UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1641

September Term, 2014

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JOSEPH BENJAMIN BUCIO

v.

STATE OF MARYLAND

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Meredith,
Berger,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

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Opinion by Kenney, J.

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Filed: December 23, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Joseph Benjamin Bucio, was charged with multiple sexual offenses: first degree, Md. Code (2002, 2012 Repl. Vol.), § 3-305 of the Criminal Law Article ("CL § 3-305"); second degree, CL § 3-306; third degree, CL § 3-307; and fourth degree CL § 3-308. He was also charged with first degree assault, CL § 3-202; second degree assault, CL § 3-203; reckless endangerment, CL § 3-204(a)(1); and the common law crime of false imprisonment. A jury in the Circuit Court for Wicomico County convicted him of the four sexual offenses and second degree assault. He was sentenced to fifteen years for the first degree sexual offense conviction; the remaining convictions were merged for sentencing purposes.

In this timely appeal, appellant presents two questions for our review, which we have reworded, as follows:

1. Did the circuit court err in denying appellant's request to be tried in a suit rather than a Wicomico County Detention Center issued green shirt and khaki pants?

2. Did the circuit court err in instructing the jury that a "sexual act" includes digital penetration?

For the reasons that follow, we answer both questions in the negative.

## FACTUAL AND PROCEDURAL BACKGROUND

At some time in the late evening hours of January 3, 2014, or early morning hours of January 4, appellant contacted his former girlfriend ("the victim") on Facebook and notified her that he had been in a car accident. Believing that the accident was serious (appellant's car had "flipped over"), she went to the apartment that they had previously shared to check on his well-being. Appellant was not in the apartment when she first arrived; she used her personal key to gain entry and waited for him in the kitchen area.[1]

Appellant returned to the apartment approximately five minutes later. He attempted to talk to the victim about their November 2013 breakup.[2] She avoided the subject by asking him how he was feeling after the accident. When she tried to walk past him to get to the door he "kind of stepped in front of [her] and grabbed her arm." He became increasingly "frantic" and "aggressive" as she approached the door, and went from "hold[ing the victim] on the arm to . . . bear hug[ging her] . . . [s]tanding in the way of the door, blocking [her], [and] not letting her leave." He then grabbed the victim and pushed her into the hallway area where he tried to remove her clothing, including her leggings, "get [in] between [her] legs," and to kiss her. He began "rubbing [her] breasts" and "touch[ing her] hips" and "inner thighs." Throughout that interaction, she asked appellant "to stop . . . [and was] trying to push him off [of her,]" but instead, he became more aggressive.

She told him to "stop, leave [her] alone, let [her] go," and that she did not "want [him]" or "want this[,]" but he continued "trying to take off [her] shirt[,] . . . put his hands [in] between her legs, . . . [and] kiss [her.]" When she told him that she did not "want [him]," he went to the kitchen and grabbed a knife. As the victim was attempting to pull

[1] At the time of the incident, the victim was living with her mother, but she remained a named lessee of the apartment.

[2] The victim testified that she stopped living with appellant because he had "a history of putting his hands on [her] inappropriately[, a]nd . . . [had] cheated on [her]."

her leggings up, he stepped toward her with the knife. He told her that "if I can't have you I might as well be dead," and put the knife to his throat. He attempted to put the victim's hand on the handle of the knife and screamed "cut me, cut me, cut me[,]" but she pulled her hand back and continued to tell him to "get off [of her.]"

When appellant refused to stop, she told him she would have to call the police, and he replied that he did not care. Now, "very frightened," she attempted to run past him. When she did, appellant dropped the knife and grabbed her, causing her to fall. He dragged her by the ankles into the bedroom and pushed her onto the bed so that she was lying on her back. Appellant again attempted to remove her leggings and to take off her bra. He "pull[ed] up [her] shirt [to] kiss the top of [her] breasts, [her] stomach [and] the front of [her] pelvis" while she "was . . . in a fetal position . . . [with her] knees clasped together."

By then, appellant had taken off the pants of his scrubs.[3] He was trying, unsuccessfully, to remove the shorts he was wearing underneath, but, because she resisted, he repeatedly had to stop to push the victim down. Appellant, after turning her onto her stomach, held her so that she could not move her neck. He forced her legs apart, and "put his finger inside of [her]." She reacted by kicking him and rolling off of the bed to the side opposite appellant.

[3] Testimony at his sentencing hearing indicated that appellant had "a nursing background," and worked as a nursing home aide. Appellant was at work prior to the car accident.

Again, the victim tried to run away, but he intercepted her and "thr[ew her] against the wall." She screamed for him to "let [her] leave." But, despite her requests, appellant "put his hands on [her] throat and choke[d]" her, and "pin[ned her] up against the wall to the point where [she] couldn't breathe[.]" Eventually, appellant became so angry that he lifted her up, took her to the door, and tried to throw her out with her pants around her ankles, and without her phone or car keys. He released her when she punched him in the face, which caused him to bleed. She grabbed her belongings and "bolted to the door." [4]

She reported the incident to the Salisbury Police Department around 7:30 a.m. on January 4. Approximately one hour later, she was interviewed by Officers Brittany Sigmund and Larry Jones at the Salisbury Police Department. Appellant was interviewed by those same officers later that same day. During his interview, appellant admitted that he held the victim against the wall, put her down on the bed, tried to remove her pants and "tried to hold her and hug her and kiss her, [even though] she pushed [him] off of her . . . [and that he] just kept on trying to." He also stated that he removed her jacket because he "was trying to . . . make her more comfortable . . . because [he knew that] the more clothes that she had on . . . the quicker [sic] that she was going to try and get out." He admitted retrieving a knife from the kitchen.

At trial, the State presented three witnesses: the victim, and Officers Sigmund and Jones. The State also introduced a video recording of appellant's January 4th interview.

[4] When asked on cross examination about not leaving until she got her things, she stated that she gathered "things that would help her leave . . . [including her] [s]weater, phone, keys, [and] coat."

The defense did not present any witnesses. After hearing instructions and arguments of counsel, the jury retired. A verdict was returned later that evening.

Additional facts will be included below as they relate to our discussion of the issues.

*Courtroom Attire*

At trial, appellant wore the clothing issued to him at the Wicomico County Detention Center. According to counsel, appellant's mother had "attempted to drop off a suit [the] week [before trial] . . . at Wicomico County Detention Center[, but t]hey rebuffed her[,]" and later, "rebuffed [counsel]" when he attempted to drop off the suit himself. Counsel stated that, based on prior experience, the detention center policy required trial clothing "to be submitted five days prior, . . . [a]nd . . . ma[d]e[] no mention of any attorney request." But, a written copy of the protocol for dropping off clothing, read into the record by defense counsel, stated that "clothes may be delivered three days prior to an inmate's court date only if requested by the attorney. Contact Operations Commander or his designee prior to approval."

Prior to the start of voir dire, the circuit court gave defense counsel the opportunity to be heard regarding appellant's clothing. Counsel told the court that he had a suit available for appellant and requested that appellant be allowed to change at the courthouse. The court refused, stating "it [was] a court policy not to allow that . . ." and explained:

> we have three criminal courtrooms, all of which have a criminal jury trial underway, all of which have our security spread out[. . . . W]e have two

> additional courtrooms, one of which . . . [has a] domestic case, [and] I don't know if there's a confined person [in that case, a]nd there's an additional courtroom . . . that is a civil courtroom. . . . [Appellant] is under . . . protective custody[, w]hich means he cannot be combined with other prisoners.
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> We have limited holding areas in this Court[, so i]t's going to be impossible to do a clothing swap even if it weren't against our court policy, it's a security issue. The Sheriff's Department is in control of security . . . [and its] position is that the inmate would be returned to the Wicomico County Detention Center to have his clothing arrangements made.

As to the detention center's policy, the court indicated that it was "not a matter within the Court's jurisdiction; in other words, . . . [the court could not] order the executive branch [to do something or determine] what they should do."

Counsel then asked that the trial be delayed and that appellant be taken back to the detention center to change. That request was also denied.

*Standard of Review*

A trial court's factual finding related to whether a defendant's clothing was identifiable as prison attire is subject to the clearly erroneous standard of review. *See United States v. Martin,* 964 F.2d 714, 720 (7th Cir. 1992) (citing *Anderson v. City of Bessemer City,* 470 U.S. 564, 572 (1985)). Therefore, when the record available for appellate review fails to demonstrate that the clothing at issue was readily identifiable as prison attire, appellate courts will defer to the trial court's decision in that regard. *See Williams v. State*, 137 Md. App. 444, 452-53 (2001); *United States v. Henry*, 47 F.3d 17, 22 (2d Cir. 1995).

The denial of appellant's request to delay the beginning of trial is reviewed under an abuse of discretion standard. *See Bradley v. Bradley*, 208 Md. App. 249, 267 (2012).

*Discussion*

Appellant argues that "the trial court erred in denying [his] request to be tried in clothing [that] did not reveal his status as an inmate[,]" when it declined to permit him to return to the detention center to change. Therefore, he contends, he was deprived "of the fundamentally fair trial guaranteed by the due process provisions of the fifth and 14th Amendment and Art. 24 of the Declaration of Rights[.]" The State responds that "[t]he green shirt and khaki slacks worn by [appellant] were not readily identifiable as jail garb[,]" and that the circuit court properly determined that returning appellant to the detention center to change clothes would have caused an inordinate delay.

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment[, and t]he presumption of innocence, . . . is a basic component of a fair trial . . . ." *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (internal citation omitted). To safeguard the presumption of innocence, courts must be sensitive to factors in the fact-finding process that tend to undermine the right to a fair trial, and "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.* (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

For that reason, an accused cannot be compelled "to stand trial before a jury while dressed in identifiable prison clothes." *Williams*, 137 Md. App. at 450 (quoting *Estelle*, 425 U.S. at 512). Such attire, "serves as a 'constant reminder' that the accused is in custody, and presents an unacceptable risk that the jury will consider that fact in rendering its verdict." *Knott v. State*, 349 Md. 277, 286-87 (1998). *And see Estelle*, 425

U.S. at 504-05 ("[t]he constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment.").[5] But, that does not mean that "[t]he presumption of innocence, . . . [is] impermissibly impaired every time a defendant stands trial before a jury in prison attire." *Knott*, 349 Md. at 287. Accordingly, "courts have refused to embrace a mechanical rule vitiating any conviction, regardless of the circumstances, where the accused appeared before the jury in prison garb." *Estelle*, 425 U.S. at 507.

To advance a claim that one's attire so impaired the presumption of innocence that the right to a fair trial was violated, a defendant must first establish the "element of compulsion." *Knott*, 349 Md. at 287. Otherwise, a defendant could choose to appear in prison attire as a trial tactic in order to claim a constitutional violation. *Id.* at 287. Simply put, "a defendant must object to being tried in prison attire . . . at the first available opportunity[.]" *Id.* at 287, 290. A defendant who objects "before the jury has been impaneled is deemed to have objected in a timely manner . . . ." *Id.* at 288.

In this case, counsel objected on the record to appellant being tried in clothing issued by the detention center prior to the start of voir dire and the jury being impaneled. And, the record suggests that counsel had previously raised the issue "in chambers" before the commencement of proceedings.

[5] The defendant in *Estelle*, the case in which the term "identifiable prison clothes" originates, "appeared at trial wearing a white T-shirt with 'Harris County Jail' stenciled across the back, oversized white dungarees that had 'Harris County Jail' stenciled down the legs, and shower thongs." *Estelle v. Williams*, 425 U.S. 501, 516 n.1 (1976) (Brennan, J., dissenting).

The compulsion element of the claim being satisfied, appellant must also demonstrate that the clothing he was wearing was "identifiable prison attire." *Knott*, 349 Md. at 286-87. In *Knott*, which we find instructive, the defendant was concerned that his "orange, prison-issued jumpsuit" would influence the jury and requested a continuance to obtain different clothing. *Id.* at 283-84. The trial judge denied Knott's request based on an absence of prejudice because, due to the severity of the charges, the jury would expect him to be in jail. *Id.* at 283-85. On appeal, the State argued that Knott's conviction should be upheld because the record failed to demonstrate that his orange jumpsuit was identifiable as prison attire. *Id.* at 291. The Court of Appeals disagreed and reversed, noting that "[w]hen Knott's counsel presented her first reason for a continuance, the trial court immediately recognized where the argument was headed and described the attire as giving the jury a 'hint' that Knott was being held in jail." *Id.* The Court treated the trial court's statement as an implicit finding that the jurors would recognize Knott's attire as prison garb. *Id.* at 291; *see also Williams*, 137 Md. App. at 452 ("[A] person in an orange jumpsuit might stand out like the proverbial sore thumb[.]").

*Williams* is also instructive. There, Williams argued that the trial court erred in refusing to require the removal of his prison identification bracelet prior to trial. 137 Md. App. at 449. We agreed with the circuit court that "the bracelet was not readily identifiable as a type of prison attire[,]" and concluded that there was "no hint in the record that the bracelet worn by [Williams] branded him as a prisoner." *Id.* at 452. We also noted that the record failed to shed any light on whether the jurors could actually see the bracelet because there was no information regarding the "size of the courtroom or the distance between the jurors and [Williams.]" *Id.*

*Knott* and *Williams* address the near ends of a broad prison attire spectrum running from an orange jumpsuit to an identification bracelet. No Maryland case has yet addressed where, along that spectrum, an unmarked green shirt and khaki pants would fall, but courts from other states and federal jurisdictions have considered various forms of dress. In *Louisiana v. Ricard*, 751 So. 2d 393, 395 (La. App. 4th Cir. 2000), the court reviewed a decision denying a defendant's request to change out of the pants issued to him by the Orleans Parish Prison, which contained the letters "O.P.P." *Id.* The *Ricard* court upheld the denial of that request based on the trial court's observation that the pants were not "so obvious[ly] prison decor, [or a prison] uniform, that [they] would jeopardize the defendant . . . " because, when the trial court "viewed the defendant's pants from four feet away, [it] didn't observe the outline of the O.P.P. letters and . . . would not have known if it was not called to [the court's] attention." *Id.* According to the *Ricard* court, "[w]hether or not the pants were readily identifiable prison attire [was] a question of fact better left to the trial court, which had the opportunity to view them, than to the reviewing court, which d[id] not." *Id.*

In *United States v. Henry*, the United States Court of Appeals for the Second Circuit upheld a district court's decision to deny a defendant's request for an adjournment to obtain clothes other than the Metropolitan Correctional Center issued denim that he was wearing. 47 F.3d at 22. The *Henry* court "deferr[ed] to the [trial] court's [determination]" that defendant's "MCC clothing was not clearly identifiable as prison garb but merely unmarked, generic denim." *Id. And see United States v. Martin*, 964 F.2d 714 (7th Cir. 1992) (concluding that defendant was unable to demonstrate that his plain, [blue] jumpsuit, devoid of any letters, markings, or numbers that would designate it as prison garb, was clearly identifiable as prison clothing); *Wilkins v. Virginia*, 771 S.E.2d 705, 708 (Va. Ct. App. 2015) (upholding the trial court's decision because "[t]he record . . . contain[ed] only a somewhat vague description of appellant's clothing (i.e., a green scrub outfit, black sneakers, and a bracelet), and the trial judge openly expressed skepticism over whether the jury would even identify appellant's clothing as being a jail uniform."). *But see Scott v. Texas*, 80 S.W.3d 306, 307, 309 (Tex. App. 2002) (concluding that defendant's "orange overalls" with the writing "pod 5, pod 6, No. 27, 25" were identifiable as prison attire).

In this case, defense counsel described the clothing simply as "standard . . . with the green and the khaki pants." The circuit court observed that appellant was "not marked in [Wicomico County Detention Center] attire[, and that t]here [was] nothing about him that sa[id] he's a prisoner." The court explained:

> I can't make any inference about his bracelet. From what I can see it's a clear bracelet. It has a white piece of paper that is attached to it. I have no idea what the white piece of paper says. I'm significantly closer to him now than the jury will ever be, so I'm going to deny your request[.] . . . We have all of the jurors waiting downstairs. If, in fact, the [appellant] was returned to the jail to provide him with a suit and tie or something of that nature, you know, obviously it would have been my preference that he be permitted to have that attire, Counsel, I cannot, however, say that his clothing suggests that he's a prisoner to the jury. There's nothing about it that I believe

> violates the rule that he should not be required to go to trial in front of a jury in clearly marked prison attire.

Nothing within the record persuades us that the circuit court's finding that appellant's clothing was not identifiable prison attire was clearly erroneous, or that, under the circumstances, the court erred or abused its discretion in denying appellant's request that the proceedings be delayed so he could be transported back to the detention center in order to change clothes.

*Jury Instructions*

After the State rested its case, the court reviewed proposed jury instructions with counsel out of the presence of the jury. At the beginning of that discussion, in regards to the first and second degree sexual offenses, the court commented on the State's requested instructions (apparently following the pattern jury instructions),[6] that "there was an act of

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[6] The Maryland Pattern Jury Instructions for first and second degree sexual offense MPJI-Cr 4:29.4-5 reads as follows:

> The defendant is charged with the crime of second degree sexual offense. In order to convict the defendant of second degree sexual offense, the State must prove: (1) that the defendant committed [fellatio] [cunnilingus] [analingus] [anal intercourse] with (name); (2) that the act was committed by force or threat of force; and (3) that the act was committed without the consent of (name).
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> * * * *
>
> The defendant [also] is charged with the crime of first degree sexual offense. In order to convict the defendant, the State must prove all of the elements of forcible second degree sexual offense and also must prove one or more of the following: (1) the defendant used or displayed a dangerous weapon or an object that (name) reasonably concluded was a dangerous weapon; (2) the defendant inflicted suffocation, strangulation, disfigurement, or serious physical injury against [(name)] . . . in the course

(continued…)

cunnilingus[, but] the allegation that [appellant] penetrated her with his finger [was] not the subject of [the first and] second degree sex offense instruction[s.]" The pattern jury instructions regarding first and second degree sexual offenses do not include digital penetration in the list of "sexual acts" provided for in the Maryland Code. But as the court pointed out, by statute, "sexual acts" include "an act in which part of an individual's body penetrates, however slightly, into another individual's genital opening . . . and that can reasonably be construed for sexual arousal or gratification . . . ."

Asked by the court to clarify whether it was "submitting only the cunnilingus on the first and second degree sex offense[,]" the State stated that "it would . . . prefer[] to argue the digital penetration as a basis for the first and second degree sex offense utilizing the definition provided in the statute, . . . if the court would allow that to be the instruction[.]"[7] In response, defense counsel expressed an "objection . . . [because the State was attempting to make] an amendment [not] as to form but actually [as] to substance" and that he had understood that the State intended for "the second degree sex offense [to] go[] by route of the cunnilingus." Asked how he reached that conclusion,

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> of committing the offense; (3) the defendant threatened or placed (name) in reasonable fear that [(name)] [any person known to the victim] would be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; . . .

[7] Defense counsel and the State relied on the definitions in the 2013 version of the MPJI discussed above, *supra* note 7. In 2011, the statutory definition of "sexual act" was expanded to include "part of an individual's body," Md. Code (2002, 2012 Repl. Vol.), § 3-301 of the Criminal Law Article ("CL § 3-301"), but that change was not reflected in the pattern jury instructions.

counsel responded that he had relied on the jury instructions previously submitted by the State, and that "when you look at the pattern jury instructions the only option that could be considered at that time, . . . was the cunnilingus, anal intercourse, fellatio, [and] analingus[.]"[8]

After a brief meeting in chambers in which the court "gave [defense counsel and the State] the opportunity to educate [it on] the substantive law regarding a second degree sexual offense and [whether] the definition of sexual act [had recently] been changed by the legislature[,]" it found no evidence that it had, and decided to "give the definition of sexual act in conjunction with second degree sex offense and first degree sex offenses . . . according to the definition in Maryland law."[9] The court instructed the jury:

> The Defendant is charged with the crime of second degree sexual offense. In order to convict the Defendant of second degree sexual offense, the State must prove, one, that the Defendant committed a sexual act upon [the victim]; two, that the act was committed by force or threat of force; and, three, that the act was committed without the consent of [the victim]. A sexual act means any of the following acts regardless of whether semen was emitted: Cunnilingus, which means that the Defendant applied his

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[8] The following colloquy, related to that discussion, indicates that defense counsel had relied on the pattern jury instructions:

> THE COURT: What . . . are you referring to, Counsel?
> DEFENSE COUNSEL: I'm talking about the instructions, pardon me, the actual jury instructions - -
> THE COURT: The pattern jury instructions.
> DEFENSE COUNSEL: - - the actual jury instructions, correct. Your Honor.

[9] A "sexual act" is a necessary element of a sexual offense in the first degree and a sexual offense in the second degree. *See* CL §§ 3-305, 3-306. CL § 3-301(e)(v) defines a sexual act to include "an act: 1. in which any object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and 2. That can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party."

> mouth to the sexual organ of a female, *or an act in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus*, and that can be reasonably construed to be for sexual arousal or gratification or for the abuse of either party. The amount of force necessary for second degree sexual offense depends on the circumstances. No particular amount of force is required, but it must be sufficient to overcome resistance or the will to resist. You must be satisfied that [the victim] resisted and that her resistance was overcome by force or threat of force.
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> The Defendant is also charged with the crime of first degree sexual offense. In order to convict the Defendant, the State must prove all of the elements of forcible second degree sexual offense and must prove one or more of the following circumstances: One, that the Defendant used or displayed a dangerous weapon or an object that [the victim] reasonably concluded was a dangerous weapon; two, the Defendant inflicted suffocation or strangulation against [the victim] in the course of committing the offense; three, the Defendant threatened or placed [the victim] in fear that the Defendant would be imminently subjected to death, disfigurement, or serious physical injury. A dangerous weapon is an object that is capable of causing death or serious bodily harm.

(Emphasis added). When asked if he had "any exceptions to the Court's instructions . . . " appellant's counsel replied: "None[.]"

*Standard of Review*

"A Maryland appellate court reviews a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011).

*Discussion*

Appellant contends that "under the circumstances of this case, it was error to instruct the jury that a 'sexual act' includes digital penetration[]" because he relied "upon the State's intent, . . . to rely entirely upon cunnilingus as the sexual act . . ." in the proposed jury instructions. The State counters that appellant's "claim may be reviewed only for plain error, [because counsel] did not object to the instruction defining 'sexual act' at the close of the jury instructions . . . [, and] there was no plain error because promulgation of the jury instruction did not deny [appellant] his right to a fair trial." Moreover, there was no error because "the instruction was a correct statement of the law."

The threshold issue is whether appellant preserved for appeal the alleged error in the instruction. *See Gore v. State*, 309 Md. 203, 206 (1987).

Maryland Rule 4–325(e), provides the following:

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

To properly preserve a jury instruction for appellate review, "a party must make [a] timely . . . objection, after the instruction is given, that states the particular grounds of the objection." *Stabb*, 423 Md. at 464-65. This is because a timely objection allows the court to correct the instruction in response to a well-founded objection. *Id.* at 465. Nevertheless, "substantial compliance with Rule 4-325(e) is sufficient to preserve [an alleged] error for appellate review." *Gore*, 309 Md. at 208. There is substantial compliance when (1) there is an objection to the instruction; (2) the objection appears in the record; (3) the objection is accompanied by a definite statement of its grounds, unless those grounds are apparent from the record; and (4) under the circumstances of the case a renewal of the objection would be futile or useless. *Id.* at 209.

In the instant case, appellant's counsel first objected to whether the instruction for the first and second degree sexual offenses would encompass digital penetration during a discussion among counsel and the court regarding the jury instructions. Counsel objected, arguing that the State was attempting to amend the substance of the charges against appellant. Thereafter, the court took a brief recess, and when proceedings resumed, the court notified counsel that the first and second degree sexual offense instructions would "be given according to the definition in Maryland law." Under these circumstances, we are persuaded that any further objection in regard to the digital penetration issue would have been useless and that there was substantial compliance with Rule 4-325(e).

Maryland Rule 4–325(c), provides the following:

> The court may, and at the request of any party shall, instruct the jury as to the applicable law . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

Although the use of pattern jury instructions is encouraged, their use is not required. *Cousar v. State*, 198 Md. App. 486, 521-22 (2011). And, a "deviation from the recommended language in the pattern jury instructions does not *per se* constitute error." *Sydnor v. State*, 133 Md. App. 173, 184 (2000). In other words, when, as in this case, the evidence at trial presents an issue not covered in the pattern instructions, parties "must count on the court to incorporate relevant and valid legal principles . . . ." *Green v. State*, 119 Md. App. 547, 562 (1998).

When deciding whether a trial court abused its discretion in denying a request for a particular jury instruction (in this case, that the jury instructions for first and second degree sexual offense not include digital penetration), we consider the following: (1) whether the instruction requested was a correct statement of the law; (2) whether it was applicable given the facts of the case; and (3) whether the requested instruction was fairly covered in the instruction actually given. *Stabb*, 423 Md. at 465 (citing *Gunning,* 347 Md. at 348).

*Cousar* is instructive. The defendant in *Cousar* argued that the circuit court erred by declining to give the Maryland Pattern Criminal Jury Instruction for reckless endangerment, and giving, instead, a jury instruction that was a "direct and complete quote of the relevant Maryland criminal law statute under which appellant was charged . . . ." 198 Md. App. at 523. We concluded that the instruction that was given did not convey prejudicial or confusing information and was not lacking in detail. *Id.* at 524. As such, the circuit court's decision to quote from the relevant statutory definition of the offense did not constitute error. *Id.* at 523-24.

We are not persuaded that appellant could reasonably rely "upon the State's intent, . . . to rely entirely upon cunnilingus as the sexual act . . ." based on the State's proposed jury instructions. The State's application for the statement of charges included the victim's statement that appellant "attempted to perform oral sex on [her] . . . and penetrated [her] vagina with his fingers." The victim testified at trial to that effect without objection or challenge during cross examination.

The circuit court's instruction regarding the specific sexual acts involved in a first and second degree sexual offense was a correct statement of law, supported by the evidence produced in the trial, and was not otherwise covered in the instruction. As in *Cousar*, the instruction essentially quoted the statute. The circuit court did not err or abuse its discretion by including digital penetration in the first and second degree sexual offense charges.

## CONCLUSION

We hold that the circuit court did not err or abuse its discretion by denying appellant's request for a delay in beginning the trial to obtain clothing other than the green shirt and khaki pants issued to him by the detention center. Additionally, we hold that the court did not err or abuse its discretion in instructing on the first and second degree sexual offenses in accordance with the applicable statutes. Accordingly, we affirm the judgment of the Circuit Court for Wicomico County.

**JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.**