applies to the facts of the case, and (3) is not fairly covered by other instructions. *Molina v. State*, 244 Md. App. 67, 147-48 (2019).

As noted above, appellant contends that the trial court abused its discretion, by failing to exercise discretion, when it declined to give the proposed first-degree murder instruction, merely because it differed from the pattern instruction. In essence, appellant claims that the trial court abused its discretion by giving the pattern first-degree murder instruction to the jury. We disagree.

Both this Court and the Court of Appeals have regularly encouraged trial courts to use the pattern instructions or risk reversal. *Armacost v. Davis*, 462 Md. 504, 545 (2019); *Johnson v. State*, 223 Md. App. 128, 152 (2015); *Evans v. State*, 174 Md. App. 549, 567 (2007). In *Green v. State*, 127 Md. App. 758, 771 (1999) we said:

> … that the wise course of action is to give instructions in the form, where applicable, of our Maryland Pattern Jury Instructions. These instructions have been put together by a group of distinguished judges and lawyers who almost amount to a "Who's Who" of the Maryland Bench and Bar. Many of these instructions have been passed upon by our appellate courts.

Id. at 771.

We have also recognized that, under the correct circumstances, it may be necessary to alter a pattern instruction. *Arthur v. State*, 420 Md. 512, 528 (2011).

In this case, appellant never explains to us why the facts of his case required an instruction different than the pattern one. Moreover, he never makes any argument that the pattern instruction is incorrect. The only thing remarkable about the facts of this case is the brutal and savage nature of the beating the victim took at the hands of a man with a baseball bat. There is no reason that we can discern that the pattern instruction was in any way inadequate for this case.

In addition, appellant's defense had absolutely nothing to do with whether the killing in this case amounted to a first-degree murder. As noted above, his defense dealt solely with criminal agency and not with *mens rea* or *actus reas*.

Finally, the trial court did not state that it had no ability to give a non-pattern instruction when warranted. To the contrary, the record reflects that the court, after hearing from both parties on the subject, declined to give appellant's requested instruction. The court, in recognizing that it had very little "artistic license" to alter the instructions, recognized that it could alter a pattern instruction, but declined to exercise its discretion to do so in this case.

On this record, we are not persuaded that the court's decision to instruct the jury with the pattern instruction amounted to an abuse of discretion.

As noted above, appellant also claims that he is entitled to have his convictions vacated because he has been denied his right to appellate review as a result of the apparent loss of the written first-degree murder instruction that he proposed to the trial court. The situation in this case is a far cry from the situations/circumstances in *Smith v. State*, 291 Md. 125, 136 (1981) and *Wilson v. State*, 334 Md. 469, 473-474 (1994), upon which appellant relies, where trial transcripts could not be created. In this case, the transcript clearly reveals that the trial court gave the jury the pattern instruction for first-degree murder. Appellant does not make any argument that that instruction was, in any way, incorrect or insufficient. In short, appellant has not shown that the missing requested instruction "rendered his appeal meaningless." *Wilson*, 334 Md. at 477. For the same reasons, we do not believe that a remand is necessary for the trial court to conduct fact-finding.[4]

First-Degree Felony Murder Instruction

At trial, the court erred, when instructing the jury on first-degree felony murder, because it failed to instruct the jury on the elements of the underlying felony, *i.e.*, robbery

[4] Moreover, in his briefs before this Court, appellant has explained the seemingly exhaustive search that he conducted to locate or re-create his proposed jury instruction on first-degree murder. That search included reviewing the record and contacting and/or obtaining affidavits from appellant's trial counsel, the Office of the State's Attorney for Montgomery County, appellant's wife, and the appellate clerk in the circuit court. It seems to us that, under these circumstances, a remand would be pointless.

or attempted robbery.[5] Appellant acknowledges that he lodged no contemporaneous objection to the trial court's instruction, and that the issue is, therefore, not preserved for appeal. He asks us to review the error under our authority to review unpreserved errors pursuant to Md. Rules 4-325 and 8-131.

Maryland Rule 4-325(f) provides, in pertinent part that "[a]n appellate court, on its own initiative or on the suggestion of a party, may … take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." Maryland Rule 8–131(a) provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."

Although this Court has discretion to review unpreserved errors, the Court of Appeals has emphasized that appellate courts should "rarely exercise" that discretion because "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Ray v. State*, 435 Md. 1, 23 (2013) (citation omitted). Therefore, plain error review "is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair

[5] After the jury found appellant guilty of first-degree premeditated murder, the court took no further verdicts from the jury. We note, however, that the verdict sheet contained in the appellate record shows guilty verdicts for first-degree premeditated murder and second-degree murder, and no verdict for first-degree felony murder.

trial." *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted). Under the circumstances presented, we decline to overlook the lack of preservation and thus do not exercise our discretion to engage in plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so [,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis and footnote omitted).

The State's Closing Argument

Appellant contends that the State made several improper comments in closing argument to include appealing to the passions of the jury, and vouching, which individually and collectively prejudiced him in the eyes of the jury. He acknowledges that he did not object at trial to any of the things he identifies on appeal and urges us to engage in plain error review of the matter. As in *Morris*, *supra*, "[w]e decline to do so."

Consequently, we shall affirm the judgments of the circuit court.

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