UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2320

September Term, 2014

TIMOTHY DARREL HENSON

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Reed,

JJ.

Opinion by Meredith, J.

Filed: December 6, 2016

At the conclusion of a jury trial in the Circuit Court for Charles County, Timothy Darrel Henson, appellant, was found guilty of arson, Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article, § 6-102(a). The court sentenced Henson to a 30-year period of incarceration, with all but ten years suspended, and five years of supervised probation upon release. Henson appeals and presents four questions for our review:

> 1. Did the trial court err in permitting a deputy fire marshal to opine that Appellant intentionally set the fire at issue?
>
> 2. Did the trial court fail to properly exercise discretion in denying Appellant's repeated motions to discharge counsel where both of the involved judges declined to consider appointing counsel?
>
> 3. Did the trial court err in refusing to instruct the jury upon a theory of voluntary intoxication and commit plain error in permitting the prosecutor to argue to the jury incorrect and misleading "principles of law" concerning voluntary intoxication?
>
> 4. Was the evidence legally insufficient to sustain the conviction?

We conclude that question 1 was not preserved. We answer questions 2, 3 and 4 in the negative, and we affirm the judgment of the circuit court.

BACKGROUND

On October 20, 2013, Officer Paul Morgan of the Charles County Sheriff's Office, responded to a report of a domestic dispute at a townhome at 1752 Brightwell Court in Waldorf. When Officer Morgan arrived, the front door was locked. He looked through a glass panel on the door and observed on the floor of the kitchen a liquid substance that led to the front door. A male individual was in the kitchen, and "something that was on fire

[was] in his hand." The flaming object then "left his hand," and ignited the liquid substance on the floor. Officer Morgan notified dispatch that the townhouse was on fire, and he went to the surrounding townhomes to instruct occupants to evacuate.

Officer Morgan then went to the rear of the home to ensure that the individual who lit the fire did not escape via the back door. He saw the same male individual that had been inside the house walking outside at the back of the townhome. The suspect, later identified as Henson, smelled strongly of gasoline and alcohol. Officer Morgan detained Henson and placed him in the back seat of the police cruiser. Officer Morgan turned on a camera system in the vehicle that recorded Henson as he sat in the police cruiser. Officer Morgan read Henson his *Miranda* rights, but Henson said he did not understand them.

The camera system continued to operate when Officer Morgan temporarily left Henson alone in the vehicle at the scene. The audio-video recording, which was admitted into evidence, captured Henson saying while he was in the cruiser:

> Burn that bitch down; burn that bitch down. You want to fuck with me. I don't give a fuck. Told that bitch time and time again, don't fuck with me. But that bitch keep antagonizing, antagonizing, antagonizing me. Man, you get what you get (inaudible, 2-3 words).[1]

Deputy Fire Marshal Matthew Stevens responded to the scene in his capacity as a volunteer firefighter. After being advised by one of the deputy sheriffs that Henson was a suspect, he spoke to Henson. He asked Henson if all children were out of the house before

[1] Henson filed a pretrial motion to suppress the recording based on his claim that he had not been properly advised of his *Miranda* rights. The court denied the motion to suppress, finding that Henson's statements were not in response to any question, but were "blurts" that were freely made and easily heard by anyone in the area.

he set the fire. Henson confirmed that they were, and explained that "he wanted to make sure the kids were out of the house cause there was gonna be some fucked up shit," and that he was trying to get "revenge" and "satisfaction." In order to determine whether there was still a dangerous jug of gasoline in the house that the firefighters were entering, Deputy Stevens asked Henson where the jug of gasoline was. Henson responded that he had gotten rid of the jug and the firefighters were okay.[2]

Deputy Stevens asked Henson if he had been drinking. When Stevens was asked at trial if he asked that question because he could smell alcohol on Henson's breath, he responded that "the gasoline smell was more overcoming . . . than the alcohol," and then stated, "I wouldn't testify that I smelled alcohol." He explained that he asked Henson whether he had been drinking as "just [a] general question."

Deputy State Fire Marshal Caryn McMahon was called as a witness for the State, and was accepted by the court as an expert in the field of fire investigation, specifically, the origins and causes of fires. She arrived on the scene in response to a request from the Waldorf Volunteer Fire Department, but arrived after the fire had been suppressed. Her investigation led her to conclude that the fire originated in two separate locations within

[2] Henson also moved to suppress the statements he made to Deputy Fire Marshal Stevens because they were made after he said he did not understand the *Miranda* rights that were read to him. The court denied the motion to suppress, finding that Henson was capable of understanding his *Miranda* rights, and that the public safety exception applied in any event. *See New York v. Quarles*, 467 U.S. 649, 657 (1984) (holding that the need for answers to questions posing a threat to the public or officer safety "outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.").

the townhouse --- the foyer and the kitchen. She explained that the charring on the floor was "indicative of something being poured on the floor and [ ] burning on the surface[.]" An empty gasoline can was recovered during the investigation. The can was wet, indicating to her that "gas or an ignitable liquid [] was poured out of it[.]" She expressed the opinion that the fire was "classified to be incendiary, which would be arson meaning that it was an intentional act."

After rendering her opinion on the cause of the fire, the following exchange took place:

> [PROSECUTOR]: And what information and what observations and what evidence that you collected led you to believe that [the cause of the fire was arson]?
>
> DEPUTY McMAHON: Based on examination of the scene and looking at the fire pattern, the patterns that I observed are not indicative of an accidental fire. So then I would go and conduct witness interviews and I would gather information and data to determine what may have caused or who may have caused such fire.
>
> **So I was able to determine that Mr. Henson was in the home earlier in the evening and actually had ignited the fire**.
>
> * * *
>
> [DEFENSE COUNSEL]: **I'd just object to that**. She's; **she doesn't say how she was able to determine Mr. Henson had ignited the fire**.
>
> THE COURT: Do you want to approach?
>
> [PROSECUTOR]: **Your Honor, she's gonna get to Mr. Henson's statement in a second.**

THE COURT: **Okay. She said she interviewed people so overruled at this point**.

(Emphasis added.)

Deputy McMahon then explained that she interviewed Henson at the detention center after learning from Officer Morgan that he had detected a strong odor of gasoline on Henson.[3] After reading Henson his rights, Deputy McMahon asked him why he set the fire. Henson admitted that he caused the fire, but asserted that it was an accident. He claimed that he was carrying the open gas can through the house, spilled the gasoline when he slipped and fell, and that he dropped a cigarette that he was smoking, causing the fire. Deputy McMahon opined that Henson's explanation was implausible because gasoline can only be ignited with an open flame, and cannot be ignited with a lit cigarette.

Deputy McMahon asked Henson if he had been drinking because "he wasn't making sense." Henson replied that he had one or two drinks.

DISCUSSION

I.

Opinion Testimony

Henson contends that the trial court erred in allowing Deputy McMahon to testify that he intentionally set the fire. He argues on appeal that the testimony invaded the province of the jury to decide (1) the identity of the perpetrator and (2) whether he acted

[3] Deputy McMahon advised Henson of his *Miranda* rights before interviewing him. Henson did not verbalize that he did not understand, and voluntarily answered Deputy McMahon's questions.

with the requisite criminal intent. The State responds preliminarily that Henson's arguments are not preserved for appellate review because the sole objection made at trial challenged only the absence of a proper foundation for Deputy McMahon's testimony, and did not include the grounds he now advances on appeal. Alternatively, the State counters that, even if reviewed for plain error --- which Henson did not request --- Deputy McMahon's testimony did not impermissibly encroach upon the jury's province given that she did not testify that Henson had acted with criminal intent.

We agree with the State's contention that Henson's appellate arguments about Deputy McMahon's testimony were not preserved. Because the grounds for Henson's sole objection to Deputy McMahon's testimony was lack of foundation --- *i.e.*, that she did not state how she was able to determine that Henson ignited the fire --- Henson's present claim that her testimony should not have been admitted because it invaded the province of the jury is not properly before us for review. "While a party need not state the specific grounds for objection unless directed to do so by the court, the Court of Appeals has nonetheless held that where a party voluntarily states his grounds for objection even though not asked, he must state all grounds and waives any not so stated." *Hall v. State*, 225 Md. App. 72, 84 (2015) (citation and internal quotation marks omitted). *See also Klauenberg v. State*, 355 Md. 528, 541 (1999) ("It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds, and ordinarily waives any grounds not specified that are later raised on appeal.").

II.

Motion to Discharge/Appoint Counsel

Henson was represented during the proceedings by the Office of the Public Defender ("OPD"). According to the record before us, Henson notified the court of his dissatisfaction with his appointed counsel on four different occasions: a hearing on his motion to discharge counsel on May 2, 2014; a plea hearing on May 5, 2014; a status hearing on May 14, 2014; and a hearing on a second motion to discharge counsel on August 22, 2014. By the time of the hearing on August 22, 2014, a second public defender had entered his appearance on Henson's behalf, and acted as lead counsel. As grounds for the motions to discharge, Henson claimed that his attorneys had not provided him with information he requested, had pressured him to accept a plea agreement, did not investigate the case or prepare his defense properly, were not protecting his rights, and did not act in accordance with his best interests.

Henson maintained his desire to be represented by counsel, but, because he could not afford to hire a private attorney, he requested that the court appoint him private counsel who was not an attorney in the OPD. The court explained that he had three options: to accept the services of the OPD, hire a private attorney, or represent himself. On each occasion Henson raised the issue, the court allowed Henson an opportunity to explain each of his concerns, and either attempted to resolve the issue or explain why it did not amount to a meritorious reason to discharge counsel. For example, when Henson complained that he had been rushed by his attorney to accept the plea bargain offered by the State, the court

explained that his attorney was simply conveying the relatively short deadline that the State's Attorney had established, and that it was not within the control of the OPD. Arrangements were made for Henson to view the video recording from the police cruiser after he stated that his attorney had not shown it to him. The court attempted to allay Henson's concerns that information was being withheld from him by going over the information that the State had provided in discovery and confirming with defense counsel that it had been shared with Henson. The court also explained that some of the information Henson believed was being withheld --- such as detailed information from the insurance company and a transcript of the video recording --- did not exist. Ultimately, the court found that there was no meritorious reason for Henson to discharge his counsel, and denied the motions.

Maryland Rule 4-215(e) sets forth the procedure to be followed when a criminal defendant seeks to discharge counsel:

> **Discharge of Counsel--Waiver**. If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

Henson concedes in his brief that, in each instance when he expressed dissatisfaction with his counsel, the court complied with Maryland Rule 4-215(e), and he sets forth no argument that the court erred in finding that his complaints were without merit.

Henson nevertheless contends that the circuit court failed to properly exercise its discretion by failing to grant his request to appoint new counsel. Henson argues that the court *could have* exercised its discretion to appoint new counsel for him in order to "obviate the unfortunate circumstance of a client and his lawyers at each other's throats," and he suggests that the court's comments demonstrate that the court erroneously believed that it did not have authority to appoint an attorney to represent him. The State responds that, because the court correctly denied Henson's motion to discharge the Office of the Public Defender, the court was under no obligation to consider whether to exercise its discretionary authority to appoint counsel. We agree with the State.

In the case of *Dykes v. State*, 444 Md. 642 (2015), the Court of Appeals summarized the law relating to an indigent defendant's right to counsel:

> The right of a defendant in a criminal case to counsel is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. That right also protects a defendant's decision to proceed *pro se.* In other words, a criminal defendant has an independent constitutional right to have the effective assistance of counsel and to reject that assistance and defend himself. . . . If a defendant cannot afford counsel when the charges carry a risk of incarceration, the defendant has a right to counsel appointed at government expense.
>
> While an indigent defendant is entitled to appointed counsel, that right should not be mistaken for a right to select the attorney of one's choice. The right to counsel guarantees an effective advocate for each criminal defendant

> rather than ensuring that a defendant will inexorably be represented by the lawyer whom he prefers.

Id. at 647-48 (citations, internal quotation marks and footnotes omitted).

In a situation such as the one in Henson's case, where the trial court determines that there is no meritorious reason for the discharge of counsel, the *Dykes* Court said the trial court has "no obligation to exercise its inherent authority to appoint counsel or even to direct [the defendant] back to [the Office of the Public Defender] to seek substitute counsel." *Dykes*, 444 Md. at 669 n.20. Accordingly, because Henson does not argue that the court erred in determining that there was no meritorious reason for him to discharge his attorneys, his claim that the court should nevertheless have considered appointing him new counsel is without merit. *Id.*

III.

Voluntary Intoxication Instruction

Henson contends that the court erred in denying his request to instruct the jury on the defense of voluntary intoxication because, he claims, there was "some evidence" that he was sufficiently intoxicated to support the instruction. The State responds that, even though there was some evidence of intoxication, there was insufficient evidence that Henson was intoxicated to such a degree that the voluntary intoxication instruction was warranted.

Maryland Rule 4-325(c) provides: "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." We review a trial judge's decision whether to grant or deny a request for a particular jury instruction under the abuse of discretion standard. *Bazzle v. State*, 426 Md. 541, 548 (2012); *Stabb v. State*, 423 Md. 454, 465 (2011). In determining whether a trial court has abused its discretion we consider "(1) whether the requested instruction is a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." *Bazzle,* 426 Md. at 549 (citation omitted). The Court observed in *Bazzle*:

> The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge. The task of [the appellate] Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.

Id. at 550 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)).

"[A] defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Id.* at 551. "If there is any evidence relied on by the defendant which, if believed, would support his claim . . . the defendant has met his burden." *Id.* (citations omitted). "In evaluating whether competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused." *Id*. (citation and internal quotation marks omitted).

Henson relies on the above language in *Bazzle* in urging us to hold that the "some evidence" threshold was crossed in his case. This language must, however, be read in conjunction with the law regarding what is required in order to invoke the defense of voluntary intoxication and entitle a defendant to the instruction.

Voluntary intoxication is a defense to a specific intent crime. *Hook v. State*, 315 Md. 25, 30 (1989). And Henson was charged with a specific intent crime, arson. *See Marlin v. State*, 192 Md. App. 134, 163, *cert. denied*, 415 Md. 339 (2010). But "the degree of intoxication which must be demonstrated to exonerate a defendant is great." *Hook*, 315 Md. 31, n.9 (quoting *State v. Gover*, 267 Md. 602, 607 (1973)). "*[M]ere intoxication is insufficient to negate a specific intent[.]*" *Bazzle*, 426 Md. at 553 (emphasis added). As the Court of Appeals has explained:

> Evidence of drunkenness which falls short of a **proven incapacity in the accused to form the intent necessary to constitute the crime** merely establishes that the mind was affected by drink so that he more readily gave way to some violent passion and **does not rebut the presumption that a man intends the natural consequences of his act**.

Bazzle, 426 Md. at 553-54, (quoting *Hook*, 315 Md. at 31, n.9) (emphasis in *Bazzle*).

The sum of the evidence regarding Henson's alcohol consumption and possible intoxication was: 1) Officer Morgan detected a "very strong odor" of alcohol on Henson; 2) Deputy Fire Marshal Stevens asked Henson if he had been drinking "just as a general question"; 3) Deputy Fire Marshal McMahon asked Henson if he had been drinking because "he wasn't making sense"; 4) Henson admitted to having one or two drinks; and (5) he ranted about revenge when he was alone in the police cruiser.[4] Viewed in the light most favorable to Henson, this evidence may have supported an inference that Henson was under the influence of alcohol, but it was insufficient to support a finding of the level of

[4] Henson argues that his statement to Deputy Fire Marshal McMahon that he accidentally spilled the gasoline when he slipped and fell was "additional indicia of intoxication."

intoxication necessary to entitle Henson to be relieved of criminal liability on grounds of voluntary intoxication.

"Mere drunkenness does not equate to the level of intoxication necessary to generate a jury instruction on intoxication as a defense to a crime." *Bazzle*, 426 Md. at 555. "A defendant is not entitled to an instruction on voluntary intoxication unless he can point to 'some evidence' that would allow a jury to rationally conclude that his intoxication made him incapable of forming the intent necessary to constitute the crime." *Id*. (citations and some internal quotation marks omitted). The circuit court did not err in concluding that there was insufficient evidence to permit the jury to find that Henson was so intoxicated that he could not form the intent to commit arson, and the court's refusal to give the requested instruction was therefore not an abuse of discretion.

Although the court declined to instruct the jury on the defense of voluntary intoxication, defense counsel attempted to persuade the jury in closing argument that Henson was drunk and did not know what he was doing, and therefore, that he lacked specific intent to commit arson. In response, the State argued in its rebuttal that "being drunk is not a defense to the charge of arson," and explained that "in order for that to work he has to be incoherent past the point of understanding anything that's going on." The prosecutor continued, stating, "in order for that to work [a defendant] has to be falling down and vomiting on himself and passing out[.]"

Although defense counsel did not object, Henson argues on appeal that the State's argument "misinformed" the jury, and that the trial court's "failure to remedy a

prosecutor's erroneous explanation to the jury of a central point of law may constitute reversible error," citing *Rheubottom v. State*, 99 Md. App. 335 (1994). But, in *Rheubottom*, the defendant objected to the prosecutor's improper argument about reasonable doubt, *id*. at 34, and the trial court "refused to give a corrective instruction" "even though asked to do so." *Id*. Here, Henson neither objected to the prosecutor's argument nor requested a curative instruction. Any claim regarding the trial court's failure to intervene during the prosecutor's rebuttal argument was not preserved for appellate review.

IV.

Sufficiency of the Evidence

Finally, Henson claims that the evidence was insufficient to sustain the conviction of arson for two reasons. First, he argues that the evidence "leaves serious doubt" that there was any structural damage as a result of the fire. Second, Henson argues that there was no proof that he acted wilfully or maliciously, and, he asserts, the fire was ignited accidentally. The State responds that, because appellant did not argue as grounds for his motion for judgment of acquittal that the fire caused no structural damage, that argument is waived. In any event, the State asserts that, even if that argument had not been waived, there was sufficient evidence of charring of the floor and walls of the townhouse to support a finding of arson. The State further responds that there was sufficient evidence of Henson's intent to commit arson.

Henson moved for judgment of acquittal only on grounds that the evidence was insufficient to prove that he acted intentionally, wilfully or maliciously. Accordingly, his

claim on appeal that the evidence left "serious doubts" as to whether there was damage to the townhome is waived. *See Claybourne v. State*, 209 Md. App. 706, 750, *cert. denied*, 432 Md. 212 (2013) ("A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal.") (citation and internal quotation marks omitted).

Even if the argument had been preserved, however, we would find it to be without merit. "If there is the slightest burning of any part of the building, the offense [of arson] is complete." *Fulford v. State*, 8 Md. App. 270, 274 (1969), *cert. denied*, 257 Md. 733 (1970). Deputy McMahon testified that there was charring damage to the floor and walls of the townhome, and the photographs admitted into evidence show significant charring of the floor and adjacent walls.

With respect to the point that was argued in support of the motion for acquittal, the standard for reviewing the sufficiency of the evidence is "whether, after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found each element of the crime beyond a reasonable doubt." *Rodriguez v. State*, 221 Md. App. 26, 35, *cert. denied*, 442 Md. 517 (2015) (citation and internal quotation marks omitted). The jury was instructed that, in order to convict Henson of arson, the State was required to prove not only that he set fire to or burned at least part of a dwelling, but also that setting fire to or burning the dwelling was done with the intent to harm others or their property.

The State produced ample evidence from which the jury could have found each element of the crime beyond a reasonable doubt. Officer Morgan witnessed Henson drop a flaming object into a liquid substance on the floor of the dwelling, causing it to ignite. Although Henson told the investigators that he lit the fire accidentally, the jury could have found Officer Morgan's description of a seemingly intentional act more credible, particularly, in light of the very strong odor of gasoline and Deputy McMahon's opinion that the fire could not have been ignited by a dropped cigarette. Henson admitted to Deputy Fire Marshal Stevens that he lit the fire in order to get "revenge" and "satisfaction." This admission was corroborated by Henson's on-camera rantings to himself while inside the police cruiser. Additionally, the State produced expert testimony that the cause of the fire was determined to be "incendiary," *i.e.*, intentionally set, and there was obvious damage to the dwelling in the form of charring of the floor and walls. In short, there was sufficient evidence to support the jury's finding of the elements of arson.

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