UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2694

September Term, 2015

REGINALD LAMONT COOPER

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: November 1, 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.

Accused of stabbing two men at a bus stop, Reginald Lamont Cooper, appellant, was convicted by a jury, in the Circuit Court for Montgomery County, of two counts of attempted second-degree murder. On appeal, Cooper contends that the trial court erred in giving a "mere presence" instruction to the jury.[1] Because we conclude that the issue was not preserved for appellate review, we affirm the judgments of the circuit court.

Maryland Rule 4-325(e) provides, in pertinent part, that "[n]o 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 the grounds of the objection." (Emphasis added.) "A principal purpose of Rule 4-325(e) is to give the trial court an opportunity to correct an inadequate instruction before the jury begins deliberations." *Robinson v. State*, 209 Md. App. 174, 199 (2012), *cert. denied*, 431 Md. 221 (2013) (citations and internal quotation marks omitted). "[T]here are good reasons for requiring an objection at the conclusion of the instructions, even though the party had previously made the request." *Id.* (quoting *Johnson v. State*, 310 Md. 681, 686 (1987). Not only does it afford the trial court an opportunity to amend or correct the charge, but, as the *Johnson* Court observed, "a party initially requesting [or objecting to] a particular instruction may be entirely satisfied with the instructions as actually given." *Johnson*, 310 Md. at 686.

[1] The court instructed the jury as follows: "A person's presence at the time and place of a crime without more is not enough to prove that the person committed the crime. The fact that a person witnesses a crime, made no objection or did not notify the police does not make that person guilty of the crime. However, a person's presence at the time and place of the crime is a fact in determining whether the defendant is guilty or not guilty."

Although defense counsel stated during a bench conference, during which jury instructions were discussed, that he "was going to" object to the instruction at issue, he did not do so after the court instructed the jury, as required by the rule, in order to preserve the objection. But, "[s]ubstantial compliance with Rule 4-325(e) may be sufficient to preserve arguments for appellate review even if the party fails to renew the objection on the record after the jury has been instructed." *Horton v. State*, 226 Md. App. 382, 413-14 (2016). To establish substantial compliance with the rule,

> there must be an objection to the instruction; the objection must appear on the record; the objections must be accompanied by a definite statement of the ground for the objection unless the ground for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Id. at 414. (quoting *Gore v. State*, 309 Md. 203, 209 (1987)). As the Court of Appeals has stated, however, "these occasions represent the rare exceptions, and . . . the requirements of the Rule should be followed closely." *Sims v. State*, 319 Md. 540, 549 (1990) (citations omitted). The Court observed that "often, after discussion, defense counsel will be persuaded that the instruction under consideration is not warranted, and will abandon the request[,]" and held that "[u]nless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost." *Id.* (citation omitted).

After a thorough review of the record, we do not see that counsel sought or that the court granted an ongoing objection to the instruction that preserved the issue for appeal. Defense counsel did not object to the trial court's ruling that the evidence was sufficient to

support the instruction, nor did he object after the jury was instructed. Consequently, it is impossible to determine whether defense counsel was persuaded by the court's finding that there was evidence presented to support the instruction, or whether, as a matter of trial strategy, he decided that the instruction would be helpful to the defense, and abandoned his plan to object, or, whether he intended to continue to object to the instruction.

Accordingly, we conclude that this issue was not properly preserved for review, although we note that, assuming it was preserved, Cooper would not be entitled to relief. Both victims identified Cooper at trial as the assailant, and surveillance footage that was admitted into evidence appears to show Cooper walking toward the bus stop where the stabbings took place minutes before they occurred. The instruction at issue was a correct statement of law, and was applicable under the facts of the case. *See Gupta v. State*, 227 Md. App. 718, 738 (2016) ("a court *must* give a requested evidence instruction when: '(1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'") (citations omitted).

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