Circuit Court for Baltimore City
Case No. 822311001

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2032

September Term, 2022

ROBERT L. COPES, JR.

v.

STATE OF MARYLAND

Nazarian,
Tang,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: July 8, 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 persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

After trial before a jury in the Circuit Court for Baltimore City, Robert Copes, Jr. was found guilty of telephone misuse and harassment arising from interactions with his probation officer. On appeal, Mr. Copes argues that (1) the circuit court erred by instructing the jury on uncharged modalities of both offenses and (2) there was insufficient evidence to support his convictions. We hold that the jury instructions erred, and plainly so, because they included modalities of the offenses for which Mr. Copes was not charged. Despite Mr. Copes's failure to preserve objections to the instructions, we reverse his convictions and remand for further proceedings.

I. BACKGROUND

A. Interactions Between Mr. Copes And His Probation Officer.

On May 31, 2022, Mr. Copes made repeated calls to his probation officer, Kellie Burton. To be exact, he called Ms. Burton twenty-seven times that day. Ms. Burton reprimanded Mr. Copes for his "repeated, repeated calling" and "instructed him that he should not call [her] so many times." She also "relay[ed] to Mr. Copes that [h]e was prohibited from harassing businesses, people, his probation agent, [and] his probation agent supervisor . . . ."

About two months later, on July 20th, Mr. Copes again made repeated calls to Ms. Burton and left "a series of voice mails . . . ." In particular, he left over twenty voicemails in which he referred to Ms. Burton and her supervisors with "very graphic language"—calling them terms like "white supremacist, KKK, whore, bitch, . . . [and] slut." Ms. Burton

instructed Mr. Copes to stop the repeated phone calls and voicemails and told him "[n]umerous times" that the communications were inappropriate.

Ms. Burton believed that Mr. Copes made the repeated calls and voicemails to get her "to produce a result he wanted to happen with his probation or just in general to get [her] to do something for him or to intimidate [her]." According to Mr. Copes, though, he was contacting Ms. Burton because she told a judge falsely that he had violated his probation and that her statement had caused the court to issue a warrant for his arrest. He feared that he would lose his job if he was arrested and was calling Ms. Burton to ask "if she would call [the judge] to right the wrong . . . ."[1] Ms. Burton did not agree to contact the judge after the repeated calls and voicemails Mr. Copes made on July 20th.

That same day, Mr. Copes video-called Ms. Burton. When she answered, she noticed that Mr. Copes was shirtless and "clearly had just showered and was holding the phone so [she] could see his waistline and what appeared to be a towel wrapped around his waist." Ms. Burton ended the call but before doing so, she "told [Mr. Copes] he was to 100 percent get himself together fully clothed and then call back." Mr. Copes called back "[a]lmost immediately." He had put on a shirt, but Ms. Burton could still see his towel around his waist. Ms. Burton felt "uncomfortable" and believed that Mr. Copes's clothing created a "sexual nature that shouldn't be there when having contact with a client . . . ."

[1] Mr. Copes testified at trial that he in fact lost his job after being arrested for a probation violation and that "[l]ater down the road [the judge] dismissed his probation because of [Ms. Burton's] false allegations."

Sometime after this phone call, Ms. Burton saw Mr. Copes taking pictures of her car and license plate outside of a courthouse. Mr. Copes's actions were "very unsettling" for Ms. Burton and made her afraid that he would try to access her home address.

B. Procedural History.

The State charged Mr. Copes with one count each of telephone misuse and harassment. In Maryland, telephone misuse can be proven via three different modalities—evidence that a person used telephone facilities to make anonymous calls, repeated calls, or lewd suggestions:

> (a) A person may not use telephone facilities or equipment to make:
>
> (1) an anonymous call that is reasonably expected to annoy, abuse, torment, harass, or embarrass another;
>
> (2) repeated calls with the intent to annoy, abuse, torment, harass, or embarrass another; or
>
> (3) a comment, request, suggestion, or proposal that is obscene, lewd, lascivious, filthy, or indecent.

Maryland Code (2002, 2021 Repl. Vol.), § 3-804(a) of the Criminal Law Article ("CR"). The indictment charged Mr. Copes with the repeated calls modality of telephone misuse under CR § 3-804(a)(2). At trial, however, the court instructed the jury on both the repeated calls modality and the lewd suggestions modality, under CR § 3-804(a)(2) & (3).[2]

[2] The court instructed the jury that "[a] person may not use telephone facilities or equipment to make repeated calls with the intent to annoy, abuse, torment, harass or embarrass another or a comment, suggestion, request, or proposal that is obscene, lude, lascivious, filthy, or indecent."

Moreover, the crime of harassment can be proven by evidence that a person "follow[ed]" an individual in a public place or engaged in a "course of conduct" that alarmed the individual:

> (a) A person may not follow another in or about a public place or maliciously engage in a course of conduct that alarms or seriously annoys the other:
>
> (1) with the intent to harass, alarm, or annoy the other;
>
> (2) after receiving a reasonable warning or request to stop by or on behalf of the other; and
>
> (3) without a legal purpose.

CR § 3-803(a). The State charged Mr. Copes with the "course of conduct" modality of harassment, but the court instructed the jury on both the "follow[ing] another in or about a public place" modality and the "course of conduct" modality.[3]

Mr. Copes did not object to the jury instructions on the ground that they included uncharged modalities—he objected only on the basis that there was insufficient evidence to generate the instruction on lewd suggestions under CR § 3-804(a)(3). The jury returned a general verdict finding Mr. Copes guilty of both counts. The verdict did not specify which modalities the jury had found proven. The court sentenced Mr. Copes to three years of incarceration, suspending all but one year, for the telephone misuse conviction and a concurrent term of ninety days for the harassment conviction. Mr. Copes timely appealed his convictions.

[3] The court instructed the jury that "[i]n order to convict the defendant of harassment, the State must prove . . . that the defendant followed Agent Burton in or about a public place *or* maliciously engaged in a course of conduct that alarmed or seriously annoyed Agent Kellie Burton." (Emphasis added.)

We provide additional facts as necessary below.

II. DISCUSSION

Mr. Copes raises two issues on appeal:[4] *first*, whether the court erred by instructing the jury on uncharged modalities of telephone misuse and harassment; and *second*, whether the evidence was insufficient to sustain his convictions. We will exercise our discretion to review the jury instructions for plain error, and we hold that they did amount to plain error because they allowed the jury the opportunity to convict Mr. Copes for modalities of telephone misuse and harassment for which he was not charged. We decline to do the same for his unpreserved challenges to the sufficiency of the evidence to support the convictions and find that his preserved sufficiency challenge fails on the merits, and thus we reverse Mr. Copes's convictions and remand for a new trial.

[4] Mr. Copes phrased his Questions Presented as:

> 1. Must Appellant's convictions be vacated because Appellant was not charged with the specific crimes for which he was convicted?
> 2. Is the evidence sufficient to sustain Appellant's convictions?

The State phrased its Questions Presented as:

> 1. Were Copes's convictions for telephone misuse and harassment proper because the statement of charges charged Copes with specific modalities of both crimes?
> 2. Was the evidence legally sufficient to sustain Copes's convictions for telephone misuse and harassment?

A. Mr. Copes's Challenges To The Jury Instructions Were Not Preserved For Appellate Review.

Mr. Copes contends that "the trial court submitted to the jury uncharged modalities for each count" and that "allowed for the possibility that [he] was convicted of offenses with which he was not charged . . . ." As a result, he contends, "the trial court was without the jurisdiction to enter verdicts and impose sentences on those counts" and this Court must reverse his convictions despite his failure to object. Alternatively, Mr. Copes argues that this Court should exercise plain error review because the instructional "error was obvious and material to [his] rights . . . ." He argues as well that his sentences are illegal under Maryland Rule 4-345(a) because it's possible that he was convicted of crimes that were not charged.

The State counters that Mr. Copes's complaints about the jury instructions "ste[m] from a claim of instructional error to which [he] lodged no objection" and that we should reject the claim because it is unpreserved. The State argues, moreover, that "[t]here is no compelling reason for this Court to exercise its discretion to engage in plain error review here." In addition, the State contends that "the mere theoretical possibility that the jury 'could have' convicted [Mr.] Copes under an uncharged modality did not deprive the circuit court of jurisdiction or render his sentence illegal."

"Maryland Rules require that a party make a contemporaneous objection to a jury instruction to preserve an argument that the instruction was erroneous." *Taylor v. State*, 473 Md. 205, 226 (2021). The contemporaneous objection must "stat[e] distinctly the matter to which the party objects and the grounds of the objection." Md. Rule 4-325(f).

"The preservation requirement is intended to prevent the trial court from being sandbagged by unseen error." *Jordan v. State*, 246 Md. App. 561, 586 (2020). Accordingly, "a failure to object to the giving or the failure to give a jury instruction at trial ordinarily constitutes a waiver of a claim that the instructions were erroneous." *Peterson v. State*, 196 Md. App. 563, 589 (2010) (*citing Morris v. State*, 153 Md. App. 480, 509 (2003)).

Mr. Copes did not raise an objection at trial on the basis that the court instructed the jury on uncharged modalities of telephone misuse and harassment. He objected only that there was insufficient evidence to generate the instruction on the lewd suggestions modality under CR § 3-804(a)(3). Mr. Copes concedes this point in his brief: "trial counsel did not object to the variance between the charging document and the charges submitted to the jury, [but] trial counsel did object to the court instructing the jury on the obscene modality of telephone misuse." Because he did not object to the discrepancy between the charging document and the jury instructions, his argument that "the trial court submitted to the jury uncharged modalities for each count" was not preserved.

B. We Will Review Mr. Copes's Challenge To The Jury Instructions For Plain Error.

Despite a failure to object, an appellate court may "take cognizance of any plain error in the instructions, material to the rights of the defendant . . . ." Md. Rule 4-325(f). "'Plain error review is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.'" *Hallowell v. State*, 235 Md. App. 484, 505 (2018) (*quoting Newton v. State*, 455 Md. 341, 364 (2017)). Although our discretion to consider unpreserved errors effectively is limitless, courts often have

considered four conditions when asked to find an error plain:

> (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.

Id. (cleaned up).

Beginning with the first condition, we find that the court erred in instructing the jury on uncharged modalities of telephone misuse and harassment and that Mr. Copes did not waive this error affirmatively. "'[I]t is elementary that a defendant may not be found guilty of a crime of which he was not charged in the indictment.'" *Johnson v. State*, 427 Md. 356, 375 (2012) (*quoting Turner v. State*, 242 Md. 408, 414 (1966)). "Convicting a defendant of a crime that was not charged would be a sheer denial of due process." *Shannon v. State*, 241 Md. App. 233, 243 (2019), *aff'd on other grounds*, 468 Md. 322 (2020) (cleaned up); *Stickney v. State*, 124 Md. App. 642, 646 (1999) ("[W]hen no crime is charged, a court does not have the power to inquire into the facts, to apply the law, and to impose punishment for an offense."). "Implementing these protections, the Maryland Rules provide that '[a]n offense shall be tried only on a charging document.'" *Shannon*, 241 Md. App. at 243 (*citing* Md. Rule 4-201(a)).

Maryland Rule 4-204 provides the "exclusive procedure" for amending a charging document. *Johnson*, 427 Md. at 373. The Rule states that amendments to the "character of

the offense charged" cannot be made without the defendant's consent:

> On motion of a party or on its own initiative, the court at any time before verdict may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required.

Md. Rule 4-204. Moreover, the Rule "does not permit the State to add new charges to an existing indictment." *Johnson*, 427 Md. at 375. "If the State desires to charge a defendant with additional crimes, it must 'file additional charging documents charging new offenses.'" *Id.* (*quoting Tracy v. State*, 319 Md. 452, 457 (1990)). The purpose of the Rule "'is to prevent any unfair surprise to the defendant and his counsel.'" *Id.* at 374 (*quoting Johnson v. State*, 358 Md. 384, 392 (2000)).

Moreover, "substituting different criminal acts in an indictment constitutes a change in the character of the charged offense even if both acts are prohibited by the same statute." *Shannon*, 241 Md. App. at 244 (cleaned up). In *Thanos v. State*, the charging document alleged that the defendant "attempted to alter" the price tag on a sale item at a local department store. 282 Md. 709, 711 (1978). At trial in that case, the State sought to amend the charging document to substitute the word "remove" for "alter." *Id.* Over the defendant's objection, the court allowed the amendment, and the defendant was convicted. *Id.* at 711–12. The Maryland Supreme Court held that the amendment to the charging document was impermissible because it "changed the character of the offense charged":

> This is a situation in which the statute creates one offense generically—shoplifting—but specifies a number of different "acts, transactions, or means" by which it may be committed. The "offense" charged here was attempted shoplifting; the various means by which that offense may be committed, we

> think, constitute its "character." It is inconceivable to us that the character of the offense remains unchanged, no matter which of the several proscribed acts are alleged to have been done, simply because the same generic crime is charged before and after the amendment. Were that the case, the term "character" would be entirely without meaning.

Id. at 714 (footnote omitted) (citation omitted).

Our analysis in *Tapscott v. State* is also instructive. 106 Md. App. 109 (1995), *aff'd*, 343 Md. 650 (1996). In that case, the trial court instructed the jury that it could convict the defendant of child abuse if it found the defendant to be "a person who had 'permanent or temporary care or custody of [the] child', when the indictment charged [the defendant] with only being a person having 'responsibility for the supervision' of the child." *Id.* at 133. This Court held that the jury instruction "altered the crime alleged to have been committed [and] violated the [defendant's] constitutional right to be informed of the accusation against him in time to prepare his defense." *Id.* at 136. We explained that "[i]f the State was unsure about the circumstances under which the [child abuse] occurred, it could have generally charged [the defendant] under the statute." *Id.* at 135. "When the State delineated the particular section of the statute, however, it charged only the conduct and circumstances proscribed by that section, and, absent [the defendant's] consent, was barred from later amending the indictment to charge different circumstances." *Id.*

In this case, the court instructed the jury that it could convict Mr. Copes of telephone misuse if it found that he used telephone facilities to make a "lewd" suggestion to Ms. Burton when the statement of charges alleged only that Mr. Copes made "repeated calls" to Ms. Burton. The court also instructed the jury that it could convict Mr. Copes of

harassment if it found that he "followed Agent Burton in or about a public place . . . ," but the statement of charges alleged only that Mr. Copes committed harassment by engaging in a "course of conduct" that alarmed or seriously annoyed Ms. Burton. As in *Tapscott*, the jury instructions that the court gave "altered the crime[s] alleged to have been committed . . . ." *Id.* at 136. This was legal error because "charging document[s] may not 'be amended to charge an act not alleged in the original document. . . .'" *Johnson*, 358 Md. at 390 (*quoting Thanos*, 282 Md. at 715).

In addition, the legal error here was "clear." *Hallowell*, 235 Md. App. at 505 (cleaned up). It's undisputed that the court instructed the jury on the "lewd suggestion" modality of telephone misuse and the "public place" modality of harassment when those modalities were not alleged in the statement of charges. There's also no dispute that the uncharged modalities required proof of different acts than the charged modalities. The jury should not have been instructed on the uncharged modalities, and the additions effectively amended the statement of charges to add new counts without Mr. Copes's consent or the approval of the court. *Thanos*, 282 Md. at 716 (It's "clear that the basic description of the offense is indeed changed when an entirely different act is alleged to constitute the crime."); *Stickney*, 124 Md. App. at 647 (Defendants' "convictions for felony theft in the absence of a charging document charging them with that offense were a clear violation of Maryland law."); *Johnson*, 358 Md. at 392 ("An amendment, changing the identity of the controlled dangerous substance, changes an element of the offense charged, and charges

the defendant with a different offense. Such an amendment, without the defendant's consent, is not permitted.").

As for the third condition, we find that the error affected Mr. Copes's "substantial rights." *Hallowell*, 235 Md. App. at 505 (cleaned up). Amending a charging document at trial without the consent of the defendant is a "grave" procedural error that "eviscerate[s] the constitutional and prudential reasons for indicting defendants":

> To allow a charge to be implied by the conduct of the parties and the trial court, though absent from the indictment, would create an unfair guessing game for defendants, in which they would be required to defend not only the charges in the indictment, but also any other crimes discussed on the record or argued to the jury. Such a procedure would eviscerate the constitutional and prudential reasons for indicting defendants.

Johnson, 427 Md. at 377–78; *Hallowell*, 235 Md. App. at 506 (defendant's substantial rights were affected and plain error occurred where jury instruction created the "distinct possibility" that defendant was convicted of a "non-existent crime"); *Tapscott*, 106 Md. App. at 136 (defendant's "constitutional right to be informed of the accusation against him" was violated where jury instruction "altered the crime alleged" and made it unknown "whether he was convicted of the crime for he was charged or some other crime, not charged"). For the same reason, we conclude as to the fourth condition that the error seriously affected the "fairness" and "integrity" of Mr. Copes's trial. *Hallowell*, 235 Md. App. at 505 (2018) (cleaned up); *Shannon*, 468 Md. at 326 ("A charging document that fails to give adequate notice can be akin to moving the goal posts after the game has begun.").

The jury instructions in this case amounted to plain error because they altered the crimes that Mr. Copes was alleged to have committed. We recognize that our use of discretion to find plain error is extraordinary. *Conyers v. State*, 354 Md. 132, 171 (1999) ("[I]n the context of erroneous jury instructions, the plain error doctrine has been used sparingly."). But we exercise this discretion only after careful consideration of Mr. Copes's substantial rights. *Shannon*, 241 Md. App. at 243 ("Convicting a defendant of a crime that was not charged would be a sheer denial of due process." (cleaned up)); *Johnson*, 358 Md. at 392 ("This Court has consistently reversed convictions whenever an unconsented amendment to a charging document has changed the character of the offense, without any further exploration into prejudice."). We will, after one final step, reverse Mr. Copes's convictions and remand for further proceedings.[5]

C. To The Extent Preserved, Mr. Copes's Challenge To The Sufficiency Of The Evidence Fails.

The final step relates to Mr. Copes's challenge to the sufficiency of the evidence to support his convictions. If we were to agree with Mr. Copes that the evidence was insufficient as a matter of law to support the convictions, the State would be precluded on double jeopardy grounds from trying him again. *Benton v. State*, 224 Md. App. 612, 629 (2015). For that reason, we normally need to consider sufficiency challenges even after reversing on other grounds. *Id.*

[5] Because we reverse Mr. Copes's convictions under the plain error doctrine, we need not address whether the court lacked jurisdiction to impose Mr. Copes's sentences or whether his sentences were illegal under Maryland Rule 4-345(a).

We begin by assessing whether Mr. Copes's sufficiency challenges are preserved. Mr. Copes contends on appeal that the evidence was insufficient to support his convictions because "[t]he State failed to prove specific intent." He argues as well that the evidence was "lacking to show that Ms. Burton or anyone acting on her behalf asked [him] to stop calling her, as the law requires" and that "[t]here [wa]s insufficient evidence to sustain a conviction for the obscenity modality" because "[his] conduct did not appeal to a prurient interest in sex . . . ." "[T]o the extent that any of these sufficiency arguments are unpreserved," he argues "this Court should exercise plain error review" or "find that trial counsel provided ineffective assistance of counsel by failing to argue these specific reasons why the evidence was insufficient . . . ." The State contends that Mr. Copes's motion for judgment of acquittal was limited to whether the evidence was sufficient for the jury to find that he possessed the requisite intent and that his additional sufficiency claims on appeal were never raised in the circuit court and are not properly the subject of plain error or ineffective assistance review on appeal.

The State is right. "[R]eview of a claim of insufficiency is available only for the reasons given by [an] appellant in his motion for judgment of acquittal." *Cagle v. State*, 235 Md. App. 593, 604, *aff'd*, 462 Md. 67 (2018). In his motion for judgment of acquittal, Mr. Copes argued only that the evidence was insufficient for the jury to find that he possessed the requisite intent for telephone misuse and harassment. As such, he failed to preserve any other grounds for arguing that the evidence was legally insufficient. And unlike his challenges to the jury instructions, we decline to exercise plain error review of

Mr. Copes's unpreserved sufficiency arguments. Whether or not it would be an unprecedented exercise of our discretion in that regard, as the State argues it would, the relatively fine-grained distinctions Mr. Copes asks us to make in characterizing the evidence make it hard to view the asserted errors as plain, especially in light of the further proceedings we are ordering on other grounds. We also decline Mr. Copes's request to find ineffective assistance of counsel for the failure to raise the unpreserved arguments because "a claim for ineffective assistance of counsel ordinarily should be addressed in a post-conviction proceeding," *Crippen v. State*, 207 Md. App. 236, 253 (2012), and there is no compelling rationale here for us to depart from that rule.

On the merits of Mr. Copes's preserved sufficiency argument, we find that the evidence was legally sufficient for the jury to find that Mr. Copes possessed the requisite intent for telephone misuse and harassment. When assessing the sufficiency of the evidence, we determine "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Manion*, 442 Md. 419, 430 (2015) (*quoting Taylor v. State*, 346 Md. 452, 457 (1997)).

To prove telephone misuse, the State had to show that Mr. Copes made repeated calls with "the intent to annoy, abuse, torment, harass, or embarrass another[.]" CR § 3-804(a)(2). And to prove harassment, the State had to show that Mr. Copes followed Ms. Burton in a public place or "maliciously engage[d]" in a course of conduct with "the intent to harass, alarm, or annoy [Ms. Burton]." CR § 3-803(a). Ms. Burton testified at trial

that Mr. Copes called her twenty-seven times in one day. She testified further that even though she "instructed [Mr. Copes] that he should not call [her] so many times," Mr. Copes continued to make repeated calls and left over twenty voicemails in which he referred to her and her supervisors with "very graphic language" including terms like "white supremacist, KKK, whore, bitch, . . . [and] slut." Based on the frequency and graphic nature of his calls, there was sufficient evidence for a rational jury to find that Mr. Copes had an "intent to annoy" Ms. Burton and "maliciously engage[d]" in a course of conduct to annoy her. *See Jones v. State*, 213 Md. App. 208, 218 (2013), *aff'd*, 440 Md. 450 (2014) ("A jury may infer that one intends the natural and probable consequences of his act." (cleaned up)). Although Mr. Copes contends that the evidence was consistent with him trying to reach Ms. Burton to "fix a mistake," our analysis does not change because "the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation" and "[w]e do not second-guess the jury's determination where there are competing rational inferences available." *Smith v. State*, 415 Md. 174, 183 (2010) (cleaned up).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. MAYOR AND CITY COUNCIL OF BALTIMORE TO PAY COSTS.