

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1902

September Term, 2015

DREW DAVID NEISSER

v.

STATE OF MARYLAND

Krauser, C. J.,
Graeff,
Leahy,

JJ.

PER CURIAM

Filed: September 6, 2016

*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.

Convicted of first-degree assault, second-degree assault, and malicious destruction of property less than \$1,000, in the Circuit Court for Worcester County, Drew David Neisser, appellant, filed this appeal raising a single issue: Whether the trial court committed plain error because, he claims, it instructed the jury on the presumption of innocence and reasonable doubt in a manner that substantially deviated from the pattern jury instruction? *See Ruffin v. State*, 394 Md. 355, 373 (2006) (holding that in every criminal trial, the trial court must “instruct the jury on the presumption of innocence and the reasonable doubt standard of proof which closely adheres to MPJI–CR 2:02”). For the foregoing reasons, we affirm appellant’s convictions.

Although Neisser acknowledges that he not only failed to object to the trial court’s jury instruction, but also, through counsel, approved that instruction, he now requests this Court to exercise its discretion to grant plain error review. Although this Court has discretion to review unpreserved errors pursuant to Md. Rule 8-131(a), the Court of Appeals has emphasized that appellate courts should “rarely exercise” that discretion because “considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court’s ruling, action, or conduct be presented in the first instance to the trial court[.]” *Ray v. State*, 435 Md. 1, 23 (2013) (citation omitted). Therefore, plain error review “is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.” *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted). It involves four prongs: (1) the error must not have been intentionally relinquished or abandoned; (2) the error must be clear or obvious, not subject to reasonable dispute; (3) the

error affected appellant's substantial rights, which means he must demonstrate that it affected the outcome of the court proceeding; (4) the appellate court has discretion to remedy the error, but this ought to be exercised only if the error affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

As a threshold matter, Neisser affirmatively waived the alleged error because he not only failed to object, but also, when specifically asked, indicated that he was satisfied with the trial court's instructions. Therefore, granting plain error relief in these circumstances would seriously undermine the preservation rule, the purpose of which is to allow the trial court to avoid or correct instructional error. Accordingly, we decline to exercise our discretion to engage in plain error review.

Moreover, even if the issue was not affirmatively waived, we are persuaded that any deviations from the pattern jury instructions in this case did not affect “appellant’s substantial rights” or “the fairness, integrity, or public reputation of judicial proceedings.” Here, the instructions given by the trial court clearly explained that the State had the burden of proving Neisser’s guilt beyond a reasonable doubt, that the burden remained on the State throughout the trial, and that Neisser was not required to prove his innocence. Further, nothing in the trial court’s instructions suggested that the jury could convict Neisser upon a quantum of proof lower than that legally required. *See generally Turner v. State*, 181

Md. App. 477, 485 (2008) (finding no plain error where the trial court's minor deviation from the pattern jury instructions "did not alter the State's substantial burden of proof").

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