Circuit Court for Allegany County
Case No. C-01-CR-21-000805

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1013

September Term, 2023

DAFON CANTY

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, J.
Dissenting Opinion by Nazarian, J.

Filed: May 15, 2024

A jury sitting in the Circuit Court for Allegany County found Dafon Canty, appellant, guilty of assault in the second degree of a correctional officer. The court sentenced him to three years' incarceration. He appealed, raising two issues:

> I. Whether the trial court erred in refusing to dismiss the jury pool after the jury pool had received a jury orientation manual that fundamentally misstated the law in relation to the jury's role, thereby irremediably tainting the jury pool; or, alternatively, did the trial court abuse its discretion in failing to take any steps to cure the manual's taint?
>
> II. Whether the trial court erred or abused its discretion when it required an incarcerated defense witness to testify in shackles?

Finding neither reversible error nor abuse of discretion, we shall affirm.

BACKGROUND

Appellant is an inmate at Western Correctional Institution ("WCI") in Cumberland, in Allegany County. In the morning of July 23, 2021, appellant was in line with other inmates, waiting to receive medication. David Kidwell, a correctional officer at WCI, observed appellant receive his medication, put it in his pocket,[1] and "proceed[] back to his housing unit." According to Officer Kidwell, appellant violated a prison regulation in doing so because "they're supposed to take their meds as soon as they . . . receive it."

Officer Kidwell confronted appellant, asking him "why he never took his medicine." Appellant responded with an expletive. Officer Kidwell attempted to place appellant in hand restraints but was unable to do so. An "altercation" ensued. Another correctional officer, Sergeant David Dougherty, deployed pepper spray after observing appellant taking

[1] At another point, Officer Kidwell testified that appellant "palm[ed]" the medication instead of putting it in his pocket, but in any event, he testified that appellant did not take his medication when he received it.

"a swing at Officer Kidwell" and missing. Appellant then struck Officer Kidwell "in the right side of the face." Ultimately, appellant was "escorted away."

A Statement of Charges was filed in the District Court of Maryland for Allegany County, charging appellant with assault in the second degree of a correctional officer, in violation of Criminal Law Article ("CR"), § 3-210 of the Maryland Code, and assault in the second degree, in violation of CR § 3-203. Appellant exercised his right to a jury trial, and the case was transferred to the Circuit Court for Allegany County, where a one-day jury trial was held.

The Orientation Manual

All members of the jury pool, upon their arrival at the Allegany County Courthouse, were given an orientation manual, *Serving on a Maryland Trial Jury*, explaining the function and duties of jurors.[2] On the first page of the manual, it states that the "job of a trial juror" in a criminal case is to "listen[] to evidence in a courtroom[] and decide[] the guilt or innocence of the defendant[.]"[3] Eight lines further down the page, the manual clarifies that

[2] It appears that this manual was published in 2012. We do not know to what extent it has been distributed to jury pools and juries in the circuit courts of Maryland. If it is still being distributed, a sentence on the first page should be clarified. *See Serving on a Maryland Trial Jury*, https://www.mdcourts.gov/sites/default/files/import/juryservice/pdfs/trialjuryservice.pdf (published October 2012) (last visited Apr. 18, 2024).

[3] That sentence reads in full:

> ***The job of a trial juror.***
> A trial jury listens to evidence in a courtroom, and decides the guilt or innocence of the defendant in a criminal case, and the liability and damages of the parties in a civil case.

> ***Criminal cases*** are brought by the State against one or more people accused of committing a crime(s). The person accused of the crime is the defendant. The State must prove "beyond a reasonable doubt" that the defendant committed the alleged crime(s).

On page 5, the manual states that

> You and the other jury members reach a decision by discussing the evidence presented during the trial, and only that evidence, in the light of the judge's instructions.

The Motion in Limine

On the morning of trial, trial counsel filed a motion in limine, asking that all venire persons who had been provided a copy of *Serving on a Maryland Trial Jury* (in other words, the entire venire) be stricken from the jury pool because they were "irremediably tainted" by the manual's "fundamental misstatement of law"—that a "trial jury listens to evidence in a courtroom, and decides the guilt or innocence of the defendant in a criminal case." According to the defense, that misstatement—in a document provided to every venire person by the Maryland Judiciary, no less—is fundamentally at odds with the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt.

Voir Dire

During voir dire, one of the venire members (Juror 86), who had answered affirmatively to one of the questions meant to elicit evidence of bias, was further queried by trial counsel about "some packets of papers" she was holding. At trial counsel's request, she gave him those papers. The following exchange then occurred:

> [DEFENSE COUNSEL]: Just as a quick judicial notice, um, the lady is holding what's identified as a document saying serving on Maryland Trial Jury. Ma'am, you received this packet today, I assume?
>
> JUROR: Yeah, that's just the manual, yeah.
>
> [DEFENSE COUNSEL]: And that manual, this was handed to you and as far as you know all the other jurors on the panel?
>
> JUROR: Yes.
>
> [DEFENSE COUNSEL]: Okay. I just ask that you take judicial notice this is the same as Defendant's Exhibit, uh, Number 2 that was filed as part of one of my motions.
>
> THE COURT: Okay, Court will take judicial notice of that. Thank you.

The defense subsequently exercised a peremptory strike, and Juror 86 was excused.

Among the voir dire questions the trial court propounded were the following *Kazadi*-type[4] questions:

> Under the law, the accused person in a criminal case is presumed innocent unless proven guilty beyond a reasonable doubt? Does any member of the jury panel not accept this principle or would any member of the jury panel have any difficulty in applying it if you were chosen as a juror in this case? Does any prospective juror believe that the Defendant has a duty or responsibility to prove his or her innocence? Does any prospective juror believe that the Defendant is or probably is guilty of a charge or charges in this case because charges have been filed? Under the law, the prosecution must prove each element of the offenses beyond a reasonable doubt. If the jury has a reasonable doubt concerning the Defendant's guilt, then it is the jury, the duty of the jury to acquit the Defendant. Does any member of the jury panel have any difficulty applying or accepting this principle? Or would any of you have any difficulty in applying it if you were chosen as a juror in this case? If you came to the conclusion that there was a reasonable doubt

[4] In *Kazadi v. State*, 467 Md. 1, 48 (2020), the Supreme Court of Maryland held that, upon defense request, "during *voir dire*, a trial court must ask whether any prospective jurors are unwilling or unable to comply with the jury instructions on the presumption of innocence, the burden of proof, and the defendant's right not to testify."

> as to the Defendant's guilt and the majority of jurors disagree with you, would any of you change your vote merely because you would be in the minority? Under the law, the Defendant has an absolute right to remain silent and to refuse to testify. No adverse inference, uh, of guilt may be drawn from this refusal to testify. Does any prospective juror believe that the Defendant has a duty or responsibility to testify or that he or she must be guilty merely because they may refuse to testify? I have completed the questions for this voir dire. Please listen carefully as to what I'm going to ask you next and please raise your hand if any of the following applies to you. Did any member of the jury not understand one or more of the questions that I asked? Had difficulty hearing any of the questions I asked? Did not answer one of my questions out of embarrassment? Or did not originally answer one of my questions but upon further reflection you feel that you should have. If any of those apply to you, please raise your hand.

None of the venire persons responded to any of these questions.

After eliciting the prosecutor's concurrence with all the questions asked, the court sought trial counsel's objections, if any. Trial counsel raised an issue unrelated to this appeal (which the trial court resolved to his satisfaction), and then the court turned its attention to "the juror pamphlet[.]"

The Court's Ruling on the Motion in Limine

The court declared that it had reviewed the defense motion in limine and asked counsel whether he wanted "to add anything above and beyond that[.]" Trial counsel asked the court to take judicial notice that the manual "was in fact delivered to each of the prospective members of the jury in the pool[,]" which the defense "would verify" through testimony of Juror 86. Trial counsel then asserted that the "entire pool" was "tainted" by the manual because its "very first sentence" contained a "fundamental" misstatement of the law: that "it's the burden of the jury to make a determination of guilt or innocence in a criminal trial[,]" a proposition at odds with the jury's proper role "to determine whether

or not the State has proven its case beyond a reasonable doubt." "[A]t minimum[,]" trial counsel urged the court to order that the "documents [be] removed from them" but that, furthermore, "from this point on" he would "be objecting to the, uh, seating of these jurors understanding what the Court's likely ruling on this is going to be."

The prosecutor countered that "while there is evidence that indeed they received the manual, there is no such evidence that they read the manual, understood the manual or cannot follow the instructions of the Court." Because the jury instructions would "describe to the jury what their duty is[,]" the prosecutor urged the court to deny the motion.

The trial court denied the motion, declaring:

> So, for the purposes of this argument, I'm going to stand on the proposition that every juror (a) received a copy of the manual and that (b) every juror has read that manual. I'm still comfortable with the, uh, fact that this is not a binding instruction from the Court, with this, instructions are provided to the Court or to any prospective jurors at the end of the case. Matters are and those are binding upon them. Uh, furthermore, this, that, that instructions ultimately are provided to the jury, I would note and make specific note that any pamphlets, uh, are not considered binding, uh, on the jurors and that the law that I give them is considered binding on them. Uh, so, for that, I am denying the motion[.]

Preliminary Instructions

After jury selection had been completed but prior to the presentation of evidence, the trial court gave preliminary instructions, which it declared were "binding upon" the jurors. Among other things, the court instructed, in accordance with Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 2:02, that

> the State bears the burden in this entire case throughout the entire course of the trial. Now, the Defendant is presumed innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the Defendant is

> guilty. The State has the burden of proving the guilt of the Defendant beyond a reasonable doubt. This means that the State has the burden of proving beyond a reasonable doubt each and every element of the crimes charged. The elements of a crime are the component parts of a crime which I'll instruct you about later. This burden remains on the State throughout the trial. The Defendant is not required to prove his or her innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence. A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of the fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. If you are not satisfied of the Defendant's guilt to that extent for each and every element of the crimes charged, then reasonable doubt exists and the Defendant must be found not guilty of the crime.

Presentation of Evidence

The State called three witnesses: Officer David Kidwell; Sergeant David Dougherty; and Sergeant Robert Fagan. The defense called two witnesses: Shaun McMahon, a fellow inmate at WCI; and appellant.

Officer Kidwell, the officer who was assaulted, testified as previously summarized. Pictures taken several hours after the altercation, depicting his injuries, were admitted into evidence through his testimony. In addition, grainy surveillance video, depicting the altercation, was admitted into evidence.

Sergeant Dougherty, the officer who deployed pepper spray during the assault, also testified as previously summarized. Sergeant Fagan, unlike the other two correctional officers who testified, was not present during the altercation. Instead, he was called afterwards to investigate the incident and write a report. Another of his duties was to

retrieve the surveillance video that was introduced into evidence and broadcast during trial.[5]

Mr. McMahon, appellant's cell mate at the time of the assault, was not present during the altercation. He testified only about appellant's "daily routine[,]" which was to take his medication with food. According to Mr. McMahon, appellant "always brought his medication back to his cell[.]"

Appellant testified that his "regular routine" was to take his medication with him back to his cell and, subsequently, take it with food. According to appellant, the nurses who distributed medication acquiesced in that routine and, until the day of the altercation, he had never had a problem with the staff regarding that issue. When correctional officers confronted appellant that day, demanding that he take his medication then and there, appellant maintained that he walked back towards the nurses' station so that the nurse could explain his normal routine to the correctional officers. According to appellant, one of the correctional officers sprayed him with mace, causing him to flail about and possibly strike one of the officers incidentally. Appellant insisted that he did not punch anyone.[6]

Jury Instructions

The trial court began its instructions by declaring:

> The instructions I give you about the law are binding upon you. In other words, you must apply the law as I explained at arriving at your verdict.

[5] Sergeant Fagan's testimony also served to authenticate the video, although it already had been admitted into evidence without objection.

[6] Through appellant's testimony, contemporaneous photographs depicting appellant's hands were admitted into evidence. According to appellant, the lack of any apparent injury to his hands corroborated his claim that he did not punch Officer Kidwell.

The court then instructed the jury about, among other things, the presumption of innocence and the beyond-a-reasonable-doubt standard:[7]

> The Defendant is presumed innocent of the charges. This presumption remains through, uh, remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the Defendant is guilty. The State has the burden of proving the guilt of the

[7] The trial court's instruction omitted a portion of MPJI-Cr 2:02, which was adopted in the aftermath of *Carroll v. State*, 428 Md. 679, 693 (2012) (urging "the Maryland State Bar Association Committee on Maryland Pattern Instructions to consider amending MPJI-Cr 2:02 to include explicit language instructing that the State has the burden to prove beyond a reasonable doubt each element of each charged offense" (footnote omitted)). MPJI-Cr 2:02 states:

> The defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The State has the burden of proving the guilt of the defendant beyond a reasonable doubt. <u>This means that the State has the burden of proving, beyond a reasonable doubt, each and every element of the crime [crimes] charged. The elements of a crime are the component parts of the crime about which I will instruct you shortly.</u> This burden remains on the State throughout the trial. The defendant is not required to prove [his] [her] innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. If you are not satisfied of the defendant's guilt to that extent for each and every element of [a] [the] crime charged, then reasonable doubt exists and the defendant must be found not guilty of [that] [the] crime.

(Underlining added.) Unlike the preliminary instruction, which followed the pattern instruction fully, the instruction given (without objection) after the close of all the evidence omitted the underlined portion. There was, however, no objection raised to the court's instruction on reasonable doubt.

> Defendant beyond a reasonable doubt. This burden remains on the State throughout the trial. The Defendant is not required to prove his or her innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence. A reasonable doubt is founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of the fact to the extent that you would be willing to act upon such belief without reservation in [an] important matter in your own business or personal affairs. If you are not satisfied of the Defendant's guilt to that extent, then reasonable doubt exists and the Defendant must be found not guilty.

Trial counsel did not object to the jury instructions.

Verdict, Sentence, and Appeal

Only the greater charge of second-degree assault of a correctional officer was submitted to the jury. After a brief deliberation, approximately one half-hour in duration, the jury found appellant guilty of that charge. The circuit court sentenced appellant to a three-year term of incarceration, consecutive to the sentences he already was serving.[8] Appellant noted this appeal.

Additional facts are included where pertinent to the discussion of the issues.

[8] Because appellant is incarcerated, and the assault was committed against an employee of a State correctional facility, it was mandatory that the sentence be consecutive to any sentence he then was serving or would be serving in the future, and that it not be a suspended sentence. CR § 3-210(a)-(c).

DISCUSSION

I.

A. Challenge to the Array

Parties' Contentions

Appellant contends that the trial court erred in refusing to dismiss the jury pool after it had received a jury orientation manual that fundamentally misstated the law in relation to the jury's role. He claims that the jury manual's "fundamental misstatement" of the law "irremediably tainted" the venire for two reasons—first, because that misstatement lowered the State's burden of persuasion; and second, because the taint caused by the misstatement was incurable, given that the manual was "the very first document jurors received and read when they arrived at the courthouse for jury duty[,]" and moreover, that it came with the apparent imprimatur of the court.

The State counters that the manual's "general description did not and could not vitiate the correct, repeated, and specific instructions of the trial court in this case." For one thing, the State maintains, appellant "adopts a blinkered view" of the manual, focusing only on a single phrase while ignoring the manual's admonition that the State must prove the defendant's criminal agency "beyond a reasonable doubt[.]" Furthermore, according to the State, because the venire persons were given *Kazadi*-type questions during voir dire, and the trial court properly instructed the jury about the presumption of innocence and the State's burden of persuasion, appellant cannot carry his burden to show that he did not receive a fair trial.

Analysis

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution and Article 21 of the Maryland Declaration of Rights protect a criminal defendant's right to a fair and impartial jury. In furtherance of that right, Maryland Rule 4-312(a) ("**Jury size and challenge to the array**") provides in relevant part as follows:

> (3) **Challenge to the array**. — A party may challenge the array on the ground that its members were not selected or summoned according to law, or on any other ground that would disqualify the array as a whole. A challenge to the array shall be made and determined before any individual member of the array is examined, except that the trial judge for good cause may permit the challenge to be made after the jury is sworn but before any evidence is received.

We review a trial court's decision to deny a motion to dismiss a venire for abuse of discretion.[9] *Jones v. State*, 4 Md. App. 616, 623 (1968). "[T]he burden is upon the moving

[9] Appellant contends that the standard of review is de novo. The decisions appellant cites for the standard of review do not stand for what he claims they do; in fact, none of those decisions consider the question. In *Goldstein v. State*, 220 Md. 39 (1959), the Supreme Court of Maryland addressed a challenge to the array based upon the trial court's distribution to prospective jurors of a "Handbook for Jurors" at "the time of their selection for future service." *Id.* at 47. The Court rejected Goldstein's contention that the handbook had been distributed at a critical stage of trial. *Id.* The Court further held that "the challenged statements in the handbook were substantially correct, and certainly involved no prejudicial error." *Id.*

In *Malekar v. State*, 26 Md. App. 498, *cert. denied*, 276 Md. 747 (1975), this Court addressed a challenge to the array based upon the possibility that venire persons had been exposed to prejudicial pretrial publicity about the case. *Id.* at 509. We concluded that the "voir dire screening was adequate" to ensure that the jury was untainted because the two venire persons who "felt that they would be tainted by their information . . . were discharged for cause[,]" and all the others "indicated that they would not be influenced in any way by the information they possessed." *Id.* As for "the further contention that the

(continued…)

party to show facts which will give rise to the actual prejudice." *Id.* *Accord Kidder v. State*, 475 Md. 113, 136 (2021) (noting that a "party claiming denial of the right to an impartial jury bears the burden of proving that the jury selected was not impartial").

A trial court abuses its discretion where its ruling is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Woodlin v. State*, 484 Md. 253, 277 (2023) (quotation marks and citations omitted). In other words, "an abuse of discretion occurs when no reasonable person would take the view adopted by the circuit court." *Id.* (quotation marks and citation omitted).

Merits of the Claim

We begin with the orientation manual itself. We acknowledge that its opening sentence is incorrect, and if it is still in existence, it should be redrafted. But we also do not ignore its context. Further down the first page, it correctly states the prosecution's burden of persuasion—that the "State must prove 'beyond a reasonable doubt' that the

entire array was contaminated because three of the panel members, upon being questioned, revealed the nature of the information which they had learned[,]" we determined that "their responses were very brief and totally innocuous" and that, therefore, there was "no error." *Id.*

In *Brown v. State*, 29 Md. App. 1 (1975), *disapproved on other grounds*, *Sims v. State*, 319 Md. 540 (1990), we held, consistently with *Goldstein*, that the "orientation of the entire panel of jurors that is used throughout the courts of Baltimore City cannot be miscast by [Brown] as a 'critical stage' of a criminal prosecution." *Id.* at 6. Therefore, we concluded that Brown was not entitled to be present when, during the orientation session, jurors were given a manual, similar to the one at issue here. *Id.* (We do not know, however, whether the manual at issue in *Brown* contained the same misstatement of law as contained in the manual at issue in this case.)

defendant committed the alleged crime(s)." Four pages later, the manual correctly explains that "[y]ou and the other jury members reach a decision by discussing the evidence presented during the trial, and only that evidence, in the light of the judge's instructions."

Turning to whether appellant has carried his burden to show that the empaneled jury was "irremediably tainted[,]" we note that appellant raised a timely motion to strike the venire, but he did not ask for voir dire questions directed towards uncovering evidence of the bias which, he claims, infected the venire. The only evidence of bias uncovered during voir dire was that the jurors had, in fact, been given copies of the offending orientation manual and that they presumably had read it.[10] The battery of *Kazadi*-type questions were asked and none of the jurors responded. Moreover, both prior to and following the presentation of evidence, the jurors were given "binding" instructions, directing them to apply the presumption of innocence and the beyond-a-reasonable-doubt standard. Although the court gave both sets of instructions after it already had denied appellant's motion to strike the venire, it presumably knew ahead of time when and how it would instruct the jury and properly could account for that eventuality when making the ruling at issue.

Under all the circumstances, we cannot say that the trial court's denial of the motion to strike the venire was unreasonable or that its ruling was "well removed from any center mark imagined by the reviewing court and beyond the fringe of what" we deem "minimally acceptable." *Woodlin*, 484 Md. at 277 (quotation marks and citations omitted). Therefore,

[10] We do not know if any of the jurors actually read the manual, but the circuit court presumed that they did so for purposed of its ruling.

we conclude that the trial court did not abuse its discretion in denying the motion to strike the venire.

B. Failure to Take Curative Action

Parties' Contentions

Appellant contends that the trial court abused its discretion in denying trial counsel's request to have the manuals removed from the jury or in otherwise failing to take any steps to cure the manual's taint. According to appellant, the trial court should have given a curative instruction, directing the jury to "ignore the manual's misstatement of law," but that it failed to do so at any time, either before the jury was sworn, prior to opening statements, or prior to closing arguments.

According to the State, appellant's contention that the trial court abused its discretion in failing to give a curative instruction to cure the taint flowing from the jury manual is unpreserved because he "never requested such an instruction[.]" The State does not address appellant's claim that the trial court abused its discretion in declining to order that the manuals be taken from the jurors.

Analysis

Standard of Review

We review appellant's claim that the trial court abused its discretion in failing to take curative measures to mitigate the taint caused by the manual's misstatement of law, as he suggests, for abuse of discretion. *See*, *e.g.*, *Simmons v. State*, 436 Md. 202, 223-24 (2013) (reviewing for abuse of discretion a trial court's decision to declare a mistrial rather than give a curative instruction when, in opening statement, defense counsel declared that

his client was willing to take a lie detector test); *Carter v. State*, 366 Md. 574, 588 (2001) (holding that, when a trial court "finds that inadmissible evidence has been presented to the jury, it is within the discretion of the trial court to decide whether a cautionary or limiting instruction should be given"); *Bruce v. State*, 351 Md. 387, 393 (1998) (declaring that "the conduct of a criminal trial is committed to the sound discretion of the trial court").

1. Denial of the Request to Take the Manuals from the Jurors

The abuse-of-discretion standard is highly deferential, and we do not find abuse of discretion merely because we would have made a ruling different from that made by the trial court. *Woodlin*, 484 Md. at 277. We recognize that taking the manuals from the jurors, thereby preventing them from taking the manuals into the jury room during deliberations, would not have been disruptive or have spillover effects on other pending trials. The trial court was allowed to take into account all of the circumstances, however, including the possibility of prejudice, in exercising its discretion. We find no abuse.

Nevertheless, were we to find an abuse of discretion, we would conclude that the error is harmless. If an appellate court determines that a trial court abused its discretion, the ruling at issue is treated the same as if the trial court had committed legal error. *Green v. State*, 456 Md. 97, 165 (2017); *Hall v. State*, 437 Md. 534, 540-41 (2014); *King v. State*, 407 Md. 682, 698 (2009). If an appellant establishes that there was error in a criminal trial, the State bears the burden to show that the error was harmless. *Belton v. State*, 483 Md. 523, 543 (2023). An error is harmless if there is no reasonable possibility that it influenced the verdict. *Id.* at 542.

"Harmless error review is the standard 'most favorable to the defendant short of an automatic reversal.'" *Rainey v. State*, 246 Md. App. 160, 185 (quoting *Bellamy v. State*, 403 Md. 308, 333 (2008)), *cert. denied*, 468 Md. 556 (2020). We must apply that standard "'in a manner that does not encroach upon the jury's judgment.'" *Id.* (quoting *Dionas v. State*, 436 Md. 97, 109 (2013)). Included among the factors we consider are "the nature, and the effect, of the purported error upon the jury[,]" *Dionas*, 436 Md. at 110; "the jury's behavior during deliberations[,]" *id.* at 111; the strength of the State's case "from the perspective of the jury," *id.* at 116; and whether the error concerns an issue central to the case or a collateral issue. *Wallace-Bey v. State*, 234 Md. App. 501, 561 (2017).

At three different stages of the trial, the jurors were either screened, or instructed, to ensure that they would apply the correct legal standards in this case. When expressly asked during voir dire, every juror who ultimately was seated affirmed that he or she would follow the trial court's instructions concerning the presumption of innocence and the beyond-a-reasonable-doubt standard. Thereafter, the jury was instructed, both prior to and following the presentation of evidence, that the defendant was presumed innocent and that it was the State's burden to prove his criminal agency beyond a reasonable doubt. In this respect, the present case is similar to *State v. Stringfellow*, 425 Md. 461 (2012), in which the Supreme Court of Maryland found that a voir dire error (propounding an "anti-CSI" question) was harmless. Among the reasons the Court so held were: (1) "the error was not reiterated during jury instructions or other comments from the bench while the jury was present[,]" and moreover, defense counsel was allowed to argue that the police's failure to test the handgun at issue in that case for fingerprints created reasonable doubt; (2) the trial

court screened out four venire persons who declared their inability "to render a fair and impartial verdict" based solely upon the evidence and the court's instructions; (3) the trial court's final jury instructions further ameliorated the effect of the error. *Id.* at 474-77.

The jury's behavior during deliberations further confirms that the error had no influence on the verdict. The jury deliberated for a half-hour, and it asked no questions during its deliberations. And finally, both the prosecutor and trial counsel repeatedly admonished the jury, both in opening statement and during closing argument, that it could find appellant guilty only if it found every element of the charged offense beyond a reasonable doubt. Under all the circumstances of this case, we hold that the misstatement of law in the orientation manual had no influence on the verdict.

2. Failure to Give a Curative Instruction

Maryland Rule 4-325(f) provides:

> (f) **Objection.** — No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. 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.

Trial counsel did not, at any time, ask the court to give a curative instruction concerning the orientation manual's misstatement of the jury's role. Thus, appellant's claim, that the trial court abused its discretion in failing to give such a curative instruction, is not preserved, and we decline to review it for plain error.

II.

Parties' Contentions

Appellant contends that the trial court erred or abused its discretion in requiring an incarcerated defense witness, Shaun McMahon, to testify in shackles. According to appellant, the trial court "failed to even recognize the applicable test for determining whether a witness may be shackled." Appellant further maintains that the trial court's failure to exercise discretion, in combination with the inherent prejudice to the defense in shackling the witness, which was "likely to cause the jury to question the witness's credibility[,]" requires us to reverse his conviction.

The State counters that "the record does not demonstrate that the defense witness actually testified while shackled," which, according to the State, completely undermines appellant's claim. But even if the witness was shackled during his testimony, the State contends that the trial court did not abuse its discretion in denying appellant's belated request to remove the shackles, and that, even were we to assume error, any such error was harmless because the witness's testimony was collateral to the contested issues at trial.

Additional Facts Pertaining to the Claim

When the defense announced that it would call Mr. McMahon to testify, the following occurred:

> THE COURT: Okay. So, um, can we go ahead and have Mr. McMahon brought up?

[DEFENSE COUNSEL]: Could you potential . . . he's in prison issue, but could he have his shackles removed when he gets up?[11] I just think it's kind of prejudicial to have a man in shackles . . .

THE COURT: How . . .

[DEFENSE COUNSEL]: I know of, the caselaw is pretty specific about the Defendant but, also fairness (inaudible)

THE COURT: Let's see how he's brought up first and I'll . . .

[DEFENSE COUNSEL]: He was very calm with me if that's saying . . . and also, he's only going to be here a few minutes.

THE COURT: Okay. Well, um, we'll, we'll . . . I'll make that determination. Um . . .

[DEFENSE COUNSEL]: If it makes any difference, his release date's in about two weeks so he's not going to act up.

THE COURT: Okay. Well, let's, so what's the prejudice to the, your client on this?

[DEFENSE COUNSEL]: Well, it's not . . . the prejudice would be whose testimony to believe, a guard over an inmate and there's an implied bias and I know we've already voir dired everyone on this and they're willing to do their best to not be biased against them but it puts the Defense at a disadvantage if our witnesses are in shackles and the State's are not.

[PROSECUTOR]: This is, this witness is going to testify that it was Mr. Canty's regular practice to take his drugs back to his cell and he was, he has no evidence of the fight, right? It's not in direct contradiction of anything that any of my witnesses have said (inaudible).

THE COURT: Okay. At, at this point, I am going to deny that motion with your . . . if I believe it becomes, will be appropriate, I will, I will grant it but it sounds like this witness is going to be very brief. I, I'm, I think any

[11] The day before trial, trial counsel filed a motion requesting that appellant "have his shackles and restraints removed while he is in the presence of the jury." Counsel further asked that appellant "be able to wear civilian clothing while in the presence of the jury." Trial counsel did not, at that time, make a similar request regarding his witness, Mr. McMahon.

> prejudice that could be attributed to the Defendant, um, is negligible. Um, under this circumstance, I think all parties, all the jurors understand where this offense allegedly took place and, um, its very nature the inmate's within the Department of Corrections. So, I'm, I'm struggling with the finding of prejudice to the Defendant under that circumstance. Um, but, I note your objection.
>
> [DEFENSE COUNSEL]: Thank you, Your Honor.

Mr. McMahon then testified that he had been appellant's cell mate during a several-month period which included the time in question. He further testified that appellant's routine was to take his medication with food and that he "always brought his medication back to his cell[.]"

Analysis

As a preliminary matter, we address the State's assertion that "the record does not demonstrate that the defense witness actually testified while shackled[.]" During the pendency of this appeal, we granted a motion to correct the record with an audio recording of the proceedings. That recording is consistent with appellant's contention that the defense witness, Shaun McMahon, was in shackles when he appeared to testify. When Mr. McMahon appeared, trial counsel asked that his wrist restraints be removed, and the sound

of clanking chains is audible.[12] We assume for present purposes that the jury was aware that Mr. McMahon was in shackles when he appeared to testify.[13]

A trial court "'has broad discretion in maintaining courtroom security.'" *Lovell v. State*, 347 Md. 623, 638-39 (1997) (quoting *Whittlesey v. State*, 340 Md. 30, 84 (1995), *cert. denied*, 516 U.S. 1148 (1996)). Thus far, no Maryland reported decision has addressed the scope of that discretion in the context of shackling of witnesses rather than of defendants themselves. We assume without deciding that the same body of law applies in both circumstances.

The general rule is that a defendant (and thus, we assume, a defense witness) has a right to be tried "without being shackled, chained, bound, handcuffed, gagged, or otherwise physically restrained." *Id.* at 639 (quotation marks and citation omitted). The rationale behind the rule is that "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck v. Missouri*, 544 U.S. 622, 630 (2005). *Accord Whittlesey*, 340 Md. at 85 (observing that the use of "restraints might derogate the presumption of innocence in the eyes of the jury"); *Wagner v. State*, 213 Md. App. 419, 476 (2013) (noting that "requiring a defendant to wear shackles that will be seen by a jury implicates the defendant's due process right to a fair trial"). Thus, shackling a defendant

[12] Even if we may infer from the audio recording that Mr. McMahon's wrist restraints were removed prior to when he testified, we further infer that, at the moment he appeared, he was in shackles, and because the proceedings took place in open court before the jury, the shackles were visible to the jury.

[13] That assumption also is consistent with the trial court's ruling, denying the defense motion to unshackle the witness but with the promise to revisit that ruling should it become "appropriate[.]"

during trial is "inherently prejudicial," *Hunt v. State*, 321 Md. 387, 409 (1990), *cert. denied*, 502 U.S. 835 (1991), and "it is appropriate only when there is a compelling state interest." *Wagner*, 213 Md. App. at 477.

"There are three essential state interests which may justify physically restraining a defendant: Preventing the defendant's escape, protecting those in the courtroom, and maintaining order in the courtroom." *Hunt*, 321 Md. at 410. "Unless one or more of these factors outweigh any prejudice to the defendant, physical restraint is inappropriate." *Id.* In determining whether there is a compelling state interest sufficient to allow shackling a defendant (and presumably, a defense witness), a trial court must make "an individualized evaluation of both the need for shackling and the potential prejudice therefrom." *Whittlesey*, 340 Md. at 85. The trial court must "ensure that the record reflects the reasons for the imposition of extraordinary security measures." *Id.* at 86.

In the instant case, the trial court skipped any consideration of an "essential state interest[]," assumed, or silently determined that there was none in addressing Mr. McMahon's appearance before the jury in shackles. The court went directly to the matter of prejudice. The court declared that "any prejudice that could be attributed to the Defendant, um, is negligible." It added that, "under this circumstance, I think all parties, all the jurors understand where this offense allegedly took place and, um, its very nature the inmate's within the Department of Corrections." We do not accept the reasoning that the mere fact that the witness was an inmate means no prejudice, but assuming that, in this instance, the court abused its discretion by relying solely on Mr. McMahon's status, we conclude that appellant was not prejudiced.

As we previously noted, the jury deliberated for a half-hour and asked no questions during its deliberations. Furthermore, although the trial court relied solely upon Mr. McMahon's status in concluding that no prejudice ensued from his appearance before the jury in shackles, that status does, nonetheless, weigh in favor of harmless error, because the jury understood that Mr. McMahon was an inmate at a maximum security prison.[14] But most importantly, Mr. McMahon's testimony was, at most, of marginal importance—as trial counsel himself acknowledged, Mr. McMahon did not "know anything about" the "altercation with the officers"; rather, he testified only about appellant's routine of taking medication back to his cell and consuming it with his food, a point that was largely uncontested. Therefore, any error was harmless beyond a reasonable doubt.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[14] *See Western Correctional Institute*, Maryland Dep't of Pub. Safety & Corr. Servs., https://www.dpscs.state.md.us/locations/wci.shtml (last visited Apr. 26, 2024) (indicating that the security level is "Maximum").

Circuit Court for Allegany County
Case No. C-01-CR-21-000805

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1013

September Term, 2023

DAFON CANTY

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Nazarian, J.

Filed: May 15, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1 104(a)(2)(B).

The crime at issue in Dafon Canty's case—a second-degree assault on a correctional officer—didn't put the jury to an exceptionally complicated analytical task. But the relatively simple instructional path this case should have followed was occluded needlessly, and in two ways that put three different standards in the jury's way. The Judiciary itself created the *first* roadblock by publishing and distributing a jurors' orientation manual, called *Serving on A Maryland Trial Jury*, that contained an indisputably incorrect statement of the jurors' role. We know that the jurors had and saw this manual and that they had it in the jury room with them during deliberations, unlike the actual jury instructions, which don't appear to have been provided. The *second* roadblock appeared when the court misread the pattern jury instruction on the presumption of innocence and the State's burden to prove its case beyond a reasonable doubt.

In combination, the contradictory directives from the court—the jurors' manual's (incorrect) statement of the law, the court's (correct) preliminary instructions on burdens of proof, and the court's (incomplete) pre-deliberation instructions—forced this jury to navigate three different statements of the standards on its own. The circuit court could have cured this confusion by removing the manual or by replacing the venire, relief Mr. Canty requested, but declined to do so. My colleagues hold that the manual's misstatement of the law had no influence on the verdict. I am not persuaded. This case would be simple to try again, without self-inflicted confusion. I would reverse Mr. Canty's conviction and remand for further proceedings consistent with this opinion.[1]

[1] I agree with my colleagues' conclusion that the circuit court didn't abuse its discretion in requiring a defense witness to testify in shackles.

I.

Lawyers and judges understand that a defendant's innocence plays no role whatsoever in a criminal trial. Indeed, it plays no role in the criminal *law* of Maryland except in connection with a petition for a writ of actual innocence, a relatively recent statutory innovation.[2] A criminal trial determines a defendant's guilt of alleged crimes by testing whether the State has proven each element of the crime beyond a reasonable doubt. If the State succeeds, the defendant is guilty; if not, the defendant is not guilty. The danger of including innocence in the analytical mix is obvious: any consideration of innocence places the burden of proving it on the defendant who, under our system of criminal law, has no burden whatsoever, and it defeats the presumption of innocence that each defendant has as they enter the proceeding and hold until judgment otherwise is entered. And although one can debate the broader philosophical question of whether acquittal truly exonerates a defendant (or should), that isn't the point of a criminal trial and never has been.

So it is mystifying to learn that a Judiciary-written and -provided juror orientation manual—quite possibly the first thing that potential jurors see after arriving for service—misstated the jurors' role in exactly this way. The language undoubtedly was meant to read as colloquial and more accessible, but it committed perhaps the one unforgivable sin of

[2] Even there, a petitioner can prevail without actually proving their innocence. Md. Code (2001, 2018 Repl. Vol.), § 8-301(a)(1)(i) of the Criminal Procedure Article (petition must claim that there is newly discovered evidence that "if the conviction resulted from a trial, creates a substantial or significant possibility that the result may have been different . . ."). And that, of course, is a post-conviction vehicle that's relevant only long after a person's initial judgment of conviction and the exhaustion of direct appellate review.

imprecision in this context. I agree with my colleagues that the first page of the manual should not say that the "job of a trial juror" in a criminal case is to "listen[] to evidence in a courtroom[] and decide[] the guilt or innocence of the defendant[,]" and it's more than inartful drafting—it's wrong. If this manual has in fact been in circulation since 2012 and is still available and in use, the Judiciary should remove it and revise it forthwith.

But that directive doesn't help the jury convened in Mr. Canty's case. That jury received and read the manual. The question is whether receiving and reading the incorrect statement of their purpose and function tainted the jury's understanding of its role to the point that the trial court erred in denying Mr. Canty's motion to remove the manual or to strike the venire. My colleagues don't find any harm—they conclude that this panel was screened for bias and eventually received correct instructions and, in any event, view the relief Mr. Canty sought as unreasonable. Slip op. at 14. I see the damage done by this manual as more severe than my colleagues do, and the manual's misinformation was only compounded by confusing instructions that the jury received over the rest of the trial. And unlike my colleagues, I can't escape the conclusion that the resulting confusion very well could have misdirected the jury's analysis. And that is enough to warrant a new trial.

II.

Again, the first thing this jury saw and read—we assume they saw and read it because the circuit court assumed they saw and read it—was an official Maryland Judiciary juror orientation manual that told them that their job was to decide the "guilt or innocence of the defendant." As the majority recounts, slip op. at 2–3, the manual does refer as well to the State's burden to prove beyond a reasonable doubt that the defendant committed the

crime. But neither that entry nor any other part of the manual distinguished a finding that a defendant is not guilty from a finding of innocence. That misconception is left unclarified altogether.

Mr. Canty filed a motion *in limine* the morning of trial asking the court to strike from the venire everyone who had been provided a copy of the manual, on the ground that they had been tainted by it. My colleagues view this request as an unreasonable request, slip op. at 14, but I don't see it that way. Culling the panel at that point would have excised any taint or confusion instantly. The cost doesn't seem that onerous either. If there weren't enough other jurors to form a new venire, the trial might have had to be postponed—a source of aggravation, perhaps, but one created by the Judiciary itself, not Mr. Canty. Denying this motion seems like a lost opportunity to solve the problem right when it happened and, ultimately, to save the trial. And then, the court denied Mr. Canty's request to take the manuals away from the jurors. So not only were the jurors left in place, the misleading manuals stayed in the room with them.

The confusion over the jury's role only compounded as this trial went on. After jury selection but before evidence began, the court read Maryland Criminal Pattern Jury Instruction 2:02 in full, so the jury got at that point a correct and complete statement that Mr. Canty was presumed innocent, that the State bore the burden of proving his guilt beyond a reasonable doubt as to every element of the crime, and that he was not required to prove his innocence. At that point, the incorrect statement of the jury's role described in the manual may have been countered by the Pattern Instruction's correct statement of the jury's role.

But things went sideways again when the court instructed the jurors before deliberation. Although the court intended to read the appropriate pattern instruction on the presumption of innocence again, the court left out two pretty important sentences: "[The burden of proving the guilt of the defendant beyond a reasonable doubt] means that the State has the burden of proving, beyond a reasonable doubt, each and every element of the crime [crimes] charged. The elements of a crime are the component part of the crime about which I will instruct you shortly." Nobody caught this or objected, but the record reveals the discrepancy. And although we don't know of any other instructional errors, it appears, and the State acknowledged at oral argument, that the court's written jury instructions were not provided to the jurors during deliberations.

The net result was largely unmitigated confusion. While they deliberated, the jury had one incorrect statement of their role—that one in writing, and in hand in the jury room—competing against their memory of two oral renditions of their role, one of which was delivered correctly and the other incompletely. Lawyers and judges can parse through these, not least because we know which parts were wrong to begin with. But it is a lot to ask a jury to reconcile these competing statements of their role, especially since it is the court's role to explain the jury's role to it and, most importantly here, the confusion was solely a function of errors created and cemented into place by the judicial branch. Our courts have worried about this before. In *Ingram v. State*, 427 Md. 717, 727–33 (2012), defense counsel had sought at trial to describe to the jury a "probability spectrum" contrasting the criminal reasonable doubt standard with other (lower) burdens of proof in civil cases. The defense argued that this context would help the jury understand the decision

the court was asking them to make, but our Supreme Court held that describing these "extraneous" legal standards posed too much risk of confusing the jury and affirmed the circuit court's decision not to allow counsel to make this argument.

My colleagues are comfortable that this jury wasn't confused or that any confusion was mitigated by the jury selection process and the reading of Pattern Instruction 2:02. I am not so confident. The fact that none of the jurors responded to the *Kazadi*-type questions meant only that they thought they could perform their role as jurors—those questions didn't (and couldn't) undo or ameliorate the confusion the orientation manual and the inconsistent pattern instructions created before and after jury instructions. Yet another curative instruction might have helped had Mr. Canty asked for one, but the inconsistent readings of Pattern Instruction 2:02 undermines the certainty of that remedy, and the latter, and incomplete, reading added another source of potential confusion.

This leaves us to ask whether the trial court abused its discretion in declining to remove the manuals from the jury and in declining to replace the venire. I would hold that it did. Viewed purely at the time of Mr. Canty's motion *in limine*, I cannot think of a reason *not* to take the manuals away from the jurors—what was gained by leaving them there? If the intention was to have the jury ignore the manual in favor of the court's instructions, fine—take the manual away, tell them you're removing it, and give the correct instructions. I cannot imagine why the manuals were allowed to remain in the jury room during deliberations at all, especially if the court's binding jury instructions were not provided in writing. Add to that the inadvertently incomplete reading of the Pattern Instruction and we know that this jury was left to figure out for itself how to navigate conflicting descriptions

of its task. Some confusion may have been inevitable, but this jury's ability to walk through it accurately was compromised, and I do not share my colleagues' certainty that the errors didn't matter.

III.

This case didn't raise the most complicated issues ever, and I understand the pressure to get the trial underway and done. At the same time, the relatively straightforward nature of the issues here made it easier to dismiss the initial venire, start again with a new set of potential jurors, or postpone the case if necessary. And the fact that the jury took only forty-five minutes to reach its verdict doesn't say anything about whether the members applied the right standard. Indeed, if they came away thinking that Mr. Canty's innocence was at issue and that, as an inmate alleged to have assaulted a correctional officer, he couldn't have been innocent, the misstatement of the jury's role might well have greased their path to an analytically incorrect conclusion. It doesn't matter how likely it is that Mr. Canty is guilty under the correct standard or that he'll be convicted or tried again. He was entitled to have a jury determine whether he was guilty or not guilty, and I am not convinced that we can know that that's the question this jury answered.

With respect, then, I dissent.