Circuit Court for Montgomery County
Case No. 138536C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2191

September Term, 2022

KINGSLEY ENYINNAYA AKPARAWA

v.

STATE OF MARYLAND

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

JJ.

Opinion by Arthur, J.

Filed: May 17, 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 Rule 1-104(a)(2)(B).

At the conclusion of a three-day trial in the Circuit Court for Montgomery County, the jury found Kingsley Akparawa guilty of one count of sexual abuse of a minor and five counts of rape in the second degree.

After the trial, the court asked the jurors to complete a written exit survey with questions about their experience serving on the jury. One juror wrote that the juror "thought" that one of the bailiffs or courtroom deputies had "acted inappropriately in [the] courtroom" on the second day of the trial by "making faces at a juror and eye rolling[.]"

Several weeks after the trial, the court informed the parties of the juror's response to the exit survey. Akparawa moved for a new trial under Md. Rule 4-331. He argued that the conduct of the bailiff, as described by the juror in the exit survey, violated his right to a fair trial by an impartial jury. The court denied the motion for new trial.

The court sentenced Akparawa to a total of 75 years of imprisonment, with all but 35 years suspended, followed by five years of supervised probation. Akparawa has appealed, raising the single issue of whether the circuit court erred when it denied his motion for new trial. For the reasons discussed in this opinion, we determine that the court did not err or abuse its discretion when it denied the motion for new trial. Consequently, the judgments will be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. Jury Trial on the Charges Against Akparawa

By indictment in the Circuit Court for Montgomery County, the State charged Akparawa with one count of sexual abuse of a minor and seven counts of rape in the

second degree. The State alleged that, in a continuing course of conduct between June 2018 and August 2019, Akparawa repeatedly raped a child while he had temporary care and custody and responsibility for supervision of the child. The victim was between 10 years old and 11 years old at the time of the alleged acts.

The jury trial on all charges took place on three days: Tuesday, September 6, 2022; Wednesday, September 7, 2022; and Thursday, September 8, 2022.

On the first day of trial, the parties completed jury selection and the court delivered preliminary instructions to the empaneled jury.

On the second day of trial, after opening statements, the State presented its case-in-chief. The State introduced testimony from: the victim; three members of the victim's family; a detective who had been present during an interview of the victim and who had interviewed Akparawa; and a child trauma therapist, whom the court permitted to testify as an expert in child and adolescent mental health and child sexual abuse. Defense counsel cross-examined each of the State's witnesses. At the close of the State's case-in-chief, the court granted a motion for judgment of acquittal on two of the counts of second-degree rape.

On the third day of trial, Akparawa testified in his own defense. The State recalled two of its witnesses in rebuttal. Afterwards, the court delivered its final instructions to the jury, and the attorneys made closing statements. The jury completed its deliberations and announced its verdict later that afternoon. The jury found Akparawa guilty as to all charges submitted for its consideration: one count of sexual abuse of a minor and five counts of second-degree rape.

B. Response to the Juror Exit Survey

At the conclusion of the trial, the circuit court gave jurors a written survey with questions about their experience in serving on the jury. The one-page survey form is titled: "Juror/Customer Service Exit Survey." Jurors who complete the survey may submit it by mail to the Jury Commissioner's Office of the circuit court.

An introductory paragraph describes the purpose of the survey. It states:

> Your responses and answers to the questions below will assist us in improving our jury service and customer service in the Montgomery County Circuit Court. All responses are voluntary and confidential, and we request that you DO NOT SIGN your name. We appreciate your taking the time to complete this information.

The first few questions seek general information about the juror's service: whether the juror was selected to report to a courtroom for jury selection; whether the juror actually served on a case; the type of case (criminal or civil) on which the juror served; the number of days served; and the name of the trial judge. The next two questions ask the juror to "rate" the judge and the attorneys, providing a blank space for the juror to write a response.

Question five asks the jurors to "rate" various "factors[.]" The factors listed are: "Video"; "Orientation Program"; "Parking and Directions"; "Jury Commissioner and Staff"; "Jury Lounge"; "Courtroom Personnel/Other Court Personnel"; "Security Personnel"; and "Cafeteria Food." For each factor, the possible ratings are "Excellent"; "Good"; "Adequate"; "Poor"; or "N/A."

The next question asks whether the juror visited the circuit court website prior to service. If the juror answers "YES" to that question, the juror is asked to rate two

additional factors: "Information regarding jury service on the website" and "Locating jury service information on the website." Finally, the survey states that "[a]dditional comments are welcome" and provides a blank space for writing comments.

At issue in this appeal is a response to the juror survey that the court received shortly after Akparawa's trial.[1] As requested by the instructions, the juror did not write the juror's name on the completed survey. The information on the survey establishes that the juror served at Akparawa's trial. The juror listed the "Date" as "Sept 8," which was the third and final day of Akparawa's trial.

In response to question five, the juror provided ratings for the first six "factors" listed on the form. For the next factor, the juror provided no rating but circled the words "Security Personnel." Next to those words, the juror wrote: "one on Wednesday I thought acted inappropriately in courtroom making faces at a juror and eye rolling[.]" As mentioned previously, Wednesday, September 7, 2022, was the second day of the trial, during which the attorneys made opening statements and the State presented its entire case-in-chief.

C. Disclosure of the Response to the Juror Exit Survey

Several weeks after the trial, while Akparawa was awaiting sentencing, the circuit court convened a status hearing on its own initiative. The status hearing took place on October 19, 2022, about six weeks after the verdicts. The same attorneys who had represented the defense and the prosecution at trial attended the status hearing.

[1] An image of the completed form is reproduced in the appendix to this opinion.

The trial judge explained that he had convened the hearing "because some information was brought to [his] attention following the trial," and he thought that it was "important to share that information with the parties." The judge informed the attorneys that the circuit court typically gives jurors an exit survey after a trial, intended to gather information to help improve the court's services to the public. The judge displayed the survey response in which a juror had expressed the opinion that one of the security personnel had "acted inappropriately" on the second day of trial by "making faces at a juror and eye-rolling[.]" The judge did not provide the parties with a copy of the survey response at that time. After disclosing that information, the judge asked the attorneys if they wished to "say anything else on the record."

In response, the prosecutor made the following statement:

> [PROSECUTOR:] We were actually aware of this incident, and [defense counsel] and I had a conversation about it during the trial. I can't remember exactly how -- well, maybe [defense counsel] remembers -- how we became aware of it, but I did actually inquire of that officer and -- that, the sheriff's deputy -- what was going on and shared the information . . . with [defense counsel], and essentially, the sheriff's deputy had been drifting off and falling asleep a little bit, and the deputy that he had made eye contact with -- or, excuse me, the juror he had made eye contact with had noticed and saw him drifting off, and so it was -- according to this deputy, it was a sort of acknowledgment of, like, ooh, I kind of drifted off to sleep a little bit and oops kind of situation. That's my recollection of it.
>
> [Defense counsel], obviously, if you want to, you can clarify anything, but we did actually -- we were aware of this. It was inappropriate. I did speak with the deputy, and -- but it was related to him drifting off and falling asleep and a juror seeing it.

Defense counsel then made the following statement:

> [DEFENSE COUNSEL:] Just briefly now, Your Honor. I was aware that there was -- at one point a deputy was laughing. It was, it looked like,

> pretty quick with a juror. I would note that I was unaware of -- well, of eye-rolling, things like that, and obviously, it's something that I'm going to be researching and discussing with Mr. Akparawa, and obviously, at this point I want to do additional research before making any other statement on the record, that if any motion is appropriate to be made, then we'll bring it to the Court's and the State's attention at that time.

After those remarks, the judge stated that he would "leave it to counsel" to take any appropriate action concerning the response to the juror exit survey.

D. Motion for New Trial

On October 31, 2022, Akparawa filed a motion for new trial under Md. Rule 4-331. He contended that the conduct of the bailiff during the trial impaired his constitutional right to a fair trial by an impartial jury.

In the motion, defense counsel made factual assertions based on his personal observations of what occurred on the second day of trial. Counsel stated:

> During the testimony, the undersigned counsel noticed that the deputy sheriff (the "Deputy") in the courtroom was smiling and snickering during the testimony. I also noticed that one or two of the jurors were smiling and snickering back at him. At a break in the testimony, I mentioned this issue to the Assistant State's Attorney, and she confronted the Deputy. The Deputy advised that he may have dozed off during the testimony and that is why the jurors were laughing.

Akparawa stated that, at the time of the motion, he "d[id] not have the exact wording on the response" to the juror exit survey.[2] Based on the information disclosed at the status hearing, Akparawa asserted that the response to the juror exit survey "indicated" that the deputy sheriff "was acting inappropriately" by "laughing and rolling

[2] At the request of the defense, the court later issued an order releasing the survey response to the parties and making a copy of that survey part of the record.

his eyes[.]" Akparawa noted that the deputy sheriff "did not mention that he was rolling his eyes" when the prosecutor had spoken with the deputy sheriff during the trial.

In support of the motion, Akparawa argued that the deputy sheriff's conduct during the trial was inherently prejudicial to the defense. Akparawa asserted that the deputy sheriff "was first seen smiling and snickering with one or two jurors" and "then was apparently rolling his eyes at the testimony." He argued that "one or more of the jurors could have been influenced by this behavior." He also argued that "[t]he expression of rolling the eyes is well known to be a symbol of disbelief." He observed that the deputy sheriff was "clearly an agent of the court[.]" Akparawa concluded, therefore, that the court itself, through the deputy sheriff, "was expressing its belief and/or disbelief as to the testimony of the case."

In the State's opposition to the motion,[3] the prosecutor also made assertions based on her personal observations of what occurred at trial. The prosecutor wrote:

> The recollection of the undersigned Assistant State's Attorney [hereinafter "the ASA"] of this event is as follows: Defense counsel approached the ASA during a brief recess following her questioning of a witness. While seated at counsel table, defense counsel had noticed an exchange of glances between a deputy sheriff seated at the edge of the courtroom and a juror with a direct line of sight to that deputy based on their locations in the courtroom. The juror apparently reacted with a smile or perhaps small, silent laugh. When defense counsel raised this issue with the ASA, she asked defense counsel how he wanted to proceed; she offered to ask the deputy about the exchange to gather more information or to bring it to the attention of the Court. Defense counsel asked the State to consult with the deputy about what he had witnessed and declined to be present for the exchange. The ASA spoke with the deputy, who informed the ASA that he had been drifting off to sleep and when he opened his eyes, he saw one of

[3] The State raised no objection to Akparawa's use of the juror's written statement in support of his motion for new trial.

> the jurors in the middle of the front row watching him. In response, the deputy shrugged and rolled his eyes, prompting the juror's reaction. No further contact or communication was made between the juror and the deputy. The ASA promptly informed defense counsel of the content of her conversation with the deputy and asked how he would like to proceed. Again, she offered to bring the matter to the attention of the Court if he felt it was necessary. Defense counsel declined to raise the issue on the record, making a comment that this was nothing to worry about.

The prosecutor later added: "In fact, the event occurred during the State's case-in-chief, and it is the ASA's recollection that she was questioning a witness at the time."

Opposing the motion, the State argued that the motion for new trial was untimely because the motion was filed more than 10 days after the verdict. The State claimed that "defense counsel was well-aware of the incident" that formed the basis for the motion for new trial. The State asserted that defense counsel had "not rais[ed] this issue with the [c]ourt at the time of the event" and had "fail[ed] to raise it in a timely manner after trial[.]" The State argued that, if defense counsel had alerted the court of the issue at trial, "the [c]ourt could have inquired of the juror and the deputy on the record" and chosen an appropriate action, such as empaneling an alternate juror. The State concluded that, "[b]y failing to raise the issue with the [c]ourt and by affirmatively acknowledging to the State that the situation did not merit further action, defense counsel effectively waived the issue" as a basis for granting a new trial.

On the merits, the State argued that the record did not show that the deputy sheriff's conduct had caused either actual prejudice or inherent prejudice. In the State's view, the record did not establish that the conduct actually influenced the jury's decision-making process. The State argued that the record also failed to "establish that there is

any risk that the event had an impact on the jury's decision-making process."

E. Denial of Motion for New Trial

The circuit court conducted a sentencing hearing on January 31, 2023. Before addressing the matter of sentencing, the court heard arguments concerning the motion for new trial.

During the hearing, Akparawa disputed the State's contention that the motion was untimely under Maryland Rule 4-331(a), which authorizes a court to order a new trial "in the interest of justice" on a motion "filed within ten days after a verdict[.]" Akparawa acknowledged that the motion was not filed within 10 days after the jury verdict. Akparawa argued, however, that the motion had been filed within the 10-day period after the status hearing at which the court had disclosed the juror survey response.[4] In the alternative, Akparawa argued that the court should consider the motion under its powers to revise a judgment at any time "in case of fraud, mistake, or irregularity" under Md. Rule 4-331(b)(2).

Addressing the merits of the motion, defense counsel began by describing his recollection of events from the second day of trial. He stated:

> [DEFENSE COUNSEL:] Regarding the merits of this case, Your Honor, so from what I recollect from the -- from what happened during the trial -- and obviously, a lot of things are going on at trial -- there was -- the State's witness was testifying, was being questioned by the State, and I did notice that the deputy sheriff that was in the room was making eye contact and

[4] The status hearing occurred on October 19, 2022. The tenth day after the status hearing was Saturday, October 29, 2022. Defense counsel filed the motion for new trial on Monday, October 31, 2022. When the last day of the designated period for filing a motion is a Saturday, Sunday, or holiday, the filing period ordinarily runs until the end of the next day that is not a Saturday, Sunday, or holiday. Md. Rule 1-203(a)(1).

snickering with a couple of the jurors.

> I did make, at a break -- we had a break; I got a bathroom break or something like that -- then I did bring it to the attention of the assistant state's attorney, saying that I observed that the deputy was, like, laughing, snickering, things like that, with a couple of the jurors. The -- from my understanding and from what I remember, the State did go to the deputy and say, you know, what's going on? The deputy mentioned something about falling asleep or dozing off or something like that and the juror may have caught -- saw him and they -- and laughed or something like that.
>
> When I was told that, I did not bring it to the attention of the Court. I found that, just the fact that the deputy may have dozed off and been caught by one of the jurors, as not something that -- as innocuous, okay, not anything that's prejudicial. I didn't think it impacted the trial in any way just that fact that he may have fallen asleep and been seen.

Defense counsel explained that, after learning of the response to the juror exit survey, he came to believe that the deputy sheriff had engaged in conduct that was prejudicial to Akparawa. Counsel stated that the description of the deputy sheriff's conduct as "making faces at a juror and eye-rolling" "made [him] think that it wasn't just about dozing off." Counsel emphasized that, although he had noticed the deputy sheriff "smiling" or "laughing" with the jurors, he "did not see" anything that he would describe as "eye-rolling or making faces[.]" Counsel argued that "[e]ye-rolling is a different thing than falling asleep and a couple snickers[,]" because "[e]ye-rolling is well known to be a symbol of disbelief." Because the jurors had observed "an agent of the court standing up there and rolling [his] eyes" during the trial testimony, counsel argued that Akparawa sustained inherent prejudice to his right to a fair trial.

Opposing the motion, the prosecutor argued that the jurors would not have interpreted the deputy sheriff's conduct as a commentary on the testimony. The

prosecutor asserted that the jurors may have been "glancing around the courtroom" and observed that the deputy sheriff "might not have been fully alert and attentive" during the State's examination of a witness. The prosecutor argued: "[S]o I think what we're talking about here is really a natural human interaction: when someone is caught maybe not doing their job to the best of their ability, that one might sort of make a face and even roll their eyes at themselves." These facial expressions, the prosecutor argued, were "not an endorsement . . . or a lack of endorsement of the State's case or the Defense's case of the merits of the case at all." The prosecutor asserted that the reason that defense counsel did not raise any issue with the conduct of the deputy sheriff at trial was that defense counsel recognized and acknowledged at that time that the conduct was "nothing to worry about[.]" The prosecutor concluded that Akparawa could not establish inherent prejudice because he had failed to "object[] to the challenged practice at trial" and because the record failed to show that the conduct "created an unacceptable risk that impermissible factors would come into play in the jury's determination of the case."

After considering those arguments, the court announced that it would deny the motion for a new trial. The court gave the following explanation for its ruling:

> [THE COURT:] . . . . I'm not going to deny the motion based upon timeliness. Even if it were outside of 10 days, I don't think that it would be appropriate to, in this case, deny the motion simply because of that. I think it's a better practice, given the seriousness of the charges of which the defendant was convicted, I think it's more important that I deal substantively with the arguments and resolve the issue now before it gets any later and before we have to try to recreate something, go through this again. I just don't find timeliness to be a basis for denying the motion, at least not one that I wish to do. So even if it was untimely, I'm going to address the merits of the motion, in any event. I'm not making a finding about timeliness.

In this case the Defense has a couple of difficulties with their motion for new trial: First, there was no objection to the incident raised at trial. I don't think the distinction between snickering and eye-rolling is of any moment. I just don't find that learning of an eye-roll as opposed to what transpired during the trial and what's been alleged, snickering, makes any difference in the analysis. I know sometimes we don't like to admit this, but court personnel, including deputy sheriffs, courtroom staff, judges, we're all human beings. We make facial expressions all day long. Whether it's on the bench, whether it's in our daily work throughout the courthouse, we do make facial expressions.

The question really that this issue raises is whether it was clear to the Defense that the -- what was seen by a particular juror was such that it created an unacceptable risk that something impermissible would play into one or more of the jurors' determination of the case. So that's one of the factors, and again, there was no objection made at the trial.

Had there been an objection, the Court could have considered various remedies, which may have included a mistrial, but we'll never know. I don't know -- and I'm not going to speculate -- what would have happened had it been brought to the Court's attention. We don't know what impact this had on that juror other than what this particular juror said on this survey form, and this wasn't volunteered out of nowhere. The form that at least this member of the bench provides to jurors in terms of an exit survey simply says, how would you rate the following factors, and it lists a number of things: video orientation program, parking and directions, jury commissioner and staff, jury lounge, courtroom personnel slash other court personnel, security personnel, cafeteria food.

I frankly didn't anticipate the response that I saw on this, but all I know is what he or she said, quote: One on Wednesday -- after circling security personnel, the juror handwrote, quote, one on Wednesday, I thought, acted inappropriately in courtroom, making faces at a juror and eye-rolling, closed quote. That's all we know. We could have found out more had it been raised during the course of the trial, and there's no question that both the State and the Defense were aware that there was something about one of the security personnel that was out of the ordinary, but we don't know what, if any, impact it may have had on any of the jurors other than one believed it was inappropriate.

And, again, we do, we tell the jurors in instructions specifically about the judge: Don't read anything into anything that I say or do, what I

say to the lawyers, how I rule on objections. I oftentimes go further, and I tell them that sometimes I may make a facial expression and they're to disregard that. I'm fairly confident I gave that portion of the instruction and probably told them don't pay any attention to what you see from me.[5] I think we can infer from that that the jurors were instructed to do the same thing and would have understood that they're not to conclude anything from any of the other court personnel.

As you correctly point out, [defense counsel], security officers are part of the court. They're an arm of the court. They're here to keep order in the courtroom. They know what their function is. This juror was simply pointing out that he or she thought it was, quote, inappropriate, closed quote. So I find that the motion fails because there was no objection in the trial court.

Going beyond that, the third factor that's discussed in the Smith case is whether the defendant has established that the challenged -- here I'm going to say conduct instead of practice -- challenged conduct created an unacceptable risk that impermissible factors would come into play in the jury's determination of the case. This is, I think, light-years different from the Smith case, where courtroom security personnel were wearing, I think it was the Blue Lives Matter logo, basically creating a perception that was political in nature and perhaps not favorable to someone who's been accused of a crime and is on trial for that crime. This is very different.[6]

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[5] During its preliminary instructions to the jury, the court had stated:

You must decide this case based upon the evidence produced at trial. Nothing that I say or do during the course of the trial is intended to indicate or should be taken by you as indicating what your verdict should be. It was easy during COVID when I was constantly wearing a mask, because nobody could see my facial expressions. My wife tells me I don't have much of a poker face. So if I make a face, ignore it. Sometimes it doesn't mean anything. Most of the time it doesn't mean anything. Sometimes it might mean I just didn't like what I had for lunch or breakfast. Don't try to read anything into my body language, my facial expressions, any questions I might ask of either the lawyers or any witness that testifies. None of that is before you, only the testimony of the witnesses and the other exhibits that may be offered in evidence.

[6] In *Smith v. State*, 481 Md. 368 (2022), the bailiffs at the defendant's trial wore face masks displaying "a 'thin blue line' version of the American flag." *Id.* at 373. The

> As I said, these facial expressions that we all make can create a number of different impressions in a jury but I have no way of knowing whether this one in particular created that unacceptable risk that an impermissible factor would come into play. All I know is that that juror thought it was inappropriate. I think that's a fair conclusion to draw. It happens, and they just wanted to point that out.
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> So I don't think that the defendant has established that there was an unacceptable risk that an impermissible factor came into play in this jury's determination of the case. So for that additional reason, I'm going to deny the motion for new trial. Those are the reasons for my ruling.

After denying the motion for new trial, the court proceeded to sentencing. The court sentenced Akparawa to a total of 75 years of imprisonment: 15 years for sexual abuse of minor; 15 years for one count of second-degree rape, to run concurrently with the sentence for sexual abuse of a minor; and four, consecutive 15-year terms for the other four counts of second-degree rape. The court suspended all but 35 years of those sentences. The court imposed five years of supervised probation upon Akparawa's release, specifying that he would be required to register as a sex offender as a condition of his probation.

After the imposition of sentence, Akparawa noted this timely appeal.

DISCUSSION

In this appeal, Akparawa contends that this Court should reverse the judgments and remand the case for a new trial. He presents a single question for review: "Did the trial court err in denying Mr. Akparawa's motion for a new trial based on prejudicial

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Court held that the bailiffs' conduct was inherently prejudicial to the defendant's right to a fair trial. *Id.* at 374. The *Smith* case will be discussed in detail later in this opinion.

conduct of the courtroom bailiff that was not disclosed until after the trial?"

The State argues the judgments should be affirmed. As an initial matter, the State argues that Akparawa's motion for new trial was untimely under Md. Rule 4-331. The State asks this Court to hold that the motion was untimely, even though the circuit court did not deny the motion on that ground. On the merits, the State contends that Akparawa failed to establish inherent prejudice, either because he failed to object to the conduct of the bailiff at trial or because the bailiff's conduct did not create an unacceptable risk that impermissible factors might have influenced the jury's decision.[7]

This discussion will begin by addressing the State's contention that this Court should affirm the judgments on the ground that the motion for new trial was untimely. Afterwards, we will address the merits of the circuit court's determination that Akparawa failed to establish inherent prejudice.

A. Timeliness of Motion for New Trial

Maryland Rule 4-331 authorizes motions for new trial in criminal cases. This rule sets forth various grounds for granting a new trial and establishes time limits for filing a motion for new trial based on those grounds. In general, "[t]he broader the recognized grounds for a new trial, the stricter are the timeliness filing requirements; as the recognized grounds become narrower, the timeliness filing requirements relax

[7] The State further argues that, if this Court does not affirm the judgments, the correct remedy is to direct the circuit court to conduct "an evidentiary hearing during which the bailiff and jurors could be questioned" about the bailiff's conduct. In the circuit court, neither party requested an evidentiary hearing or sought to introduce testimony from the bailiff or any of the jurors. For his part, Akparawa seeks only a reversal of the judgments. He has not requested a remand for an evidentiary hearing.

somewhat." *Campbell v. State*, 373 Md. 637, 655 (2003).[8]

Section (a) of this Rule "provides the shortest period in which to file [a motion], but the broadest basis upon which relief can be granted[.]" *Campbell v. State*, 373 Md. at 652. It states: "On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." Md. Rule 4-331(a).

Section (b) of this Rule establishes two, distinct time periods for filing two different types of motions. The first sentence states that the circuit court "has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial . . . on motion filed within 90 days after its imposition of sentence." Md. Rule 4-331(b)(2). The second sentence states: "Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity." *Id.*

Section (c) of this Rule "provides the longest time period for filing a motion, but has the narrowest grounds for relief[.]" *Campbell v. State*, 373 Md. at 652. Under this provision, the court "may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial" within ten days after the verdict. Md. Rule 4-331(c)(1). A motion for new trial on the ground of newly discovered evidence must be filed within one year after the date of imposition of sentence or the date that the court receives a mandate issued by the final appellate court to review the case, whichever is later. *Id.*

[8] Unlike many other filing periods set forth in the Maryland Rules, the filing periods for a motion for new trial may not be extended. Md. Rule 1-204(a) (providing that "[t]he court may not shorten or extend the time for filing . . . a motion for new trial").

In its appellate brief, the State argues that this Court should not address the merits of the motion for new trial. The State points out that the jury rendered its verdict on September 8, 2022. Akparawa filed his motion for new trial on October 31, 2022, which was 53 days after the verdict. The State asserts, therefore, that there is "no question" that the motion was not filed within 10 days after the verdict, the period set forth in Md. Rule 4-331(a). The State acknowledges that Akparawa filed his motion within the 10-day period following the status hearing at which the trial court first disclosed the response to the juror exit survey. The State argues, however, that Rule 4-331(a) does not include any language that might extend the filing period when a defendant receives new information after the verdict. For his part, Akparawa agrees that his motion "could not be considered under Rule 4-331(a)[.]"

The State observes that, at the hearing on the motion for new trial, Akparawa invoked Md. Rule 4-331(a) as well as Md. Rule 4-331(b)(2), which authorizes the court to revise a judgment at any time on the ground of "fraud, mistake, or irregularity." The State argues that the conduct at issue in the motion does not amount to "fraud, mistake, or irregularity," as those terms have been narrowly defined. *See generally Minger v. State*, 157 Md. App. 157, 172-75 (2004) (explaining that the term "mistake" in Md. Rule 4-331(b) means a "jurisdictional error," such as when the court had not obtained personal jurisdiction over a party, and that the term "irregularity" means "irregularity of process or procedure," such as the failure to send a required notice) (citations and quotation marks omitted); *State v. Rodriguez*, 125 Md. App. 428, 448-49 (1999) (explaining that the type of "fraud" that might justify setting aside a judgment under Md. Rule 4-331(b) is

"extrinsic fraud," meaning fraud that "prevented the actual dispute from being submitted to the fact finder at all") (citations and quotation marks omitted). Akparawa disagrees, arguing that the allegedly prejudicial conduct of the deputy sheriff amounts to an "irregularity" within the meaning of Rule 4-331(b).

Although the State discusses Md. Rule 4-331(b)(2), the State makes no mention of the first sentence of that provision, which authorizes the court to "to set aside an unjust or improper verdict and grant a new trial" on a motion filed within 90 days after the imposition of sentence. In his brief, Akparawa argues that the trial court had authority to grant him a new trial under this provision. Akparawa points out that "the 'unjust' or 'improper' standard" from the first sentence of Rule 4-331(b)(2) "is not synonymous with the 'fraud, mistake, or irregularity' standard" from the second sentence. *Minger v. State*, 157 Md. App. at 167. When a defendant files a motion for new trial "within ninety days of sentencing, a court may set aside a verdict upon a showing that the verdict was 'unjust' or 'improper.'" *Id.* at 166-67. Likewise, when a defendant files a motion for new trial "prior to sentencing," the court may exercise its revisory power to set aside an unjust or improper verdict. *Id.* at 166 (discussing *Bates v. State*, 127 Md. App. 678, 692 (1999)). Although most trial errors "are not generally cognizable under Rule 4-331(b)," this Court "has sometimes considered appeals of trial courts' denials of motions for new trials under Rule 4-331(b) based upon assertions of trial error." *Washington v. State*, 191 Md. App. 48, 122-23 (2010).

The State acknowledges that Md. Rule 4-331(c)(1) authorizes motions for new trial "on the ground of newly discovered evidence which could not have been discovered

by due diligence in time to move for a new trial" within 10 days after the verdict. In this appeal, Akparawa contends that the juror's written response to the exit survey constitutes "newly discovered evidence" because the trial court did not disclose the survey response until several weeks after the verdict. Akparawa further argues that the "newly discovered evidence" that may justify granting a new trial under this provision may include evidence that "expose[s] procedural flaws in the trial that denied the [defendant] due process of law." *Yonga v. State*, 221 Md. App. 45, 57 (2015), *aff'd*, 446 Md. 183 (2016). The State has not disputed the assertion that the survey response qualifies as "newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial" within 10 days after the verdict under Md. Rule 4-331(c)(1). The State nevertheless argues that Akparawa has "waived" that ground for relief because he did not mention that ground as the basis for his motion in the circuit court.

Based on those arguments, the State argues that the circuit court "could have" denied the motion for new trial on the ground of untimeliness. The State asks this Court to affirm the judgments on the ground of untimeliness, even though the circuit court did not rely on that ground. The State insists that it is "of no moment" that the circuit court refused to deny the motion on that ground.

The State's timeliness argument is unpersuasive. The State's argument fails to recognize that, in this case, the circuit court affirmatively exercised its discretion to decide the motion on the merits. Accordingly, for the purpose of appellate review, the appropriate question is whether the circuit court had authority to do so. We agree with Akparawa that, under the circumstances, the circuit court had authority under Md. Rule

4-331 to consider the merits of Akparawa's motion for new trial.

In his brief, Akparawa cites *Campbell v. State*, 373 Md. 637 (2003), in which the Court analyzed the trial court's authority to consider a motion for new trial filed before sentencing. The defendant initially filed a motion for new trial within 10 days after the verdict, alleging that defense counsel had obtained exculpatory evidence after the trial. *Id.* at 642-43. Three weeks after the verdict, the defendant filed a supplement to his motion, proffering additional evidence discovered after the trial. *Id.* at 643. Two months after the verdict, the defendant filed a second supplement, proffering more newly discovered evidence impeaching the credibility of one of the State's primary witnesses. *Id.* at 643-44. The trial court denied the motion for new trial without addressing the issue of timeliness, concluding that the additional evidence would not have affected the verdict. *Id.* at 644-45.

On appeal, this Court concluded that the trial court lacked authority to decide the defendant's motion for new trial to the extent that it relied on the additional evidence introduced in the supplement filed two months after the verdict. *Campbell v. State*, 373 Md. at 646. This Court reasoned that this filing was "too late" under Rule 4-331(a), because it had not been filed within 10 days after the verdict, and "too early" under Rule 4-331(c), because it had been filed "two months after the verdict, but before sentencing." *Id.* at 647. On that basis, this Court concluded that the trial court "did not err in declining to hear" the additional evidence. *Id.* This Court noted, however, that the defendant was free to file another motion under Rule 4-331(c), based on the same evidence, within one year after the final appellate decision. *Id.*

On further review, this State's highest Court held that the trial court had the authority to decide the request for a new trial based on the supplement filed before sentencing. *Campbell v. State*, 373 Md. at 658. The Court reasoned that, although the supplement was untimely under Md. Rule 4-331(a), the supplement could be "viewed as having been filed prematurely under section (c) of the Rule." *Id.* The Court observed that the "technical requirements of the Rule . . . should not be applied without regard to the purposes driving the Rule." *Id.* at 661. The Court explained: "Rule 4-331 was crafted primarily to set content-based *outer* limits on when motions for new trial may be filed." *Id.* at 662 (emphasis in original). The Court reasoned that the language of Rule 4-331(c), authorizing the trial court to consider motions for a new trial based on newly discovered evidence within one year after sentencing, "does not mean [that] the court does not have authority to consider such a motion prior to sentencing when no final judgment has been entered." *Id.* at 662-63.

The Court concluded that, under the circumstances of that case, the trial court could treat the supplement filed before sentencing as a premature motion for new trial based on newly discovered evidence under Md. Rule 4-331(c)(1). *Campbell v. State*, 373 Md. at 665. The Court explained that this filing, "although technically not filed within the time frame established by Rule 4-331(c), was filed before final judgment was entered and while the trial court retained jurisdiction over the matter." *Id.* "Thus," the Court concluded, "the trial judge had discretion to consider the newly discovered evidence ground for new trial" raised in that filing. *Id.* The Court added: "The reasons for imposing strict filing deadlines are not implicated by premature filings." *Id*. Because the

Court concluded that the trial court had authority to consider the motion for new trial, the Court proceeded to review whether the trial court had properly denied the motion on the merits. *Id*.

Here, as in *Campbell*, Akparawa filed a motion for new trial more than 10 days after the verdict but before sentencing. His motion was untimely to the extent that it requested a new trial under Md. Rule 4-331(a). Yet because he had not yet been sentenced, his motion was technically premature as a request to set aside an unjust or improper verdict under the first sentence of Md. Rule 4-331(b)(2). *See Minger v. State*, 157 Md. App. at 166. For similar reasons, his motion was technically premature as a motion for new trial based on newly discovered evidence under Md. Rule 4-331(c)(1). *See Campbell v. State*, 373 Md. at 665. When considering the proper treatment of a motion for new trial, courts should not "elevate form over substance" if the motion might not identify the correct provision authorizing relief. *Id*. at 664 (analyzing *Myers v. State*, 137 Md. 482, 487-88 (1921)). In this case, therefore, the trial court (at a minimum) had authority to consider Akparawa's motion for new trial as a premature motion for new trial under Md. Rule 4-331(c)(1). Under the circumstances presented, it would be an error to hold that the trial court lacked authority to consider the substance of the motion.

The record makes it clear that the trial court here affirmatively exercised its authority to consider the substance of the motion for new trial. Although the State had urged the court to deny the motion on the ground of untimeliness, the court announced that it was "not going to deny the motion based upon timeliness." The court said that, under the circumstances of the case, the court did not "think that it would be appropriate"

to "deny the motion simply because" it had not been filed within 10 days after the verdict. The court mentioned "the seriousness of the charges of which the defendant was convicted" as one factor that informed that decision. The court said that it thought that it was "important" to "deal substantively with the arguments and resolve the issue now before it gets any later and before we have to try to recreate something" or "go through this again." The court reiterated that it was "going to address the merits of the motion" without "making a finding about timeliness[.]" These statements made it clear that, if the court had found a violation of Akparawa's right to a fair trial, the court would have granted him a new trial rather than denying his motion based on untimeliness.[9]

If the trial court had chosen to deny the motion for new trial based on timing concerns, as the State suggests it should have done, the court could not deny the motion with prejudice as to the matters raised in the motion. Rather, one proper course of action would have been to deny the motion as premature and to "direct[] [Akparawa] to file it anew after sentencing." *Campbell v. State*, 373 Md. at 665 n.25. In those circumstances, the trial court may have been required to address the merits eventually, as long as Akparawa filed another motion under Md. Rule 4-331(c)(1) within one year after sentencing or the final appellate mandate in the case. The circuit court's decision was designed to avoid any such unnecessary delay in deciding the merits of the motion. This

[9] Trial judges are "presumed to know the law," and are "not required to set out in detail each and every step of [their] thought process[es]." *State v. Chaney*, 375 Md. 168, 180 n.8 (2003). Accordingly, it makes no difference here that the court did not specify a particular section of Rule 4-331 supporting its decision to resolve the merits of the motion.

decision was consistent with the purpose of the filing deadlines of Md. Rule 4-331. *See Campbell v. State*, 373 Md. at 662.[10]

In sum, because Akparawa filed his motion for new trial before sentencing, the trial court was authorized to consider the merits of the motion under Rule 4-331(c)(1). The State has not disputed Akparawa's contention that the motion was, in substance, a request for new trial based on "newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial" within 10 days after the verdict. *Id.* The trial court affirmatively exercised its discretion to consider the merits, and we see nothing unreasonable in that decision. Under the circumstances, we will not override the trial court's sound exercise of discretion in choosing to consider the merits of the motion at that time.

B. Merits of Motion for New Trial

In this appeal, Akparawa contends that the circuit court erred when it denied his motion for new trial. He observes that the written response to the exit survey establishes that a juror observed the bailiff "making faces at a juror and eye rolling" on the second day of trial. He argues that this conduct "signified disbelief of the testimony and trial

[10] Affirming the judgments on the ground of untimeliness, as the State requests, might result in unfair prejudice to Akparawa. If the circuit court had denied the motion based on untimeliness and declined to consider the merits, Akparawa could have filed another motion within 90 days after sentencing, asking the circuit court to exercise its revisory power "to set aside an unjust or improper verdict" under the first sentence of Md. Rule 4-331(b)(2). At present, Akparawa may no longer rely on that provision because more than 90 days have passed since the date of sentencing. In its brief, the State has not refuted Akparawa's contention that the circuit court could have granted a new trial under its power to set aside an unjust or improper verdict under the first sentence of Md. Rule 4-331(b)(2). The State's brief simply ignores that contention.

proceedings or tactics, by an agent of the court[.]" He argues, therefore, that the bailiff's conduct denied him the right to fair trial by an impartial jury.

"[D]enials of motions for new trials are reviewable on appeal and rulings on such motions are subject to reversal when there is an abuse of discretion." *Campbell v. State*, 373 Md. 637, 665 (2003). Motions for a new trial are "nearly always" decided "by the same judge who presided over the trial, typically close enough in time that the trial judge can recall (from memory or notes) the facts of the case." *Hunt v. State*, 474 Md. 89, 103 (2021). "Trial courts are vested with 'wide latitude in considering a motion for new trial and may consider a number of factors, including credibility, in deciding it; thus, the court has the authority to weigh the evidence and to consider the credibility of witnesses in deciding a motion for new trial.'" *Mack v. State*, 166 Md. App. 670, 683 (2006) (quoting *Argyrou v. State*, 349 Md. 587, 599 (1998)).

In this context, an abuse of discretion "'occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when [the trial judge] acts beyond the letter or reason of the law.'" *Williams v. State*, 462 Md. 335, 345 (2019) (quoting *Campbell v. State*, 373 Md. at 666). The "'breadth of a trial judge's discretion to grant or deny a new trial . . . will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial, and to rely on [the judge's] own impressions in determining questions of fairness and justice.'" *Hunt v. State*, 474 Md. at 103-04 (quoting *Campbell v. State*, 373 Md. at 666). The trial judge does not exercise discretion when deciding "purely legal questions" presented by a motion for new

trial. *McGhie v. State*, 449 Md. 494, 510 (2016).

In the present case, Akparawa moved for a new trial based on an alleged violation of his right to a fair trial. The Sixth Amendment to the United States Constitution, as well as Article 21 of the Maryland Declaration of Rights, guarantees that in a criminal prosecution the accused has the right to a fair trial by an impartial jury. *See, e.g.*, *Dillard v. State*, 415 Md. 445, 454 (2010). "A fair criminal trial requires that the jurors 'be without bias or prejudice for or against the defendant and that their minds be free to hear and impartially consider the evidence and render a fair verdict thereon.'" *Smith v. State*, 481 Md. 368, 392 (2022) (quoting *Hunt v. State*, 345 Md. 122, 146 (1997)). A claim that a defendant was denied the constitutional right to a fair trial is subject to de novo review by an appellate court. *Smith v. State*, 481 Md. at 390.

"Events or practices that inject outside influences into the courtroom, if sufficiently prejudicial, can violate a defendant's right to a fair trial." *Smith v. State*, 481 Md. at 392-93. A defendant may demonstrate a violation of the right to a fair trial by proving either "actual prejudice" or "inherent prejudice." *Id.* at 393. "To prove actual prejudice, the defendant must show some actual prejudicial effect on the jurors based on what transpired in the courtroom." *Id.* (citing *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1961)). By contrast, "[a] showing of inherent prejudice does not require proof that the complained-of practice actually affected the jurors' decision-making process." *Smith v. State*, 481 Md. at 393.

The concept of inherent prejudice is based on a recognition that "'[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully

determined.'" *Smith v. State*, 481 Md. at 393 (quoting *Estelle v. Williams*, 425 U.S. 501, 504 (1976)). "'[E]ven though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused.'" *Smith v. State*, 481 Md. at 396 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). Despite the difficulty of determining the actual effect on the jury, "there is 'no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.'" *Smith v. State*, 481 Md. at 393 (quoting *Estelle v. Williams*, 425 U.S. at 504). Accordingly, "'[c]ourts must do the best they can to evaluate the likely effects of a particular [event or practice], based on reason, principle, and common human experience.'" *Smith v. State*, 481 Md. at 393 (quoting *Estelle v. Williams*, 425 U.S. at 504).

To establish inherent prejudice, the defendant must show that the challenged event or practice "presented 'an unacceptable risk . . . of impermissible factors coming into play'" in the jury's determination of the case. *Smith v. State*, 481 Md. at 393 (quoting *Holbrook v. Flynn*, 475 U.S. at 570) (further citation and quotation marks omitted). "This is a difficult showing to make." *Smith v. State*, 481 Md. at 393 (citing *Hill v. Ozmint*, 339 F.3d 187, 199 (4th Cir. 2003)). The question of whether an event or practice was inherently prejudicial is a question of law, subject to de novo review on appeal. *See Smith v. State*, 481 Md. at 390.

Claims of inherent prejudice must be evaluated "based on the unique facts and circumstances of each case." *Smith v. State*, 481 Md. at 400. Ordinarily, "[t]o prevail on a claim of inherent prejudice, the defendant must: (1) have objected to the challenged

practice in the trial court, (2) demonstrate, based on the record of the proceeding in the trial court, that the challenged practice was observable by the jury; and (3) establish that the challenged practice created an unacceptable risk that impermissible factors would come into play in the jury's determination of the case." *Id.* If these requirements are satisfied, the challenged practice may be permitted only if it is "necessary to further a compelling governmental interest." *Id.*

"Several of the leading inherent prejudice cases have concerned whether courtroom decorum or security measures posed an unacceptable risk that the jurors would make judgments based on factors outside of the evidence." *Smith v. State*, 481 Md. at 393. The United States Supreme Court has held that requiring a defendant to appear before a jury in shackles or in clothing distinctly marked as prison-issued clothing are inherently prejudicial practices, which may be permitted "only where justified by an essential state interest specific to each trial." *Holbrook v. Flynn*, 475 U.S. at 568-69 (discussing *Estelle v. Williams*, 425 U.S. 501 (1976), and *Illinois v. Allen*, 397 U.S. 337 (1970)). By contrast, the noticeable presence of security personnel near the defendant in the courtroom is not presumed to be inherently prejudicial. *Holbrook v. Flynn*, 475 U.S. at 569-71 (holding that, at a joint trial of six defendants, the presence of four uniformed and armed officers sitting in the first row of the spectator section was not inherently prejudicial).

"The chief feature that distinguishes the use of identifiable security officers from [those] courtroom practices" presumed to be inherently prejudicial "is the wider range of inferences that a juror might reasonably draw from the officers' presence." *Holbrook v.*

Flynn, 475 U.S. at 569. "While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that [the defendant] is particularly dangerous or culpable." *Id.* Instead, jurors might infer that "the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence." *Id.* It is also "entirely possible that jurors will not infer anything at all from the presence of the guards." *Id.* "In view of the variety of ways in which such guards can be deployed," the United States Supreme Court has adopted a "case-by-case approach" to determine whether the use of identifiable security guards in a courtroom might be inherently prejudicial. *Id.*

Maryland's highest court recently analyzed the issue of inherent prejudice in *Smith v. State*, 481 Md. 368 (2022). In that case, the Court determined that the defendant had sustained inherent prejudice where the trial court had permitted the sheriff's deputies serving as bailiffs at the defendant's trial to display a "pro-law enforcement message" during the trial. *Id.* at 374. At the time of the defendant's trial in October 2020, Maryland courts required all persons in the courtroom to wear face masks to help prevent the transmission of COVID-19. *Id.* at 373. At the same time, the Sheriff of Kent County required all deputies "to wear face masks that displayed a 'thin blue line' version of the American flag." *Id.* Smith's counsel asked the court to direct the deputies serving as bailiffs at Smith's trial to wear masks that did not display the thin blue line flag. *Id.* at 382-83. The trial court denied the request, incorrectly believing that the deputies had a First Amendment right to express a political message while serving as bailiffs at the

criminal trial. *Id.* at 384-85.

In those circumstances, the Court held that the bailiffs' display of the thin blue line flag on their face masks was inherently prejudicial. *Smith v. State*, 481 Md. at 392. The Court explained that the thin blue line flag is "is a controversial and polarizing symbol[,]" which some people view "as an expression of general support for law enforcement[,]" which others view "as a symbol of how police serve as a barrier between civilized society and criminals[,]" and which others view as "a racist symbol that expresses support for white supremacy and violence against African Americans." *Id.* at 373. The Court reasoned: "None of the meanings reasonably associated with the thin blue line had any place at Smith's criminal trial." *Id.* at 403. In other words, even if "the jurors gave the most benign meaning possible to the bailiffs' display of the thin blue line—that the sheriff's deputies were expressing general support for, and pride in, their chosen profession of law enforcement—it nevertheless was an inappropriate message to convey to the jury in a criminal trial." *Id.* at 403-04.[11]

The Court reasoned that the bailiffs' display of the blue line flag during Smith's trial had a heightened potential for prejudice because "the bailiff is an *agent* of the court." *Smith v. State*, 481 Md. at 405 (emphasis in original). The Court stated that "'the official character of the bailiff—as an officer of the court as well as the State—beyond question

[11] The Court further reasoned that the risk of prejudice was heightened because Smith's trial occurred in October 2020, a time when "[t]he thin blue line symbol, already controversial, had become even more polarizing" in the aftermath of the nationwide response to the murder of George Floyd by a white Minneapolis police officer. *Smith v. State*, 481 Md. at 411.

carries great weight with a jury[.]'" *Id.* (quoting *Parker v. Gladden*, 385 U.S. 363, 365 (1966) (per curiam)). "Thus, any political message that bailiffs convey to the jury—verbally or non-verbally—in the course of performing their duties may well be imputed by the jurors to the court." *Smith v. State*, 481 Md. at 405-06.

In *Parker v. Gladden*, 385 U.S. at 363-64, the Court held that the defendant had been denied the right to a fair trial based on evidence that the bailiff made improper statements to jurors outside of the room where they conducted deliberations. The bailiff told one juror that the defendant was "'guilty'" and a "'wicked fellow.'" *Id.* at 363. Two other jurors heard the bailiff say: "'If there is anything wrong (in finding [the defendant] guilty) the Supreme Court will correct it.'" *Id.* at 364. The Court concluded that this "unauthorized conduct of the bailiff 'involve[d] such a probability that prejudice will result that it is deemed inherently lacking in due process[.]'" *Id.* at 365 (quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)). The Court explained that, even though many jurors did not hear the bailiff's statements, the defendant had the right "to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. at 366.

The central question in this appeal is whether the record establishes that the conduct of the deputy sheriff serving as bailiff at Akparawa's trial was inherently prejudicial. The main source of information about the bailiff's conduct was a written response to the juror exit survey. As discussed earlier, the exit survey asked the jurors to "rate" various "factors" including the "Security Personnel" at the trial. In response to this question, one juror wrote: "one on [the second day of trial] I thought acted inappropriately in courtroom making faces at a juror and eye rolling[.]"

The court also received information about the bailiff's conduct from the written and oral representations made by defense counsel and by the prosecutor. Defense counsel stated that he was "unaware" of any "eye-rolling" by the bailiff. Defense counsel recalled that he had noticed that, at one point, the bailiff "was smiling and snickering during the testimony" and that "one or two of the jurors were smiling and snickering back at him." According to defense counsel, this incident occurred while the prosecutor was questioning one of the State's witnesses. Defense counsel recalled that, when he "mentioned this issue" to the prosecutor during "a break in the testimony," the prosecutor spoke to the bailiff, who stated that he "may have dozed off during the testimony and that is why the jurors were laughing."

Defense counsel said that he did not bring the incident to the court's attention at that time, believing that "the fact that the deputy may have dozed off and been caught by one of the jurors" was "innocuous" and "not anything . . . prejudicial." Defense counsel "didn't think" that the "fact that [the bailiff] may have fallen asleep and been seen" by one or more jurors had "impacted the trial in any way[.]" Counsel emphasized that he "did not see" anything that he would describe as "eye-rolling or making faces[.]" The juror's later report about the bailiff's conduct "made [him] think that it wasn't just about dozing off."

The prosecutor offered a similar description of an event that occurred during the examination of one of the State's witnesses. The prosecutor did not personally observe an interaction between the bailiff and a juror. Rather, when defense counsel reported seeing an "exchange of glances" between the bailiff and one juror, the prosecutor offered

to speak with the bailiff about that incident. The bailiff "informed" the prosecutor that he "had been drifting off to sleep and when he opened his eyes, he saw one of the jurors in the middle of the front row watching him." According to the prosecutor, the bailiff stated that, "[i]n response" to seeing the juror notice him falling him asleep, the bailiff had "shrugged and rolled his eyes, prompting the juror's reaction." The prosecutor recalled that she repeated this information to defense counsel, who declined to bring it to the attention of the trial judge.

In this appeal, Akparawa and the State offer competing approaches for analyzing the conduct of the bailiff at trial. Most notably, they disagree about what conduct actually occurred. Based on their differing views of the conduct, they disagree over whether defense counsel had the opportunity to raise an objection during the trial.

In his brief, Akparawa describes the bailiff's conduct using the words from the juror response to the exit survey— "making faces at a juror and eye rolling[.]" Akparawa observes that the conduct described by the juror is different from what his defense counsel had observed (or what the bailiff had described to the prosecutor) during the trial: "a singular incident where [the bailiff] dozed off in court, woke up, and made eye contact with a juror and laughed about the awkwardness of being caught falling asleep on the job." "Because the description of the literal conduct was different," Akparawa argues that there is "no basis to conclude that the juror described the same incident that the attorneys observed during the trial." In his view, the "appropriate analysis" of the bailiff's conduct is to "[c]onsider[] the bailiff's conduct as described by the juror— without presuming that it is related to the dozing off incident[.]"

Akparawa further argues that, because he did not receive the information that the bailiff was "making faces at a juror and eye rolling" until weeks after trial, he had no opportunity to raise an objection during the trial. Akparawa argues, therefore, that he raised the issue in the trial court in a timely fashion by moving for a new trial promptly after he learned of the challenged conduct.

In its brief, the State presumes that the conduct that defense counsel observed at trial is the same conduct described in the juror exit survey as "making faces at a juror and eye rolling." Based on that premise, the State asserts that "defense counsel *was* aware of the inappropriate conduct of which the juror [later] complained." (Emphasis in original.) In the State's view, therefore, defense counsel had a sufficient opportunity to object to the bailiff's conduct, but elected not to do so. The State argues that defense counsel effectively waived any claim of prejudice resulting from the bailiff's conduct.

The State observes that a defendant ordinarily cannot prevail on a claim of inherent prejudice unless the defendant "objected to the challenged practice in the trial court[.]" *Smith v. State*, 481 Md. at 400; *see Estelle v. Williams*, 425 U.S. at 512-13 (holding that, although the State cannot "compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes . . . is sufficient to negate the presence of compulsion necessary to establish a constitutional violation"). The State asks this Court "to conclude that Akparawa waived the issue of inherent prejudice by failing to raise the matter with the court during trial."

In making this waiver argument, the State appears to assert that the trial court

made a factual finding that the conduct reported by on the juror exit survey was the same conduct observed by defense counsel at trial. The State writes: "The trial court found that, under the circumstances, there was not a meaningful difference between eye-rolling and snickering." The State also says that the court "found" that "a bailiff 'snickering' and a bailiff 'rolling his eyes'" were "equivalent." The State cites a portion of the transcript in which the court stated: "I don't think the distinction between snickering and eye-rolling is of any moment. I just don't find that learning of an eye-roll as opposed to what transpired during the trial and what's been alleged, snickering, makes any difference in the analysis."

Contrary to the State's suggestion, the trial court did not make any express or implied factual finding that the conduct that the juror described as "making faces at a juror" and "eye-rolling" was the same conduct that defense counsel had described as "snickering." It is unclear how any fact-finder might have made such a finding based on the limited record. The court recognized a potential "distinction" between these different types of conduct but focused on whether this distinction "ma[de] any difference in the analysis" of inherent prejudice.

Reading the court's entire ruling makes it apparent that the court declined to adopt the State's basic theory of the event in question. The State had asked the court to find that the juror had observed the bailiff rolling his eyes in response to the juror seeing the bailiff fall asleep. The State then asked the court to conclude, based on that finding, that the jurors must have interpreted the eye-rolling as the bailiff's reaction to that incident. In its ruling, however, the court highlighted the lack of clarity on what actually occurred.

The court stated that "all we know" about "what was seen by a particular juror" was what "the juror handwrote" on the exit survey response. The court said that both defense counsel and the prosecutor "were aware" only "that there was something about one of the security personnel that was out of the ordinary[.]" The court went on to say: "we don't know what, if any, impact it may have had on any of the jurors other than one believed it was inappropriate."

In our assessment, the court made no finding that the conduct described in the juror exit survey was the same conduct observed by defense counsel at trial. Accordingly, we reject the State's related argument that, by failing to object to the conduct observed at trial, defense counsel waived his objection to the conduct later disclosed in response to the juror exit survey. Defense counsel could not have "waived" a claim of prejudice based on the information that had not yet been disclosed.

The ultimate issue, therefore, is whether the circuit court erred by concluding that the record failed to establish that the bailiff's conduct was inherently prejudicial. The circuit court reasoned that, based on the record presented, the court had "no way of knowing" whether eye-rolling or other "facial expressions" of the bailiff "created [an] unacceptable risk that an impermissible factor would come into play" in the jury's determination of the case. The court thus concluded that Akparawa had failed to establish inherent prejudice.

On appeal, Akparawa contends that the juror's report that one of the security personnel had "acted inappropriately in [the] courtroom" on the second day of the trial by "making faces at a juror and eye rolling" was sufficient to prove inherent prejudice.

Akparawa argues that eye-rolling is commonly understood to be an expression of disbelief. He further argues that, because the bailiff is an agent of the court, improper communication from the bailiff to the jurors carries a substantial risk of influencing the jurors.

Akparawa further argues that the bailiff's "eyerolling and facial expressions could reasonably be construed by the jurors as a commentary on the trial proceedings, and particularly a commentary of disbelief." He asserts that "the only thing happening in trial is witness testimony and examinations by the attorneys[.]" He argues that "the act of rolling one's eyes and making faces during those moments is necessarily a reaction to whatever is occurring during the trial." According to Akparawa, it "necessarily follows" that the bailiff must have been rolling his eyes and making faces "to suggest disbelief at the testimony or examination[.]" Akparawa goes on to argue that the bailiff's "reactions very well may have been directed at the theory pursued by defense counsel on cross-examination that day, or to testimony about [Akparawa's] conduct and disbelief that a person could act in those ways." Akparawa concludes that the bailiff's conduct in the presence of the jury "created an unacceptable risk that the jurors would believe that the court and an agent of the court disbelieved or found incredulous the testimony and examination of the witnesses."

In its brief, the State "does not dispute that at least one juror observed inappropriate behavior by a bailiff" during the trial. Moreover, the State "does not dispute" the propositions that "bailiffs are agents of the court or that courtrooms should be neutral environments." "In addition," the State acknowledges that "eye rolling

(combined with 'making faces') can certainly signal 'disbelief,' as Akparawa maintains." The State notes, however, that eye-rolling may also communicate other meanings, such as annoyance or exasperation. *See* Eye-rolling, Merriam-Webster.com Dictionary (2024), https://www.merriam-webster.com/dictionary/eye%20rolling (defining "eye-rolling" as "the action or gesture of turning the eyes upward as an expression of annoyance, exasperation, disbelief, etc.") (archived at https://perma.cc/TUS4-YPT8).

The State contends that the "sparse nature of the record" makes it inadequate to show that the bailiff's conduct created an unacceptable risk of improperly influencing the jury. The State argues that the primary "difficulty" with Akparawa's claim of prejudice is that the record does not establish the "context" in which the bailiff's conduct occurred. The risk that the bailiff's conduct might have improperly influenced the jury depends on the likely meaning perceived by the jury. As Akparawa's own argument recognizes, eye-rolling is a form of non-verbal communication that expresses the person's "reaction[]" to something perceived by that person. The possible meanings of this facial expression can be determined only by reference to whatever caused the person's reaction.

The record here discloses almost nothing about the context in which the bailiff's facial expressions occurred. The record establishes that this conduct occurred on the second day of trial, during which the attorneys made opening statements, the State presented its case-in-chief, and defense counsel cross-examined the State's witnesses. The record does not establish whether the bailiff's facial expressions occurred throughout

the proceedings or in a single, fleeting moment.[12]

As the State points out, "the context in which conduct occurs" often determines the analysis of whether the conduct was inherently prejudicial. For instance, in *Bruce v. State*, 318 Md. 706, 720-21 (1990), the Court determined that a defendant did not sustain inherent prejudice when the jurors momentarily saw security personnel removing handcuffs from the defendant as the jurors were entering the courtroom. The Court concluded that "[t]his one inadvertent viewing of [the defendant] in handcuffs . . . did not result in any prejudice to defendant's right to a fair trial." *Id.* at 721.

The State further observes that the record here "does not indicate that, by eye rolling or making faces, the bailiff was expressing disbelief at a witness, the parties, the attorneys, the judge, or any other matter" that occurred on the second day of trial. The State argues that the facts of this very case demonstrate that the examination of witnesses is not necessarily the only thing that might prompt a person's reaction during a trial. The State theorizes that the bailiff may have been rolling his eyes to "express[] disbelief or exasperation at his own, admittedly unprofessional, behavior in falling asleep" in the courtroom. The State argues, therefore, that the bailiff's facial expressions were not necessarily a reaction to the examination of a witness.

Even if the record did establish that the bailiff's facial expressions occurred during the testimony of a witness, the record does not indicate when this conduct may have

[12] Akparawa argues that "[t]he juror's use of the plural . . . suggests that there were multiple incidents of this conduct." Yet the juror used a plural word only to say that the bailiff was "making faces[.]" Very little time is needed for a person to make more than one facial expression.

occurred. In his brief, Akparawa says that the bailiff's facial expressions "very well may have been directed" at defense counsel's questions or at testimony about Akparawa's own conduct. On the other hand, the State argues that eye-rolling during the testimony of one of the State's witnesses might "suggest disbelief in the State's witness (and therefore potentially help the defense case)[.]" In our judgment, communication from an agent of the court expressing belief or disbelief in a witness's testimony "has no place in the courtroom in a criminal trial" (*Smith v. State*, 481 Md. at 392), regardless of whether the witness is testifying for the State or the defense. Nevertheless, we agree with the broader point that the risk that jurors might be improperly influenced by a facial expression depends on context. A visible reaction to testimony on a matter that is legally relevant, but perhaps ancillary or cumulative, might carry minimal risk of improperly influencing the jurors during the course of a multi-day trial.

Overall, the State contends that the record demonstrates "ambiguity surrounding the bailiff's conduct[.]" In the State's view, therefore, there is a "wider range of inferences that a juror might reasonably draw" (*Holbrook v. Flynn*, 475 U.S. at 569) than the one inference suggested by Akparawa—that the bailiff was expressing disbelief in reaction to a witness's testimony or to questions by an attorney. The likely inferences depend on the context of the conduct, but the record fails to establish the context.

In his reply brief, Akparawa does not deny the importance of context when assessing prejudice. Instead, he asserts that "[t]he context for the bailiff's conduct is self-evident[.]" He argues: "had the bailiff's conduct been unconnected to the trial, it would not have been 'inappropriate[]' for the courtroom." In other words, he appears to argue

that, because the juror described the bailiff's conduct as "inappropriate," then the conduct must have occurred during the testimony of a witness.

We are unconvinced that the context of the bailiff's behavior is "self-evident" from the juror's description. Neither the juror's written response nor the survey questions were expressly limited to the subject of trial testimony. The statement that the juror "thought" that the conduct was "inappropriate" expresses one juror's subjective opinion. A particular juror may have "thought" that the conduct of eye-rolling and making faces at a juror was "inappropriate" courtroom behavior for any number of valid reasons, regardless of whether that conduct occurred during the testimony of a witness.

Akparawa correctly points out that a defendant claiming inherent prejudice need not prove that the challenged event or practice actually influenced the jury. The inquiry into inherent prejudice evaluates the "'probability'" or "'likel[ihood]'" of improper effects on the jury. *Smith v. State*, 481 Md. at 393 (quoting *Estelle v. Williams*, 425 U.S. at 504). These propositions, however, do not mean that the court should presume prejudice whenever the record reveals the possibility of some event that might carry a risk of an improper influence on the jury. To the contrary, our case law establishes that courts will not find that an event or practice created an unacceptable risk of influencing the jury without a reasonably clear record of the nature of the event or practice that was observable to the jury. *Cf. Smith v. State*, 481 Md. at 412-13 (concluding that "the record [was] sufficient" to establish inherent prejudice where the trial transcripts showed "that the jury had ample opportunity to view" a political message displayed on the bailiffs' face masks throughout a two-day trial).

For instance, in *Bruce v. State*, 318 Md. at 715-16, the Court considered the contention that the defendant sustained inherent prejudice where the court had permitted enhanced security measures during the trial. The defendant complained of certain security measures inside the courtroom, in close proximity to the defendant at trial, as well as other security measures outside the courtroom, such as metal detectors and armed guards posted on the roof of the courthouse. *Id.* at 716. The Court concluded that the defendant failed to establish that these outside security measures created an unacceptable risk of unfair prejudice, in light of "the limited description, on the record, of the security forces deployed in, around, and on top of the courthouse." *Id.* at 719-20.

Similarly, in *Williams v. State*, 137 Md. App. 444, 449 (2001), this Court considered a contention that a defendant suffered inherent prejudice where the trial court refused to permit the defendant to remove an identification bracelet issued by the Baltimore City Detention Center. The Court rejected that contention, in part, because "there [was] no evidence in the record as to the size of the courtroom or the distance between the jurors and [the defendant], which might have shed light on the question of the visibility of the bracelet." *Id.* at 452. "Therefore," the Court "[could not] tell from the record whether the jurors could necessarily see the bracelet" well enough to identify it as a prison-issued identification bracelet. *Id.*

In the present case, we conclude that the record was insufficient to establish inherent prejudice. The record discloses almost no information about the challenged conduct other than the juror's statement that the bailiff had "acted inappropriately" on the second day of trial by "making faces at a juror and eye rolling." The record fails to show

when or how often this conduct occurred. The record fails to show whether the bailiff made these facial expressions in reaction to testimony (and, if so, what part of the testimony) or in reaction to some other event in the courtroom. Absent information about the context of the bailiff's facial expressions (and thus the probable meanings communicated to the jurors), the record fails to support a conclusion that this conduct created an "unacceptable risk that the jury [would] decide the case based on impermissible factors[.]" *Smith v. State*, 481 Md. at 414.

In his brief, Akparawa cites various authorities establishing that judges and other officers or agents of the court must refrain from any verbal or non-verbal communication expressing an opinion on the testimony of witnesses during a jury trial. *E.g.*, *State v. Maama*, 359 P.3d 1272, 1278 n.6 (Utah 2015) (stating that "a judge should forbear from conveying skepticism of any witness, through facial expressions or otherwise" but declining to conclude, under the circumstances, "that the judge's facial expressions exacerbated any prejudice" to the defendant caused by an improper comment); *State v. Larmond*, 244 N.W.2d 233, 236 (Iowa 1976) (stating that a trial judge "may not telegraph to a jury, by purposeful exclamations, gestures or facial expressions, [the judge's] approval or disapproval, belief or disbelief, in the testimony of witnesses or arguments of counsel"); *see also State v. Adamson*, 542 N.W.2d 12, 14-15 (Iowa 1995) (commenting, in dicta, that the prosecutor's conduct of "look[ing] toward the jury and roll[ing] her eyes indicating the disbelief" of the testimony of a defense witness "hinder[ed] [the] defendant's chances for a fair trial"). Akparawa also cites authorities establishing that, in some circumstances, improper communication between a bailiff and jurors can violate a

defendant's right to a fair trial. *See Parker v. Gladden*, 385 U.S. at 363-64 (concluding that defendant did not receive a fair trial because bailiff commented on defendant's guilt in presence of at least one juror); *Smith v. State*, 481 Md. at 374 (holding that bailiff's display of a "pro-law-enforcement message" was inherently prejudicial); *see also State v. Soto*, 513 P.3d 684, 687 (Utah 2022) (holding that defendant was entitled to a rebuttable presumption of prejudice where a highway patrolman and a court IT technician told jurors that they should find the defendant guilty, while "the trial court bailiff stood quietly . . . arguably condoning these statements through his silence").

We agree with Akparawa that "the court and its agents should not communicate any opinions on the trial proceedings," including non-verbal communication in the form of facial expressions. The question here, however, is whether the mere report that a juror observed some inappropriate facial expressions by a bailiff at some unspecified point during one day of the trial is enough to prove a violation of the right to a fair trial. None of the authorities cited by Akparawa establish that this type of information, without information about the context in which the facial expressions occurred, proves inherent prejudice or creates a presumption of prejudice. To the contrary, each of the authorities cited by Akparawa confirms that any prejudice resulting from improper communication to the jurors must be evaluated in light of the circumstances in which it occurred. As stated in one opinion cited by Akparawa, the evaluation of the prejudice resulting from improper contact between jurors and a third party "depend[s] on *who* made the improper contact, *what* was said, and the *circumstances* of the contact." *State v. Soto*, 513 P.3d at 689 (emphasis in original).

In the present case, the record fails to disclose the relevant circumstances in which the jurors observed the reportedly inappropriate facial expressions made by the courtroom bailiff. Without information about those circumstances, a court cannot properly assess what the bailiff may have communicated to the jurors or whether this communication created an unacceptable risk of improperly influencing the jurors. On this record, therefore, there is no basis to conclude that the bailiff's conduct resulted in inherent prejudice.

The circuit court did not err when it determined that it had "no way of knowing" whether the bailiff's conduct created an unacceptable risk that impermissible factors might influence the jury's determination. Accordingly, the circuit court did not err or abuse its discretion when it denied the motion for new trial.

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

APPENDIX

JUROR/CUSTOMER SERVICE EXIT SURVEY

Date: Sept 8

Your responses and answers to the questions below will assist us in improving our jury service and customer service in the Montgomery County Circuit Court. All responses are voluntary and confidential, and we request that you DO NOT SIGN your name. We appreciate your taking the time to complete this information.

1. Were you selected to report to a courtroom for jury selection today? ..... ☒ YES ☐ NO
2. Did you serve on a case? ..... ☒ YES ☐ NO
   If YES, what type of case? Criminal ..... ☒ CRIMINAL ☐ CIVIL
   Number of days you served: 3 Name of Judge: Fogelman
3. How would you rate the Judge? Excellent
4. How would you rate the Attorneys? Excellent
5. How would you rate the following factors:

	Excellent	Good	Adequate	Poor	N/A
Video	☒	☐	☐	☐	☐
Orientation Program	☒	☐	☐	☐	☐
Parking and Directions	☒	☐	☐	☐	☐
Jury Commissioner and Staff	☒	☐	☐	☐	☐
Jury Lounge	☒	☐	☐	☐	☐
Courtoom Personnel/Other Court Personnel	☒	☐	☐	☐	☐
Security Personnel one on Wednesday I thought acted inappropriately in courtroom making faces at a juror and eye rolling	☐	☐	☐	☐	☐
Cafeteria Food	☐	☐	☐	☐	☐

6. Did you visit the Montgomery County Circuit Court website prior to your jury service date? ..... ☐ YES ☒ NO

If YES, please rate the following factors:	Excellent	Good	Adequate	Poor	N/A
Information regarding jury service on the website	☐	☐	☐	☐	☐
Locating jury service information on the website	☐	☐	☐	☐	☐

7. Your occupation: Teacher (optional)
8. Additional comments are welcome. Your participation as a Montgomery County Juror is most valuable and appreciated.

PLEASE RETURN TO:

JURY COMMISSIONER'S OFFICE
Montgomery County Circuit Court
50 Maryland Avenue
Rockville, Maryland 20850
240-777-9090