UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1717

September Term, 2013

JAMES L. HOUSE

v.

STATE OF MARYLAND

Meredith,
Woodward,
Friedman,

JJ.

Opinion by Meredith, J.

Filed: July 21, 2015

In this timely appeal, James L. House, appellant, contends that the Circuit Court for Garrett County committed plain error by reading pattern jury instructions on sodomy and unnatural or perverted sexual practice.

QUESTIONS PRESENTED

Appellant raises two issues for our review:

> I. Did the trial court commit plain error by reading the pattern jury instruction on sodomy, which allows a jury to convict a person who engages in constitutionally protected acts?
>
> II. Did the trial court commit plain error by reading the pattern jury instruction on unnatural or perverted sexual practice, which allows a jury to convict a person who engages in constitutionally protected acts?

Because appellant invited both errors by expressly requesting that the court read those two pattern instructions, we decline to exercise our discretion to review appellant's claims of plain error. We shall affirm the judgments of Circuit Court for Garrett County.

FACTS AND PROCEDURAL HISTORY

The evidence at trial showed that, in the early morning of October 18, 2011, James L. House raped, sodomized, forcibly received oral sex from, and falsely imprisoned a forty-nine-year old woman we shall refer to as Ms. L. Ms. L testified that she and House became friends on approximately January 1, 2011. Ms. L testified that she would occasionally stay with House when she traveled to Morgantown, West Virginia, for medical appointments. Ms. L acknowledged that she and House had occasionally engaged in consensual sexual intercourse. As of October 18, 2011, Ms. L had been staying with House for about a week while she recovered from foot surgery.

Between 8 p.m. and 9 p.m. on the evening of October 17, 2011, Ms. L fell asleep on a loveseat while watching television. House was watching the television from a rocking chair positioned behind her. Ms. L testified that she was awakened by House, who had placed his penis in her hand. After she pulled her hand away, House expressed his displeasure with Ms. L's reaction. House tied Ms. L's wrists together and then penetrated her vaginally. Ms. L then freed herself from the ropes. At approximately 1:30 a.m., and again at 1:40 a.m., on October 18, 2011, Ms. L called 9-1-1 to request help but was unable to give her address to the dispatcher. Following a 9-1-1 dispatcher's successful effort to reconnect with Ms. L at 2:22 a.m., Ms. L's location was determined by the dispatcher, and officers were sent to her location.

Ms. L testified that, during the time between her first 9-1-1 call and the arrival of the police, House again restrained her and forcibly penetrated her vaginally. Ms. L again freed herself from the rope House used to tie her wrists together, but House dragged her into the bathroom and forcibly penetrated her anus. After convincing House to stop, Ms. L sat on the toilet, at which time House forced his penis into her mouth.

Officers then arrived at the scene. After they arrested House, he made an unsolicited comment to one of the arresting officers, stating that "he thought it was okay" to have sex with Ms. L. Ms. L was found in the bathroom wrapped in a towel.

Later in the day, on October 18, 2011, Heather Cooper, a Sexual Assault Forensic Examiner, examined Ms. L. At trial, Cooper identified a number of photographs, taken during the October 18 examination, which depicted injuries to Ms. L. Cooper testified that

some of Ms. L's injuries were consistent with the allegations that House used force upon Ms. L, and that Ms. L fought back. Cooper testified, for example, that the abrasions on Ms. L's wrists were consistent with suffering rope burns from having her wrists tied together.

After the close of evidence at the trial in June 2013, the court read to the jury Maryland Criminal Pattern Jury Instructions (MPJI-Cr) for each charge on which House was tried, including MPJI-Cr 4:30, explaining sodomy, and MPJI-Cr 4:34 — the predecessor to MPJI-Cr 4:30.1 — explaining unnatural or perverted sexual practice. House had asked the court to give the MPJI-Cr instructions for both sodomy and unnatural or perverted sexual practice. Having expressly requested that the trial court instruct the jury using MPJI-Cr 4:30 and 4:34, House did not object to the instructions after the court gave the pattern instructions.[1]

MPJI-Cr 4:30 reads:

> The defendant is charged with the crime of sodomy. In order to convict the defendant of sodomy, the State must prove that the defendant [placed his penis into the anus of another person] [permitted another person to place his

[1] House's requests for jury instructions, which were received by the trial court on October 12, 2012, specifically requested MPJI-Cr 4:30, explaining sodomy, and MPJI-Cr 4:34, explaining unnatural or perverted sexual practices. MPJI-Cr 4:34 was the number of the pattern instruction for unnatural or perverted sexual practices in the first edition of the Maryland Criminal Pattern Jury Instructions (MICPEL 1st ed., 1986, 2007 supp.). MPJI-Cr 4.34 was renumbered as MPJI-Cr 4:30.1 when the second edition of the Maryland Criminal Pattern Jury Instructions was published in 2012 (MSBA, 2d ed., 2012, supp. 2013). It appears that House's requests referred to the first edition instructions because MPJI-Cr 4:34 is designated as "Reserved" in the second edition. The text of the pattern jury instruction for unnatural or perverted sexual practice is the same in the first and second editions, except for minor stylistic revisions that make no material change. For ease of reference, we shall hereafter refer to the instruction that addresses unnatural or perverted sexual practice using the present numbering scheme, that is, MPJI-Cr 4:30.1.

> penis into the anus of the defendant]. The crime of sodomy requires the penetration of the penis into the anus. The slightest penetration is sufficient and the emission of semen is not required.
>
> MPJI 4:30.1 reads:
>
> The defendant is charged with the crime of unnatural or perverted sexual practices. In order to convict the defendant of unnatural or perverted sexual practices, the State must prove:
> (1) that the defendant took into [his] [her] mouth the sexual organ of [another person] [animal];
> (2) that the defendant placed [his] [her] sexual organ in the mouth of [another person] [animal]; or
> (3) that the defendant (insert prohibited conduct under Md. Code Ann. Crim. Law I § 3-322(a) (2012)).

The jury convicted House of first degree rape, first degree sexual offense, sodomy, unnatural or perverted sexual practice, and false imprisonment. House was sentenced to thirty-five years' incarceration for first degree rape, thirty-five consecutive years' incarceration for first degree sex offense, and the remaining convictions, including the convictions for sodomy and unnatural or perverted sexual practice, were merged for sentencing purposes. This appeal followed.

DISCUSSION

House contends that, in light of the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003) (protecting private, consensual sexual activity between adults), and the Maryland Court of Appeals's ruling in *Schochet v. State*, 320 Md. 714 (1990) (protecting private, consensual, noncommercial, heterosexual activity between adults), MPJI-Cr 4:30 and 4:30.1 (the former 4:34) do not properly reflect the current state of the law regarding criminal liability for fellatio and sodomy. House argues that, because the instructions that

were read to the jury on these two charges did not reflect the changes in the law that preclude a state from punishing consensual sexual conduct between adults, the pattern instructions that were read to the jury incorrectly advised the jury that it could convict him of these two offenses even if it found that he had engaged in consensual acts of fellatio and sodomy with Ms. L. His arguments are unpreserved.[2]

Maryland Rule 4-325(e) states: "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 . . . ." The "'rules for preservation have the salutory purpose of preventing unfairness and requiring that all issues be raised in and decided by the trial court . . . .'" *Rich v. State*, 415 Md. 567, 574 (2010) (quoting *Conyers v. State*, 354 Md. 132, 150 (1999)). *See also Pickett v. State*, 222 Md. App. 322, 339-40 (2015) (considerations of fairness and judicial efficiency require that all challenges to a trial court's ruling be presented in the first instance to the trial court). "'[T]he failure to object to a jury instruction at trial results in a waiver of any defects in the instruction, and normally precludes further review of any claim

[2] House is correct in pointing out that the pattern jury instructions do not contain explicit language requiring evidence of lack of consent in order for a defendant to be convicted of sodomy and unnatural or perverted sexual practice. We note, however, that, in the second edition of Maryland Criminal Pattern jury instructions (MSBA 2d ed., 2012, 2013 supp.), both instructions contain "Notes on Use" explaining the changes in the law as a consequence of *Lawrence* and *Schochet*. The Notes on Use under each instruction advise users: "As a result of State and Supreme Court decisions, the State may not prosecute adults who engage in private, consensual, noncommercial, and non-incestuous sodomy, whether heterosexual or homosexual." In House's case, however, neither MPJI-Cr 4:30 nor 4:30.1 was modified to account for this limitation on the applicability of the instruction.

of error relating to the instruction.'" *Grandison v. State*, 425 Md. 34, 69 (2012) (quoting *State v. Rose*, 345 Md. 238, 245 (1997)).

House concedes that he did not object to either jury instruction at trial and did not otherwise preserve his challenge to MPJI-Cr 4:30 and 4:30.1 for appellate review. House contends, however, that the errors committed by the trial court in reading MPJI-Cr 4:30 and 4:30.1 merit plain error review because they were compelling, extraordinary, and fundamental to his right to a fair trial.

Although Rule 4-325(e) provides that an appellate court may, "on its own initiative or on the suggestion of a party, take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object," the State counters with two arguments, urging us to decline to review the unpreserved claims. First, the State notes that the rape, sodomy, fellatio, and false imprisonment charges all stemmed from the same occurrence, and that there was no argument at trial distinguishing the sodomy or perverted practice from conduct that the jury found to be a non-consensual first degree sex offense. The State contends that any error in the trial court's instructions was harmless because no reasonable finder of fact could have found that some act of sodomy or fellatio was consensual while the contemporaneous first degree sex offense was not. Second, the State argues that, even if the flawed jury instructions could have theoretically supported convictions for consensual acts of sodomy and fellatio, an appellate court's discretion to invoke plain error review is plenary, and we should decline to exercise that discretion in a case such as this where the evidence of guilt is so overwhelming. *See Morris v. State*, 153

Md. App. 480, 512 (2003) (even when error in jury instructions is plain and material, appellate discretion on issue of whether to overlook non-preservation "is plenary").

As the Court of Appeals stated in *Jones v. State*, 379 Md. 704, 713 (2004), "[t]here is no fixed formula for the determination of when discretion [to recognize plain error] should be exercised." *Accord Garrett v. State*, 294 Md. 217, 224 (2006). The appellate court has the discretion to overlook lack of preservation if the court determines it should "consider the issue for the proper execution of justice," *Jones, supra*, 379 Md. at 715, provided it is "clear that [considering the unpreserved issue] will not work an unfair prejudice to the parties or to the court." *Id*. at 714.

Because we are convinced that any prejudice to House as a result of these two instructions is purely speculative, and indeed, highly unlikely, we are not inclined to exercise our discretion to overlook the lack of preservation. *See Yates v. State*, 429 Md. 112, 131 (2012) (the "exercise of discretion to engage in plain error review is 'rare'"). Allowing a defendant to seek reversal as a result of flawed jury instructions which he asked the court to give "'would amount to allowing him to induce potentially harmful error, and then ambush the [S]tate with that claim on appeal . . . .'" *Rich, supra*, 415 Md. at 576-77 (quoting *State v. Fabricatore*, 915 A.2d 872, 879 (Conn. 2007)).

In this case, the unpreserved errors House asks us to address were both invited errors. *Rich, supra*, 415 Md. at 575 (the invited error doctrine "is applicable to appellate review of jury instructions specifically requested by the criminal defendant's counsel.") (citing

Bromley v. State, 150 P.3d 1202, 1213 (Wyo. 2007)). Because both of House's questions seek review of invited errors, we decline to review the instructions for plain error.

"The 'invited error' doctrine is a 'shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit — mistrial or reversal — from that error.'" *Id*. at 575 (quoting *Klauenberg, supra,* 355 Md. at 544). "'The doctrine stems from the common sense view that where a party invites the trial court to commit error, he cannot later cry foul on appeal.'" *Id*. (quoting *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009)). *Accord U.S. v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994) (a defendant in a criminal case cannot complain of error which he himself has invited).

In *Rich, supra,* 415 Md. at 579-81, the Court of Appeals of Maryland quoted at length, and expressed agreement with, the invited error analysis that the Ninth Circuit set forth as follows in *United State v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997):

> "Until now, our invited error doctrine has focused solely on whether the defendant induced or caused the error. We now recognize, however, that we must also consider whether the defendant intentionally relinquished or abandoned a known right. **If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.**
>
> We do not mean to suggest that a defendant may have jury instructions reviewed for plain error merely by claiming he did not know the instructions were flawed."

Rich, supra, 415 Md. at 580 (citations omitted) (emphasis added).

Applying the invited error doctrine in *Rich,* the Court of Appeals stated, 415 Md. at 581:

> In the case at bar, **when Respondent's trial** counsel (1) argued that the issue of voluntary manslaughter was generated by the evidence, and (2) **made a specific request for a voluntary manslaughter instruction, that action constituted an intentional waiver of the right to argue on appeal that the evidence was insufficient to support the voluntary manslaughter conviction**.

(Emphasis added.)

In *Smith v. State,* 218 Md. App. 689 (2014), we opined: "The invited error doctrine makes sense where an *affirmative* act of the appellant produced the error he raises on appeal." *Id*. at 701 (emphasis in original). Accordingly, when a defendant has requested flawed jury instructions, we have concluded that he invited error and relinquished a known right. *Accord Miles v. State,* 365 Md. 488, 554 (2001) (defendant may not "sandbag" trial judge by requesting an instruction at trial and then complaining that it was given); *Olson v. State,* 208 Md. App. 309, 366, (2012), *cert. denied*, 430 Md. 646 (2013) (denying relief when appellant received a jury instruction identical to his requested instruction); *Wimbish v. State*, 201 Md. App. 239, 264–65 (2011), *cert. denied*, 424 Md. 293 (2012) (same); *Nash v. State*, 191 Md. App. 386, 404, *cert. denied*, 415 Md. 42 (2010) (invited error doctrine precluded relief in case in which defense counsel "requested that the [trial] court proceed as it did"). *See also Perez, supra*, 116 F.3d at 844 ("We have held repeatedly that where the defendant himself proposes allegedly flawed jury instructions, we deny review under the invited error doctrine."). *But cf. Smith, supra*, 218 Md. App. at 701-02 (invited error did not apply where the State created the error and the appellant merely remained silent in response to the State's mistake).

In the present case, the invited error doctrine applies to House's argument that the challenged instructions were unconstitutional and therefore materially affected his right to a fair trial. *Cf. Rich, supra,* 415 Md. at 575 ("because the manslaughter instruction was specifically requested by Respondent's trial counsel, the doctrine of invited error is applicable to his argument that the instructional error materially affected his right to a fair and impartial trial." (internal quotations omitted)). House's argument that the trial court's use of the pattern jury instructions theoretically permitted the jury to convict him of constitutionally protected acts is fully analogous to the argument the Court of Appeals declined to consider in *Rich,* where the Court quoted, with approval, 415 Md. at 576, the following statement of the Supreme Court of Washington: "'[T]he doctrine of invited error prevents [the defendants] from now complaining about the trial court acceding to their request to give a certain instruction . . . *despite the fact that 'the unconstitutional instruction was standard in this state . . . .*'" *Id*. (emphasis added) (quoting *State v. Studd,* 973 P.2d 1049, 1055-56 (Wash. 1999)). Consequently, although Maryland trial courts have been strongly encouraged to use pattern jury instructions, that generally-sound advice does not permit a defendant to benefit from, and create an issue for appeal by, requesting instructions that the defendant may challenge as unconstitutional on appeal. It is the litigant's obligation to bring to the attention of the trial judge any perceived deficiency in the pattern instructions.

In a case such as this, where appellant not only failed to object to the court's instruction, but expressly requested that it be given, "'we simply cannot conclude that injustice has been done . . . .'" *Rich, supra,* 415 Md. at 577 (quoting *Fabricatore, supra,* 915

A.2d at 880). *Accord Brannan, supra,* 562 F.3d at 1307 (explaining that, because appellant failed to object to an erroneous instruction at trial and affirmatively asked the court to give the instruction, invited error doctrine barred the court from reviewing the error on appeal).

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