Circuit Court for Baltimore City
Case No. 118029001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1428

September Term, 2019

BRYAN HANNAH

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Kenney, James A., III,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Kenney, J.

Filed: December 23, 2021

Bryan Hannah, appellant, was charged with first-degree murder, use of a firearm in the commission of a crime of violence, wearing, carrying and transporting a handgun, and two counts of possession of a regulated firearm after a disqualifying conviction. A jury sitting in the circuit court of Baltimore City convicted Mr. Hannah of voluntary manslaughter, wearing, carrying, or transporting a handgun in violation of Md. Code Ann, Crim. Law § 4-203, and possession of a regulated firearm in violation of Md. Code Ann., Pub. Safety § 5-101(c). He was sentenced to fifteen years, all but five suspended, on the wearing and carrying conviction, to a consecutive fifteen years, all but ten suspended, for the possession of a regulated firearm conviction, and to a consecutive ten years for the voluntary manslaughter conviction.

In this timely appeal, he presents three questions for our review:

I. Did the trial court err when it denied defense counsel's motion for mistrial, the basis for which was a violation of Rule 4-326?
II. Did the trial court err when it refused to instruct the jury on involuntary manslaughter?
III. Did the trial court commit plain error when it failed to instruct the jury on the definition of regulated firearm in connection with the possession of a regular firearm count?

FACTUAL AND PROCEDURAL BACKGROUND

Daniel Mullhausen was shot and killed outside the Waverly Tavern on December 26, 2017, as he drove away from an altercation with a group of men. At trial, the State displayed a video that clearly showed Mr. Hannah inside the tavern before Mr. Mullhausen was shot. According to the State, a less clear video also showed Mr. Hannah involved in

the altercation with Mr. Mullhausen who was sitting in the driver's seat and Mr. Hannah "punching [Mr. Mullhausen] and then shooting at him 9 times."

Detective Christopher Brockdorff, the primary investigating detective, responded to the 600 block of East 38th Street after the shooting. In that block, the detective observed shell casings in the street. He saw a silver Suzuki SUV, later determined to be registered to Mr. Mullhausen, in the 3800 block of Ellerslie. The SUV had "holes in the rear" that looked "like bullets had entered through the rear," and "two holes in the [driver's] seat." Detective Brockdroff also observed two vehicles that had been hit by the Suzuki.

Detective Brockdorff had another detective recover surveillance video from the Waverly Tavern. After looking at the video, Detective Brockdorff had the Suzuki's steering wheel and part of the driver's side door "where the window goes down" swabbed for DNA. He searched the SUV and recovered sixteen "clear plastic jugs" containing cocaine which were "scattered" throughout the floorboard and console. He also had the "jugs" swabbed for DNA.

A firearms expert analyzed nine cartridge cases that were recovered from the scene. She determined that they had been fired from the same firearm.

Dr. John A. Stash, the assistant medical examiner who oversaw Mr. Mullhausen's autopsy, testified that the "[c]ause of death was multiple gunshot wounds, and the manner of death was homicide." He testified that the victim suffered from three gunshot wounds. One wound was a "graze wound on the left side of the upper back," and another wound was to the "right lower back." The third wound was to "the left side of the mid-back." That bullet hit "the thoracic aorta, which is a large blood vessel coming off the heart" and

"the pulmonary artery, which is a large vessel coming off the heart that feed blood to the lungs." Dr. Stash also observed "some other injuries": "three contusions" and abrasion to the "left side of the forehead," "another abrasion which was more towards the center of the forehead," "an abrasion in front of the left ear area," "an abrasion on the left side of the upper lip," "an abrasion on the bottom of the chin," and "an abrasion on the left temporal scalp." Abrasions and contusions are considered blunt-force injuries. Dr. Stash also testified that the results of the toxicological analysis showed that Mr. Mullhausen had "cocaine" and "benzoylecgonine, which is a metabolite of cocaine," in his system.

Virginia Sladko, a DNA analyst for the Baltimore City Police Department Crime Lab, analyzed the swabs from the car and the swabs from "jugs," or capsules, of cocaine for DNA. The swabs from the capsules showed a mixture of at least three individuals, which included Mr. Hannah and Mr. Mullhausen. The swabs from the interior driver-side front window area also showed a mixture of which Mr. Mullhausen was the source of the major male DNA profile and Mr. Hannah "matched one of the profiles in the minor."

The State played portions of the surveillance video from Waverley Tavern for the jury during the testimony of Detective Brockdorff who indicated which parts he thought were relevant to his investigation. The video, which consisted of footage from different cameras, showed the interior and exterior of the tavern.

Footage from Camera 2 showed Mr. Mullhausen's car come to a stop on the street in front of the tavern. It shows a man, alleged to be Mr. Hannah by the State, standing at the driver's side door of the victim's car for a short period of time. It then shows that man appearing to hit Mr. Mullhaussen. At that point, the footage shows three other men coming

to the driver's side door, and the victim's car driving away, hitting other cars in the process. As the car begins to leave the view of the camera, the video shows a man, alleged by the State to be Mr. Hannah, firing shots at the car as it drove away.

On January 6, 2018, Detective Brockdorff interviewed Mr. Hannah at the Homicide Office. The videotape of that interview was introduced into evidence and played for the jury. During the interview, Mr. Hannah admitted that he was inside the tavern:

> DETECTIVE BROCKDORFF: Yeah. I know you were in the area because there's pictures from inside the bar, right?
>
> MR. HANNAH: (No audible response.)
>
> DETECTIVE BROCKDORFF: Is that you?
>
> MR. HANNAH: No.
>
> DETECTIVE BROCKDORFF: So you were inside the bar that night?
>
> MR. HANNAH: (No audible response.)
>
> DETECTIVE BROCKDORFF: So we're trying to figure out what happened outside the bar.
>
> MR. HANNAH: I don't know.
>
> DETECTIVE BROCKDORFF: That is – that's a picture of you, though?
>
> MR. HANNAH: No.
>
> DETECTIVE BROCKDORFF: All right. So guy was down there in a car, got shot. I know that there was a[n] accident, wreck into a car, something like that, but we don't have the whole story about what happened. We got some pictures of some people inside the bar and we're trying to figure out what happened outside the bar.
>
> MR. HANNAH: -- no picture of me.
>
> DETECTIVE BROCKDORFF: Are you in this picture, too?

MR. HANNAH: Yes.

DETECTIVE BROCKDORFF: Yes?

MR. HANNAH: Yeah.

DETECTIVE BROCKDORFF: Where are you?

MR. HANNAH: Right there by the bar.

DETECTIVE BROCKDORFF: This one right here is you?

MR. HANNAH: Yes.

Detective Vernon Fuller also participated in Mr. Hannah's interview. According to the detective, Mr. Hannah asked if he could get several telephone numbers from his phone before he was taken to Central Booking. One of the telephone numbers Mr. Hannah wrote down was [xxx]-[xxx]-3019. Detective Fuller accessed the jail call database and pulled calls to that number.

Portions of two jail calls to the 3019 number were played for the jury. In a January 6 call, Mr. Hannah says to the female who answered the phone:

> They got my pictures, man, they got – they got a fucking – they got vivid ass pictures of my mother-fuckin' face inside that bar. I'm talking about the front, the back. I'm talking about if I walked anywhere around that bar they got my face in that shit, man. Whole fuckin' face, man. You would need a blind man and a deaf dog to tell you that shit wasn't me on that picture, man.
>
> FEMALE SPEAKER: --so they have video of you inside the bar?
>
> MR. HANNAH: I don't know what the video look like, but the pictures of the still shots that they got (indiscernible – 9:48:07) had to be some good shit, but we're going to have to see.

The next day, on January 7, the following conversation between Mr. Hannah and the female occurred:

FEMALE SPEAKER: -- just that I went by the bar last night to see and to talk to them and see if they had (indiscernible) and he said the same thing. He said – telling me, like, what you can't see. He said it's a camera outside the bar, but you can't see nothing, but the ground –

MR. HANNAH: Oh, wow.

FEMALE SPEAKER: -- and, like, (indiscernible – 9:50:58) in front.

MR. HANNAH: Oh, yeah, I'm good then, babe, you hear me?

FEMALE SPEAKER: Yeah.

MR. HANNAH: I'm good then.

FEMALE SPEAKER: He said you can't (indiscernible), like, really, so.

MR. HANNAH: Somebody snitching and I think I know who it is.

FEMALE SPEAKER: That's what I told you (indiscernible). (Indiscernible) when I told your sister, she don't talk with (indiscernible – 9:51:20), and I said the same thing that you told me, so.

MR. HANNAH: Good.

FEMALE SPEAKER: And my dad said, 'If that's all it is, then it is what it is.'

MR. HANNAH: Huh?

FEMALE SPEAKER: I said that's – my dad said that's all it is, then good (indiscernible).

MR. HANNAH: Yeah, they got a bunch of pictures of me though.

FEMALE SPEAKER: Inside the bar?

MR. HANNAH: Yeah.

FEMALE SPEAKER: Yeah, that's – and that's what I told my dad, like, for that to even be relevant, it had to been a description given.

MR. HANNAH: Uh-huh. And look, he asked me about a Under Armour hoodie.

FEMALE SPEAKER: Uh-huh.

MR. HANNAH: Yes. You (indiscernible)?

FEMALE SPEAKER: Uh-huh.

MR. HANNAH: Did you do that for real what you said you did yesterday?

FEMALE SPEAKER: What you mean, last night?

MR. HANNAH: Yeah, last night.

FEMALE SPEAKER: No, but I did it in the afternoon.

MR. HANNAH: All right. Thank you. You heard me?

FEMALE SPEAKER: Yeah, babe, and I did that immediately.

MR. HANNAH: That's my girl. That's my girl.

Other facts will be added in the discussion of the questions presented.

I.

Communication between Juror 4 and the Clerk

On Friday September 21, 2018, the second day of jury deliberations in Mr. Hannah's case, the State was notified that the victim's father had overheard, during the lunch recess, a juror ask someone in the courtroom a question.[1] The court proceeded to ask the victim's

[1] The jury started deliberations on September 20, 2019, just before a lunch recess. After lunch, the jury resumed deliberations around 2:10 pm and were released at approximately 5:07 pm. On September 21, the jury resumed deliberations in the morning and the court recessed for lunch at 1:12 pm and directed the jurors to return by 2:20 pm to resume deliberations. The court reconvened at 3:00 pm. When Mr. Hannah and his counsel were present, the prosecutor notified the court and the defense about the communication between a juror and someone in the courtroom.

father what he had heard. After the victim's father responded, the courtroom clerk indicated that she had spoken to Juror 4. The clerk stated:

> He was stating to me that he wanted to write a note that they – he had some type of appointment at 5:45 [pm]. And I said, okay, put that in the note. And he said, well, if we don't come to a decision today, what will happen. And I let him know that they would probably have to come back but that would be totally up to the judge.

At that point, defense counsel moved for a mistrial based on the "inappropriate communication" between a juror and courtroom personnel. After a discussion with the parties, the court questioned Juror 4, who explained his communication with the clerk as follows:

> JUROR 4: It was that I had a reservation to go to – a train reservation was going to leave at 5:48 [pm]. And I was just wondering if there was a stop time for this deliberation for the rest of the juror, if there was a set time.
>
> THE COURT: Okay.
>
> JUROR 4: And in talking to [the clerk], she said that I could coordinate with them but I think we've reached a verdict so I don't think it's no longer a concern.
>
> THE COURT: Okay. So what did the clerk say in response?
>
> JUROR 4: To coordinate with the rest of the jurors.
>
> THE COURT: Coordinate what?
>
> JUROR 4: A stop time with the rest of the jurors.
>
> THE COURT: Coordinate a stop time with the rest of the jurors.
>
> JUROR 4: Jurors.
>
> THE COURT: Okay. Do you remember anything else about the conversation?
>
> JUROR 4: No, sir. I asked her if I could have – ask her the question?

> THE COURT: And what was her response?
>
> JUROR 4: To discuss it with the jurors. Oh to – not going to ask her. I'm sorry. (Indiscernible – 3:16:27) if I could ask her a question.
>
> THE COURT: So you asked if you could ask her a question and she said yes. And you said what?
>
> JUROR 4: Is there a certain stop time, that I had a reservation at 5:40 [pm] to go to New York. I was just trying to figure out if there was a certain stop time that we had as jurors --

The court then asked the parties if they had any questions. Defense counsel asked: "[D]id you have any questions about what would happen if you didn't reach a verdict before the completion of today's session?" Juror 4 replied:

> Oh, I did ask would we – I don't remember. Maybe I did ask something about would we have to come back on Monday or something. . . . I – maybe I asked if we didn't finish the deliberation today would we have to come back on Monday. Maybe that was my exact wording.

The court inquired, "do you remember what the response was?" and Juror 4 replied that it was "[t]o ask the judge."

Defense counsel then asked and Juror 4 responded:

> [DEFENSE COUNSEL]: Sir, not to pry into your private life but were you going to New York for an extended stay or just a one or two-day trip or --
>
> JUROR 4: One or two-day trip.
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: And when did you plan on returning?
>
> JUROR 4: Sunday.

The prosecutor suggested that the court ask Juror 4 "if his interaction with the clerk impaired his ability to be fair and impartial," and the court declined, stating "I don't think it matters." The clerk then added:

> That was the reason why I said it's up to the jurors . . . . To try to get myself out of the question that he was asking [be]cause, at first, when he asked (indiscernible – 3:20:00) can I ask a question, I'm thinking he's just going to ask a general question. So when he asked me can I ask a question, that's why – that's up to the jurors. Like, you know, to get myself away from that. And I told him whatever question he needed at that time, like he said, you need to put it in writing and then that's up to the judge to make that decision.

Defense counsel then renewed his motion for a mistrial:

> I think there was an inappropriate communication that was initiated by a juror. And the clerk tried to do the best as possible but still the juror was obviously asking things that I think compromised his ability to reach a fair and impartial decision because he obviously wants to get on a train and go to New York.

The court denied the motion for a mistrial, ruling:

> Well, he wants to get on a train and go to New York but the only thing he's asking about is if I get on the train and go to New York, at what time are we going to end, not necessarily anything else. The answer to that question was you're going to have to ask the judge about that.
>
> I understanding your objection in this matter. I don't think it influences his ability to rush through a decision in this case. I'm going to deny your motion at this time.

Our review of the record indicates that the exchange took place during the lunch break. The proceedings ended at 1:12pm and reconvened at 3:10pm. The exchange between Juror 4 and the court occurred between 3:13pm and 3:20pm. The record reflects that after the motion for a mistrial was made and counsel returned to the trial tables, the jury returned with a verdict. The jury was polled, a sentencing date

was set, and Mr. Hannah was advised of the mistrial motion. The proceedings were adjourned at 3:34pm. The timing between 3:00pm and 3:34pm suggests Juror 4's statement that he thought it was "no longer a concern" because the jury had reached a verdict was correct.

Contentions

Mr. Hannah contends that "[f]irst, the communication in this case clearly implicated Rule 4-326" because "[i]t was a communication between courtroom personnel and the juror, and it occurred prior to the verdict." Citing *State v. Harris*, 428 Md. 700, 716 (2012), he argues that the communication "pertained to the action" because "the juror was both conveying, and seeking, information that 'implicate[d], and may [have] impact[ed], [his] ability to continue deliberation." "Second, the Rule was clearly violated" because "[t]he courtroom clerk did not inform the judge of the communication as required by the Rule" and as a result, "the judge did not inform the parties of the communication and did not seek their input before the communication was responded to." Mr. Hannah argues that this failure to comply with the Rule was not harmless beyond a reasonable doubt because "there is a significant risk that [Juror 4] may have agreed to a verdict for the sole purpose of ensuring that he was able to make his trip" and had "pressured other jurors to agree on verdict for the sole purpose of ensuring that he was able to make his trip."

The State "agrees that there was a communication between courtroom personnel and a deliberating juror about a scheduling matter and that communication violated Maryland Rule 4-326." But it contends that the court "acted within its discretion when it

denied the defense's motion for mistrial after learning that courtroom personnel had a communication with a deliberating juror about a scheduling matter."

Analysis

As the Court of Appeals has explained:

> In this State there is no doubt that an accused in a criminal prosecution for a felony has the absolute right to be present at every stage of his trial from the time the jury is impaneled until it reaches a verdict or is discharged, and there can be no valid trial or judgment unless he has been afforded that right. The constitutional guarantee includes the right of the accused to be present . . . (iii) when the court communicates with the jury in answer to questions propounded by the jury, or (iv) when there shall be any communication whatsoever between the court and the jury; *unless* the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury.

Perez v. State, 420 Md. 57, 64 (2012) (quoting *Midgett v. State*, 216 Md. 26, 36-37 (1958)).

Md. Rule 4-326(d) governing communications between the court and a jury has roots in a criminal defendant's right to be present at every stage of trial. *Id.* at 64 (citing *Bunch v. State*, 281 Md. 680, 683-84 (1978)). It provides in pertinent part:

> *(2) Notification of Judge; Duty of Judge*
>
> (A) A court official or employee who receives any written or oral communication from the jury or a juror shall immediately notify the presiding judge of the communication.
>
> (B) The judge shall determine whether the communication pertains to the action. If the judge determines that the communication does not pertain to the action, the judge may respond as he or she deems appropriate.
>
> (C) If the judge determines that the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response. The

> judge may respond to the communication in writing or orally in open court on the record.

Md. Rule 4-326(d) "extends to communication between jurors and court personnel," and "receipt by the trial judge or any court personnel of a communication from the jury pertaining to the action at a time before the jury renders its verdict constitutes receipt within the meaning of Rule 4-326(d)." *State v. Harris*, 428 Md. 700, 714-15 (2012) (internal citation and quotation marks omitted).

The Court of Appeals has explained what "pertaining to the action" means:

> Information that implicates, and may impact, a juror's ability to continue deliberation is relevant information that must be disclosed in compliance with Rule 4–326(d). That is especially so, where, as here, the juror suggests that his or her ability to continue is dependent upon a speedy conclusion of the trial.

Id. at 716. In *Harris*, the trial court's secretary received a phone call from a juror's father, informing her that the juror's grandmother had died. *Id.* at 705–06. Without notifying counsel of the phone call, the secretary informed the juror of his grandmother's death, and asked him "whether he was alright to continue" serving on the jury. *Id.* at 706. The juror responded that he was. *Id.* Shortly after the start of deliberations, the juror sent a note to the court asking to be excused so that he could help his family with preparations for his grandmother's funeral. *Id.* The court, after informing the parties of the juror's note, declined to discharge the juror. *Id.* at 709. A few hours later, the jury sent a note indicating a verdict on "the specific intent count, but was deadlocked on the depraved heart count. The court instructed the jury to continue deliberating." *Id.* Later that day, the jury,

acquitting the defendant of second-degree specific intent murder, convicted him of second-degree depraved heart murder. *Id.*

The Court of Appeals explained that "[t]o be sure, a communication, from the court to a juror, passing along a phone message that the juror's grandmother had died, if that were all there was and when viewed in isolation, could be deemed to be a personal matter and, therefore, because it would not 'pertain[ ] to the action,' . . . would not constitute error." *Id.* at 716. But, the "other part of the communication was the secretary's inquiry into the juror's ability to continue his jury service." *Id.* at 718. That communication "was, in fact, a specific question regarding the juror's ability to continue serving and deliberating" and it "undoubtedly 'pertained to the trial' because it concerned the juror's ability to perform his duty—to make a decision concerning the guilt and, ultimately, the freedom of the defendant." *Id.* at 718-19. *See also Grade v. State*, 431 Md. 85, 100-01 (2013) (holding that phone call from juror to judge concerning her required attendance at court for deliberations was a communication pertaining to the action).

The communication between the clerk and Juror 4, in this case, "pertained to the action" because it implicated, and may have impacted, the jurors' continued deliberations. The record reveals, and the parties do not dispute, that the mandates of Rule 4-326(d)(2)(C) were not followed. The clerk did not inform the court of the communication as required by the Rule and, as a result, the court did not inform the parties of the communication and did not seek their input but the communication was responded to.

"A failure to comply with [the Rule's] explicit mandate is error, and once such error is established, it only remains for this Court to determine whether that error was prejudicial

to the defendant and, thus, requires reversal." *Gupta v. State*, 452 Md. 103, 123 (2017) (quoting *Harris*, 428 Md. at 720). "[The] failure of [a] trial court to disclose a communication under Rule 4–326(d) is evaluated under the harmless error standard and will not be considered harmless 'unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury.'" *Gupta v. State*, 452 Md. at 124 (quoting *Ogundipe v. State*, 424 Md. 58, 74 (2011)). "As the beneficiary of the error, the State has the burden of establishing that it was not prejudicial," and "[a] reversal of the . . . conviction is required unless the record demonstrates that the trial court's error in communicating with the jury *ex parte* did not prejudice the [defendant]." *Harris*, 428 Md. at 721 (quoting *Taylor v. State*, 352 Md. at 354).

We "must look to the record of what transpired in the circuit court" to determine whether the communication "affirmatively show[s] that the communication (or response or lack of response) was not prejudicial." *Gupta*, 452 Md. at 125 (internal citation omitted). Here, the record reflects that on the second day of jury deliberations, the court learned from the prosecutor that, during the lunch break, the victim's father overheard a juror ask someone in the courtroom a question. In the presence of counsel and Mr. Hannah, the court spoke with the clerk who had had the conversation with Juror 4. The clerk explained that Juror 4 said he had an appointment at 5:45 pm and asked "if we don't come to a decision today, what will happen," to which the clerk responded that she "let him know that they would probably have to come back but that would be totally up to the judge." The court then questioned Juror 4 who explained that he had a train reservation at 5:40 pm to go to

New York and was "just wondering if there was a stop time for this deliberation for the rest of the jurors."

The court asked the parties if they had any questions for Juror 4. Defense counsel asked if Juror 4 had asked the clerk "any questions about what would happen if you didn't reach a verdict before the completion of today's session," and Juror 4 replied that he asked "if [the jurors] didn't finish the deliberation today would we have to come back on Monday." The court inquired, "Well, do you remember what the response was?" and Juror 4 stated that it was "[t]o ask the judge." Defense counsel also inquired about the duration of Juror 4's trip to New York, to which Juror 4 responded that it was a two-day trip and that he planned to return on Sunday.

Defense counsel moved for a mistrial, arguing that the communication was "inappropriate" and that the juror "was asking things that . . . compromised his ability to reach a fair and impartial decision because he obviously wants to get on a train and go to New York," which the court rejected. As the court found, Juror 4 "wants to get on a train and go to New York *but the only thing he's asking is if I get on a train and go to New York, at what time are we going to end, not necessarily anything else*" (emphasis added). As the State observed, "[t]he juror had clarified that he would only be gone through Sunday, and therefore there was no reason to think that returning on Monday would be a problem." We agree.

The juror's responses to the court's questions indicate that Juror 4 did not receive a substantive response from the clerk. Rather, she told him that he would have "[t]o ask the judge," and that sometime since the lunch break and his appearance before the court and

counsel, his concern had dissipated. This was not a situation where, as in *Harris*, the defendant and counsel "were not provided with the opportunity to evaluate" the juror's emotional state or to provide their opinion on how to proceed. *Harris*, 428 Md. At 722.

Based on this record, we are persuaded that the State met its burden to establish that the violation of the Rule 4-326(d)(2)(C) was "harmless beyond a reasonable doubt," and that the court did not abuse its discretion in denying the motion for a mistrial.

II.

Involuntary Murder Instruction

Mr. Hannah was charged with murder in an indictment that mirrored the text of § 2-208 of the Criminal Law Article. At the conclusion of the case, the court denied defense counsel's request to instruct the jury on involuntary manslaughter. The court explained:

> Regarding jury instruction 4:17.9, I believe I addressed that yesterday. The Court will not giving an involuntary manslaughter instruction in this matter believing that there are no circumstances where the facts conclude that this was an involuntary situation.

The court then asked, "[a]ny one want to make any objections or anything regarding those instructions?" Defense counsel objected:

> [DEFENSE COUNSEL]: Your Honor, I object to the [c]ourt not giving 4:17.9, the involuntary manslaughter. I think the evidence does raise the possibility that this was a grossly negligent act.
>
> THE COURT: Thank you. Your objection is noted for the record.

The court instructed the jury on first-degree premeditated murder, second-degree intent to kill or inflict grievous bodily harm murder, and voluntary manslaughter.[2]

Contentions[3]

Mr. Hannah contends that "the trial court erred when it refused to instruct the jury on involuntary manslaughter." Relying on *Dishman*, 352 Md. 279 (1998), he argues that he was charged with involuntary manslaughter by the State's use of the short-form indictment, that the State did not enter a nolle prosequi on the involuntary manslaughter charge, and that the "jury could have concluded that Mr. Hannah was not guilty of first and second-degree murder and voluntary manslaughter, all of which require an intent to kill, but was guilty of involuntary manslaughter, which does not require an intent to kill."

The State responds that Mr. Hannah's argument regarding the jury instruction was not "properly preserve[d]" because "although [Mr.] Hannah objected when the court declined his request for a jury instruction on involuntary manslaughter [], he did not comply with Rule 4-325 and object on the record 'promptly after the court instructs the jury." But, "in any event," the claim is unfounded because "[a]n instruction on involuntary manslaughter was not generated by the evidence," and therefore the "court did not abuse its discretion in declining Hannah's request."

[2] With respect to voluntary manslaughter, the jury was instructed on perfect and imperfect self-defense, perfect and imperfect defense of others, and hot blooded response to adequate provocation. The jury acquitted Mr. Hannah of first-degree premediated murder and second-degree intent to kill murder.

[3] Mr. Hannah disputes being the shooter in the video, but not for the purposes of this argument.

Analysis

We address first the State's contention that Mr. Hannah's argument regarding the trial court's refusal to instruct the jury on involuntary manslaughter was not "properly preserved." Rule 4-325(e) requires a party to object "on the record promptly after the court instructs the jury." The purpose of the rule is to correct any error while there is an opportunity to do so. But substantial compliance with the rule can suffice when an objection is clearly stated on the record in open court, and the court, after ample opportunity to consider the request, unequivocally denies it with such an explanation that it is clear that renewal of the objection after instructing the jury would be futile. *See Gore v. State*, 309 Md. 203 (1987); *Bowman v. State*, 309 Md. 65 (1994); *Horton v. State*, 226 Md. App. 382 (2016).

Our review of the record indicates that the trial court discussed the proposed jury instructions received from counsel after the close of evidence. The instructions received on behalf of Mr. Hannah included an involuntary manslaughter instruction based on a grossly negligent act based on MPJ.I 4.17.9. The State objected stating "this is a manslaughter case . . . covered by 4.17.2." After it was determined that the jury would be sent home for the evening and defense counsel asked the court whether it was going to give the involuntary manslaughter instruction, the court responded that it had not decided and would let him know "tomorrow morning."

Proceedings began the following morning at 9:14am with a further discussion of the instructions as a result of the court's review of them the night before:

> THE COURT: Regarding jury instruction 4:17.9, I believe I addressed that yesterday.[4] The Court will not be giving an involuntary manslaughter instruction in this matter believing that there are under no circumstances where the facts conclude that this was an involuntary situation.
>
> * * *
>
> So that leaves us with the jury instruction. Anyone want to make an objection or anything regarding those instructions?
>
> * * *
>
> Make your objection. Make a record.
>
> * * *
>
> DEFENSE COUNSEL: Your Honor, I object to the court not giving 4:17.9, the involuntary manslaughter. I think the evidence does raise the possibility that this was a grossly negligent act.
>
> THE COURT: Thank you. Your objection is noted for the record.

After a short bench discussion with a juror, the trial court instructed the jury. Defense counsel did not advance an objection to the instructions after they were given.

Counsel made the request in open court and the trial court clearly understood what was being requested. When the court denied the request the following morning and explained why it did, it expressly invited the objection. Counsel clearly objected and explained why. The instructions were given almost immediately thereafter. Under these circumstances, we are persuaded that counsel had every reason to believe that renewal of the objection would be futile, that there was substantial compliance with the rule, and that appellate review has been adequately preserved in this case.

[4] The record reflects that the court had not addressed it beyond indicating that it had not decided and would respond the following morning.

Mr. Hannah contends that the trial court erred by refusing to instruct the jury on involuntary manslaughter. His argument is premised on his indictment for the murder of Mr. Mullhausen, which tracts § 2-208 of the Criminal Law Article, and states that he "on or about December 26, 2017 . . . feloniously, willfully, and with deliberately premeditated malice, did kill and murder [Mr. Mullhausen] in violation of the Common Law and Criminal Law Article, section 2-201 . . . against the peace, government and dignity of the state." Mr. Hannah asserts that this case "is controlled by the Court of Appeals' decision in *Dishman v. State*, 352 Md. 279 (1998)."

In *Dishman*, the Court concluded that "the statutory short form indictment for first degree murder also charges second degree murder, and manslaughter, and since the prosecution in this case had not entered a nolle prosequi of the charge of manslaughter, the trail court was required to give the manslaughter instruction so long as it was a permissible verdict generated by the evidence." *Id.* at 289-90. In other words, "the determination of whether an instruction must be given turns on whether there is *any* evidence in the case supporting the instruction. *Id.* at 292.

The State agrees that the short form murder indictment charges all forms of homicide, including manslaughter, both voluntary and involuntary, and that it did not enter a nolle prosequi as to involuntary manslaughter. But it contends that the evidence in this case does not generate a charge of involuntary manslaughter as it did in *Dishman*. Based on the admitted evidence, it asserts that "this jury could not rationally convict Hannah of involuntary manslaughter."

The initial determination of whether the evidence is sufficient to support a requested instruction is a question of law decided by the trial judge. On review, we must determine whether "the minimum threshold of evidence necessary to establish a *prima facie* case," has been produced from which a rational jury could conclude that firing at the back of a car at night after an altercation between the shooter and the driver was a grossly negligent act rather than an act done with the intent to kill. To be grossly negligent in this context means "that the [shooter], while aware of the risk, acted in a manner that created a high degree of risk to, and showed a reckless disregard for, human life." *Dishman*, 352 at 292; MPJI-Cr 4:17.9. The evidentiary threshold of "any" or "some evidence" is low. *Id.* at 293. It need not rise even to a preponderance level. It may come only from the defendant. And it may be "overwhelmed by evidence to the contrary." *Id.*

The evidence in this case indicates that victim arrived at the Waverly Tavern in his car at night. While he was in his car, he was engaged by a man alleged by the State to be Mr. Hannah. For unknown reasons, an altercation between the victim and that man ensued and when it did, other men also approached the driver's side door. The victim then drove away, and the man fired multiple shots at the back of his car. Mr. Hannah argues that "given the darkness of the hour and the fact that the victim was in a car that was moving away from the shooter, the jury rationally could have found that [the man] did not intend to kill the victim but instead to frighten him or threaten him and did so in a grossly negligent manner." The State argues that this argument "is simply not persuasive."

The evidence at this stage of the proceedings, however, is not the issue. The issue is one of production and whether *some*, or *any*, evidence had been presented from which a

jury could reasonably conclude that the shooter did not intend to kill[5] the driver when he fired shots at the back of a vehicle moving away from him at night. And that doing so was a grossly negligent act fueled by the altercation and frustration "that created a high risk to, and showed a reckless disregard for, human life." MPJI-Cr 4:17.9.

The jury found Mr. Hannah not guilty of first and second degree murder, both of which include the intent to kill. And in the case of second degree murder, it also included "the intent to inflict such serious bodily harm that death would be the likely result." The jury did find him guilty of voluntary manslaughter, but to do so, they had find that he had acted under duress. We do not know what brought Mr. Hannah and the victim together. We do not know what occasioned the problem between them. But if he intended to kill the victim, he had every opportunity to do so during the altercation. He was apparently in possession of the weapon throughout the altercation but he did not draw it or fire it until the victim was leaving the scene and he shot at the back of the car.

The question is not whether the evidence, viewed in the State's favor, was sufficient to support a finding of voluntary manslaughter; it was. But the question is whether there was "some evidence" from which the jury could make a rational finding of involuntary manslaughter. We are persuaded there was such evidence and that Mr. Hannah was entitled

[5] "The central element that distinguishes voluntary manslaughter from involuntary manslaughter . . . is that intent to kill is an element of the former, but not of the latter." 631 Md. 319, 332 (2000). Voluntary and involuntary manslaughter, from the standpoint of sentencing, each carry a maximum sentence of 10 years imprisonment. *See Bowers v. State*, 227 Md. App. 310 (2016). But involuntary manslaughter is not a crime of violence under Maryland law. *See* Md. Code Ann., Crim. Law. § 14-101.

to the instruction. The failure to instruct the jury on involuntary manslaughter presented the jury with an impermissible all or nothing choice. *See Hook*, 315 Md. 25, 34-39 (1989). Therefore, we vacate the conviction for voluntary manslaughter.

III

Regulated Firearm Instruction

Besides his convictions for wearing, carrying, and transporting a firearm and manslaughter, Mr. Hannah was convicted of possession of a regulated firearm after a disqualifying conviction. The State and Mr. Hannah stipulated that he was previously convicted of a crime that disqualified him from possessing a regulated firearm. The jury was instructed on the definition of a firearm and a handgun for the other charges, but not for a "regulated firearm."

That said, whether the shooter was using a regulated firearm was not contested at trial and neither the State nor the defense objected to the court's failure to provide the jury with the definition. A regulated firearm, under P.S. § 5-101(p)(1), is: "(1) a handgun; or (2) a firearm that is any of the following specific assault weapons or their copies, regardless of which company produced and manufactured that assault weapon," and then goes on to list dozens of firearms that are defined as regulated firearms. Relevant to this case, a handgun is defined as "a firearm with a barrel less than 16 inches in length." P.S. § 5-101(n).

Contentions

Mr. Hannah admits to having failed to object to a deficient jury instruction, but he urges us to exercise of our discretion to review plain errors. He argues that because no

definition was given for a regulated firearm and its definition is different from the definitions given to the jury concerning the wearing and carrying of a handgun, the court committed reversible error in failing to provide the definition of a "regulated firearm."

The State asks that we deny Mr. Hannah's request because the failure to provide the jury with a definition for a regulated firearm was not plain error and the failure to object constituted waiver. Highlighting the burden that an appellant must meet to show plain error, the State contends that Mr. Hannah has not satisfied that burden.

Analysis

We will first address whether the issue of plain error review has been waived or forfeited. The State, albeit briefly, argues that "failure to object to jury instructions constitutes waiver." But whether a failure to object to a jury instruction actually constitutes waiver requires more of an analysis. The Court of Appeals, identifying a difference between waiver and forfeiture, has explained that waiver is the "intentional relinquishment or abandonment of a known right," whereas forfeiture is a "failure to make a timely assertion of a right." *State v. Rich*, 415 Md. 567, 578 (2010). "Forfeited rights are reviewable for plain error, while waived rights are not." *Id.*

Yates v. State, 202 Md. App. 700 (2011), is instructive. There, the parties responded that they had no objections to the jury instructions before they were given. *Id.* at 722. On appeal we held that a general failure to object to the instructions was a forfeiture rather than an affirmative waiver, and would not preclude a plain error review. *Id*. In this case, we conclude that the failure to object to a jury instruction not being given was not an affirmative waiver to object. Although there was not a general negative response when the

trial court asked if there were objections to the jury instructions as there was in *Yates*, we are persuaded that the failure to object to a particular jury instruction, while having objected to others, was not an affirmative waiver precluding plain error review.

On the other hand, plain error review is a "rare, rare phenomenon," and should be exercised "only when the unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Hammersla v. State*, 184 Md. App. 295, 306 (2009); *Turner v. State*, 181 Md. App. 477, 483 (2008); *see also Kelly v. State*, 195 Md. App. 403, 431 (2010). We have adopted a four-prong test to determine whether such review is appropriate:

> (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.
>
> *Kelly*, 195 Md. App. at 432 (quoting *State v. Rich*, 415 Md. 567, 578 (2010)) (internal quotations omitted).

As to the first prong, the alleged error was not affirmatively waived and the State concedes error. And as to the second, it was obvious and immediately apparent on appeal. But as to the third prong, we are not persuaded that the failure to define "regulated firearm" affected Mr. Hannah's substantial rights or was so erroneous as to affect the outcome in this case. The jurors could see the video of the shooting and there was no contention during trial that the shooter was not holding and firing a handgun or firearm that would appear to

fall within the definition of a "regulated firearm." In addition, by stipulating that Mr. Hannah was "previously convicted of a crime that would prohibit his possession of a regulated firearm," both parties apparently assumed that the weapon fired would qualify as a regulated firearm. As to the fourth prong, we are not persuaded that this error seriously affected the "fairness, integrity, or public reputation of judicial proceedings." For these reasons, we decline to exercise plain error review in this case.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART, REVERSED IN PART, AND REMANDED TO THAT COURT TO VACATE THE VOLUNTARY MANSLAUGHTER CONVICTION AND FOR FUTURE PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS TO BE DIVIDED TWO-THIRDS TO APPELLANT AND ONE-THIRD TO MAYOR AND CITY COUNCIL OF BALTIMORE.