Circuit Court for Baltimore County
Case No. C-03-CR-21-003346

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 177

September Term, 2022

JUSTIN RANDALL

v.

STATE OF MARYLAND

Wells, C.J.,
Nazarian,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: December 5, 2022

Appellant, Justin Randall ("Randall"), was tried by jury in the Circuit Court for Baltimore County on March 25, 2022, on charges of first- and second-degree assault. At trial, after the jury was released to deliberate, the circuit court was alerted that Juror Two had brought a blank verdict sheet with him into deliberations, contrary to the court's instructions. He completed the sheet independent of the rest of the jury. Upon learning of Juror Two's verdict sheet, the circuit court paused deliberations, asked voir dire questions of Juror Two in the courtroom with counsel for both sides and the defendant present, and then dismissed Juror Two from jury service. The alternate juror replaced Juror Two. The jury acquitted Randall on two charges and convicted him of one count of second-degree assault. The circuit court sentenced him to 10 years incarceration, with all but three years suspended, and 18 months of supervised probation. This timely appeal followed.

ISSUES PRESENTED FOR REVIEW

Randall presents three issues for our review:[1]

I. Whether the circuit court committed plain error by reviewing and relying upon Juror Two's verdict sheet as grounds for pausing deliberations, questioning Juror Two, and dismissing Juror Two from the jury.

II. Whether the circuit court abused its discretion by removing Juror Two from the jury.

[1] Rephrased from the following:

I. Did the trial court err when it reviewed Juror Two's personal notations and relied on the notations as a basis for pausing deliberations, questioning Juror Two, and removing Juror Two from the jury?
II. Did the trial court err in removing Juror Two from the jury?
III. Did the trial court err in seating the alternate after deliberations had begun?

III. Whether the circuit court abused its discretion by seating the alternate juror after deliberations had begun.

For the reasons to follow, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The issues raised in this appeal do not require a detailed recitation of the facts that gave rise to Randall's conviction, nor the evidence established at trial. Therefore, we begin with the circuit court's instructions to the jury at the close of the presentation of evidence.

After the defense rested its case, and without rebuttal from the State, the circuit court proceeded to instruct the jury on the pertinent law, the standards of proof, and the jurors' duty to deliberate.[2] Each juror was then provided with a copy of the verdict sheet to enable the judge to review it with the jury before deliberations began. Once each juror had received a copy of the verdict sheet, the court explained that the foreperson would be the only juror taking a verdict sheet to deliberations and that the rest of the sheets were for "instructional purposes," to be left on the jurors' chairs upon exit from the courtroom.

[2] The court's instructions concerning the jury's duty to deliberate were nearly identical to the Maryland Criminal Pattern Jury Instruction on the subject:

> The verdict must be the considered judgment of each of you. In order to reach a verdict, all of you must agree. In other words, your verdict must be unanimous. You must consult with one another and deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. During deliberations, do not hesitate to reexamine your own views. You should change your opinion if convinced you are wrong, but do not surrender your honest belief as to the weight or effect of the evidence only because of the opinion of your fellow jurors or for the mere purpose of reaching a verdict.

MPJI-Cr 2:01, Jury's Duty to Deliberate (2021).

The court emphasized to the jury that "[a]t no time[,]" should they tell the court "how [the jurors were] voting or . . . what the numbers [were]" because that was not information that the court "want[ed] to know or should know."

After instructions which were followed by closing arguments, the court informed the jury that it was time for deliberations and instructed the alternate juror to stay behind. The court directed the sworn jurors to bring their notebooks with them and all jurors, except the foreperson, were to leave their copies of the verdict sheet on their chairs in the courtroom. In response to a verbal inquiry from a juror, the court reiterated that only a single verdict sheet was to leave with the jurors. The jury then exited the courtroom.

Once the jury left the courtroom, the State moved to dismiss Juror Two for being "visibly hostile" during the State's closing argument. The State argued that Juror Two appeared to have already made a decision about the case before deliberations and should be excused prior to the alternate's release. The court denied the State's request, reasoning that although Juror Two "may have already made up his mind that it's a not guilty, . . . [jurors] all have opinions before they go back," and Juror Two "mak[ing] some facial expressions" in response to the State's argument was insufficient grounds to excuse him.

Shortly thereafter, following an interaction with the court clerk, the following colloquy commenced:

COURT: So, I'm going to have the alternate stay for a moment.

[DEFENSE]: I'm sorry?

COURT: I'm going to have the alternate stay for a moment.

[DEFENSE]: Um hm.

COURT: And then I'm going to –

STATE: Do we need to tell them to stop?

COURT: I, I'm going to ask juror number two to come out here with the verdict sheet, okay?

[DEFENSE]: We'll, we'll also need to make sure the alternate is staying –

COURT: I agree.

At that point, the trial judge directed the alternate juror to leave the courtroom and instructed the clerk to "tell the jury to just not deliberate, to pause." The court had Juror Two brought back into the courtroom, and the following examination took place:

COURT: Okay and the reason I've asked you to come in is because you filled this out –

JUROR: I, that's what I thought I was supposed to do.

COURT: Okay.

JUROR: But I don't need to deliberate. I, I have, I know what I, what I think.

COURT: Okay. But one of the instructions I gave, and everybody comes in –

JUROR: That's why I wanted to give it back and get a new one.

COURT: Okay.

JUROR: But that is how I feel.

COURT: Okay, understood. And so, jurors have opinions, I'm sure everybody does, before they go back. You've expressed yours more quickly –

JUROR: Um hm, sure.

COURT: – and by your facial gestures.

JUROR: Because the alcohol was involved.

COURT: Okay.

JUROR: That's all for me, that's all that (inaudible).

COURT: So, hang, hang on, hang on. So, so the issue is whether or not, because there's a request to excuse you and not to allow you to deliberate.

JUROR: (inaudible).

COURT: And I'm, I'm telling you why. Because, and that's why I'm inquiring, and that's the only reason you're out here. I typically, when juries, this is the first time in twenty years, I've done probably thousands of jury trials, so literally. So, this is the first time where I've actually ever had a juror come out and request because of this. So, okay?

JUROR: Oh, I didn't know I did anything wrong.

COURT: So, I understand. So, the, the question is, you filled out a verdict sheet immediately when I said it only, only the foreperson –

JUROR: I did it back there, I didn't do it here.

COURT: Okay. But you filled it out before going back. So, the question is –

JUROR: No, I, in the room.

COURT: Okay.

JUROR: I was in the room.

COURT: Okay, okay. So, I guess the question is, can you still go back and fairly and impartially with all of the jurors decide the case?

JUROR: No.

COURT: You can't? Okay. Okay, all right.

JUROR: Because I can already tell that –

COURT: Okay. Well, I don't want you to tell me anything. But you don't feel that you can fairly and impartially –

JUROR: I already have.

COURT: Okay. But by yourself.

JUROR: Yes.

COURT: But not with everybody else?

JUROR: I don't, I don't need to hear everybody. I heard what I needed to hear from him and her.

COURT: Okay, okay.

JUROR: And from the witnesses.

COURT: Okay.

JUROR: I have my own mind, I can think for myself.

The court then initiated a bench conference in which the State renewed its request to have Juror Two stricken:

STATE: I understand he was back there when he filled that out in opposition to your instructions. But it appears he cannot fulfill the oath that he took and follow the instructions as given by Your Honor.

COURT: Because?

STATE: And, and he can't follow the instructions given by Your Honor during the jury instructions.

COURT: Counsel?

[DEFENSE]: I think the fact that he filled it out, I think in most (inaudible) follow the instruction.

COURT: Right.

[DEFENSE]: He was only in the jury room a moment, so he really hasn't had the opportunity to listen to (inaudible) their opinions of the evidence (inaudible).

COURT: Right.

[DEFENSE]: He did indicate that he gave considered opinions of the prosecutor's arguments as well as mine, and the evidence (inaudible) and he has based his opinions on that. I would ask that you allow him to continue, to go back into the jury room, deliberate with the jurors.

STATE: Your Honor, part of your instruction said that he's to reconsider his opinion while not doing violence to that opinion and I think it's clear from his answers that he cannot do that.

> COURT: So, so this is my concern, [Defense Counsel]. I, I think, and as I said earlier at the first request, that many times people go back already with a feeling of how they're going to rule, or how they're going to go. But he clearly has already made up his mind and does not want to talk to or consider anybody else.
>
> That's where I have a problem. Because my instructions say have your opinion but consider what other people have to say. He has already made up his mind and chooses not to. And is fairly oppositional about it, that he does not want to have a group. And as you know, it's twelve unanimous and it's a group decision. And it can still be hung if somebody hangs it.
>
> But he clearly doesn't want to participate in the process, and I don't think that's anything we could have known until five minutes ago. So, I am going to excuse him. And I'm going to put the alternate in, okay? All right.
>
> STATE: Thank you, Your Honor.
>
> * * *
>
> [DEFENSE]: Understood.

The court subsequently excused Juror Two and had the alternate return as a replacement. The court told the alternate juror that Juror Two had been dismissed and that the rest of the jurors had been instructed to pause deliberations until the court provided further instruction. Without lodging an objection, defense counsel suggested that the court "bring the panel back just to explain" the switch, and the court agreed. Upon the jury's return to the courtroom, the court explained that Juror Two had been excused and that the alternate was replacing that juror.

Subsequently, the reconstituted jury exited the courtroom to deliberate. The jury ultimately found Randall not guilty of two charges and guilty of one count of second-degree assault. The court sentenced him to 10 years incarceration, with all but three years suspended, and 18 months of supervised probation. This timely appeal followed.

DISCUSSION

As a preliminary matter, Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Specifically regarding the preservation of non-evidentiary issues, Maryland Rule 4-323(c) is instructive:

> For the purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Md. Rule 4-323(c). The underlying purpose of the preservation requirement is to promote fairness and judicial efficiency by providing the opposing party an opportunity to respond to the objection and the circuit court an opportunity to address or correct any perceived errors. *See Lopez-Villa v. State*, 478 Md. 1, 20 (2022) (quoting *Robinson v. State*, 410 Md. 91, 103 (2009)).

Standard of Review

Plain error review is an exception to Rule 8-131(a)'s preservation requirement "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)); *see also Peterson v. State*, 196 Md. App. 563, 589 (2010) (emphasizing that, in the context of erroneous jury instructions, "the plain error

doctrine has been noticed sparingly"). It is a "rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003). For this court to engage in plain error review,

> (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.

Newton, 455 Md. at 364 (internal quotation marks omitted) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)).

I. THIS COURT DECLINES THE INVITATION TO ENGAGE IN PLAIN ERROR REVIEW OF THE TRIAL COURT'S CONSIDERATION OF JUROR TWO'S VERDICT SHEET.

Randall concedes that defense counsel did not object at trial to the circuit court's actions concerning Juror Two's notations on his verdict sheet. He thus requests that this Court engage in plain error review of the issue. Randall argues that the circuit court violated Maryland Rule 4-326(a) by reviewing Juror Two's notations on a copy of the verdict sheet and relying upon those notations as grounds for pausing deliberations, questioning Juror Two, and thereafter dismissing Juror Two from the jury. Maryland Rule 4-326(a) states that jurors' notes "may not be reviewed or relied upon for any purpose by any person other than the author." Md. Rule 4-326(a). Randall posits that the markings on Juror Two's verdict sheet were his personal notes and thus clearly governed by the rule. Randall further asserts that the record "bears no indication that Juror Two made his notations with the intention or expectation that they would be inspected by the trial court, or by anyone for that matter." In support, Randall claims that the circuit court "treated the instructional

verdict sheets in the same manner that it treated the jurors' personal notebooks, which were personal and private—the instructional verdict sheets were to be left on the jurors' chairs and the jurors' chairs were characterized as the safe place for the jurors' notebooks."

Additionally, by reviewing the notations on Juror Two's verdict sheet after deliberations had begun, Randall argues that the circuit court violated the principle of jury secrecy. Randall claims that the circuit court impermissibly relied upon confidential information on the verdict sheet as grounds to inquire into Juror Two's thought processes and "preemptively impeach the verdict" by dismissing him. Randall contends that the purpose of Rule 4-326 is to safeguard jury confidentiality, as a "'cornerstone' of the American judicial system." *State v. Sayles*, 472 Md. 207, 232 (2021) (quoting *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997)). Therefore, it is Randall's view that the rule should not be read narrowly to limit such protection to the confidentiality of notes written on court-issued notepads. Rather, Randall asserts that the circuit court's review of Juror Two's verdict sheet was a clear and obvious violation of Rule 4-326 because "generally, nobody, including the trial judge, has a 'right to know' how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror." *Sayles*, 472 Md. at 233.

The State maintains that Randall's request for plain error review falters at the requirement that he establish an error that is "clear or obvious, rather than subject to reasonable dispute." *State v. Rich*, 415 Md. 567, 578 (2010) (internal citation omitted). According to the State, whether instructional verdict sheets qualify as juror notes protected under Maryland 4-326(a) is neither clear nor obvious. The State argues that the rule does not govern Juror Two's instructional verdict sheet because the rule's plain language

encompasses only the circuit court's provision and control over "*paper notepads* for use by sworn jurors, including any alternates, during trial and deliberations." Rule 4-326(a) (emphasis added). While the circuit court had assured jurors as to the confidentiality of their court-provided notepads, the State argues that the court made no such guarantee regarding the verdict sheet copies provided to the jurors for instructional purposes only.

For the reasons discussed below, we decline to exercise our discretion to engage in plain error review of the unpreserved issue. As stated, *supra*, plain error review requires a party to establish the following: that the error (1) was not affirmatively waived; (2) was clear or obvious; (3) affected the appellant's substantial rights or, in other words, prejudiced the appellant; and (4) that failure to address the error would "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *See Newton*, 455 Md. at 364. Each of the four prongs is an independently necessary element of plain error review, and this Court "may not review the unpreserved error if any one of the four has not been met." *Winston v. State*, 235 Md. App. 540, 568 (2018).

First, we acknowledge that Maryland's appellate courts have yet to address whether the plain language of Maryland Rule 4-326(a), which references both court-issued "notepads" and juror "notes," more generally, precludes the circuit court's actions in this case. *See* Md. Rule 4-326(a). We agree with Randall that there is nothing in the record to suggest that Randall intentionally abandoned or affirmatively waived this issue. *See Rich*, 415 Md. at 577 (citing *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)) (explaining that "[f]orfeiture is the failure to make a timely assertion of a right, whereas waiver is the 'intentional relinquishment or abandonment of a known right'") (quoting

United States v. Olano, 507 U.S. 725, 733 (1993))). Nevertheless, we agree with the State that Randall has failed to establish an error that was "clear or obvious, rather than subject to reasonable dispute." *Rich*, 415 Md. at 578. It is reasonably disputable that Rule 4-326(a) governs notes written on instructional verdict sheets, particularly instructional verdict sheets that the jurors were specifically told to leave on their seats before exiting the courtroom to deliberate. The court explicitly stated that the verdict sheets were distributed to the entire panel "for instructional purposes" and that only one verdict sheet was to go back to the deliberation room. Contrary to the language in the rule, the verdict sheets were not provided "for use by sworn jurors, including any alternates, during trial and deliberations." Md. Rule 4-326(a). Therefore, it is neither clear nor obvious that the notations on Juror Two's verdict sheet were protected under Rule 4-326(a).

Next, we find that Randall has failed to establish prejudice that "affected the outcome of the [trial] court proceedings." *Newton*, 455 Md. at 364. As the Court of Appeals articulated in *Newton*, an appellate court will only engage in plain error review when the error was "so material to the rights of the accused as to amount to the kind of prejudice [that] precluded an impartial trial." *Id.* (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)). Although Juror Two had marked "Not Guilty" as to all three charges on his verdict sheet, there is nothing in the record to prove that his dismissal was outcome determinative of the jury's ultimate conviction. We therefore cannot conclude that Randall would have been found not guilty on all charges but for Juror Two's dismissal. Possible prejudice is not enough to grant plain error review.

Furthermore, it is illogical to, on one hand, argue that Juror Two's dismissal was

outcome determinative because his vote would have prevented Randall's conviction and, on the other hand, argue that the circuit court abused its discretion because it deduced that Juror Two was unwilling or unable to deliberate with his fellow jurors fairly and impartially. Put differently, Randall argues that Juror Two had made up his mind about the case and so his dismissal was prejudicial while concurrently arguing that Juror Two had not demonstrated that he was unwilling to deliberate, so his dismissal was an abuse of discretion.[3] This logic is circular. In addition to demonstrating a lack of "clear" or "obvious" error, this circularity undermines the alleged prejudice because it demonstrates that there are a variety of manners in which the verdict sheet could have been interpreted. We therefore cannot find that Randall has established three of the four necessary prongs to compel this Court to engage in plain error review. As such, we need not address the fourth prong: whether a failure to review the error would seriously "affect[] the fairness, integrity or reputation of judicial proceedings." *Winston*, 235 Md. App. at 567 (quoting *Newton*, 455 Md. at 364).

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN EXCUSING JUROR TWO.

A trial judge's decision "to remove a juror and substitute an alternate juror for a reason particular to that juror . . . is a discretionary one and will not be reversed on appeal absent a clear abuse of discretion or a showing of prejudice to the defendant." *State v. Cook*, 338 Md. 598, 607 (1995). This is because it is the "trial judge [who] has the opportunity to

[3] Although, Juror Two, himself, indicated a lack of willingness or need to deliberate with the jury, which we discuss in Section II.A, *infra*.

question the juror and observe [their] demeanor." *Id.* at 615. A "clear abuse of discretion" necessitates that the "trial court's decision must be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *State v. Matthews*, 479 Md. 278, 305 (2022). Therefore, it is the reviewing court's duty to "determine whether the route the trial judge traveled 'does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective,' and, thus, constituted an abuse of discretion." *Nash v. State*, 439 Md. 53, 67–68 (2014) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)).

A. Juror Two Demonstrated an Unwillingness to Fairly and Impartially Deliberate.

Randall first argues that the circuit court abused its discretion in excusing Juror Two because Juror Two had not refused to deliberate. Randall points to the fact that Juror Two had "joined his fellow jurors, uneventfully, in the deliberations room" as an indication that he was willingly following the court's instructions. Randall emphasizes that, when the court removed Juror Two from deliberations, the court had not received any communication from the other jurors expressing concerns about Juror Two's ability or willingness to deliberate. It is Randall's position that "the trial court's determination that Juror Two '[did] not want to participate in the process' [did] not logically follow from the reality that Juror Two was in fact participating in the process" when he was removed from deliberations for questioning.

Randall perceives the court's review of Juror Two's verdict sheet as the impetus for his dismissal; thus, Randall argues that the circuit court impermissibly held "an evidentiary

hearing on what, exactly [Juror Two] meant by something that he [wrote] at the beginning of deliberations," i.e., the notes on his verdict sheet. *United States v. Brown*, 996 F.3d 1171, 1195 (11th Cir. 2021) (Brasher, J., concurring). Relying on *Brown*, Randall asserts that it was inappropriate for the trial judge to question Juror Two as to the reason he marked "Not Guilty" on his verdict sheet during jury deliberations. *Id.* at 1195–96 (explaining that it is never appropriate for a court to "investigat[e] into a juror's thoughts"). By pausing deliberations to inquire the reason Juror Two had filled out his verdict sheet at the start of deliberations, Randall argues that the court "short-circuited the process." Instead of telling the jury to pause, Randall maintains that the court should have allowed the jurors to deliberate, consider each other's positions, and thereafter return a verdict. *See id.* at 1195 ("Jurors must express themselves, challenge each other, and work toward common ground.").

The State responds by arguing that the trial court had ample grounds upon which to base its finding that Juror Two was unable or unwilling to comply with his duty to deliberate. The State relies on *Stokes v. State*, 72 Md. App. 673 (1987), where this Court found that "[w]hile the decision to remove a juror because of inability to perform the usual functions of a juror is within the sound discretion of the trial judge, the exercise of this judgment must be based upon a sufficient record of competent evidence to sustain removal." *Id.* at 680 (quoting *Commonwealth v. Saxton*, 466 Pa. 438, 442 (1976)). The State argues that the record in this case is distinguishable from that in *Brown*, where the Eleventh Circuit found that there was a "substantial possibility" that the dismissed juror was capable and willing to fulfil his duty to deliberate. 996 F.3d at 1187.

Randall additionally argues that Juror Two's responses only conveyed that he saw little use in deliberating, not an outright refusal to deliberate. Randall claims that when Juror Two said, "I don't need to deliberate" and "I don't need to hear everybody[—]I heard what I needed to hear," he was merely indicating that he did not think he would change his mind "without violence to [his] individual judgment." MPJI-Cr 2:01, Jury's Duty to Deliberate. Relying on a Colorado Supreme Court case, *Garcia v. People*, 997 P.2d 1 (Colo. 2000), Randall additionally argues that the circuit court's examination of Juror Two was deficient because the circuit court failed to establish when, precisely, Juror Two had filled out the instructional verdict sheet, and "never asked Juror Two directly if he was *willing* to deliberate," only whether he could "go back and fairly and impartially with all of the jurors decide the case."

The State responds by claiming that these accompanying arguments are unpreserved. Specifically, the State argues that Randall failed to object to pausing deliberations to bring in Juror Two for questioning and to the circuit court's line of questioning when Juror Two was before the court. As such, the State contends that Randall can neither claim that the trial court should have allowed deliberations to move forward after receiving the verdict sheet nor that the trial court failed to pose the proper line of questioning.

As a threshold matter, we disagree with the State that Randall's ancillary claims relating to Juror Two's dismissal were not preserved. As previously stated, the purpose of the preservation requirement is to ensure "a proper record can be made with respect to the challenge" and to provide "the other parties and the trial judge . . . an opportunity to

consider and respond to the challenge." *Chaney v. State*, 397 Md. 460, 468 (2007). To preserve an issue for appellate review, a party need not state grounds for an objection unless the court directs otherwise. *See* Md. Rule 4-323(c). It is sufficient that Randall stated a general objection to the State's motion to strike Juror Two after hearing the court's examination and Juror Two's responses. Randall's claims concerning the sufficiency of the court's questioning merely support his general objection to Juror Two's dismissal. Therefore, this Court will address the claims.

We agree with the State that the record supports the trial court's decision to dismiss Juror Two. In *Brown*, the Eleventh Circuit was asked to decide whether a trial court had abused its discretion by dismissing a juror who expressed, after the start of deliberations, that a "Higher Being" told him that the defendant was not guilty. *Id.* at 1177. Even with this divine guidance, the juror repeatedly assured the court that he was basing his decision on the evidence presented at trial, in accordance with the court's instructions. *Id.* at 1178. The juror in question and one of his fellow jurors confirmed that he had been engaged in the deliberation process. *Id.* at 1177–78. Despite finding the juror credible, the court determined that the juror's comments regarding his faith were "categorically disqualifying" and dismissed him. *Id.* at 1175. The Eleventh Circuit vacated the conviction and remanded the case, holding that the trial court erred by dismissing the juror despite a "substantial possibility" that he was properly fulfilling his duty to render a verdict based on the evidence and law. *Id.* at 1187.

In *Cook*, the Court of Appeals noted that "the exclusion of a juror for a bias he or she may have formed based on the evidence already presented in the underlying case might

be a prejudicial abuse of discretion on the part of the trial judge." *Cook*, 338 Md. at 616. However, when, as in *Cook*, the record reflects that a juror was excused "not because he had an apparent bias as to guilt or innocence of the defendant, but because the trial judge concluded that the juror could not follow the court's instructions," the reviewing court should not "substitute [its] judgment for that of the trial judge." *Id.* at 616–17.

Here, the record is clear that the court told Juror Two he was removed from deliberations because he filled out the verdict sheet in violation of earlier instructions.[4] The court then asked, "[C]an you still go back and fairly and impartially with all the jurors decide the case?" Juror Two's response was clear: "No." When Juror Two began to explain why he had already drawn his own conclusions about the case, the trial judge appropriately interrupted by saying, "I don't want you to tell me anything[.]" The court then repeated the initial inquiry as to whether Juror Two could fairly and impartially deliberate with the other jurors. Juror Two reiterated that he had already decided what he believed and that he "[did not] need to hear everybody" because he had "heard what [he] needed to hear" from the defense and State's attorneys. This is distinguishable from the facts in *Brown*, where "[t]here was never any allegation that [the juror] refused to deliberate or that he had committed any other form of misconduct. Instead, the allegation was . . . that [the juror] was not thinking correctly." *Brown*, 996 F.3d at 1196 (Brasher, J., concurring).

Furthermore, we find Randall's reliance upon the Colorado Supreme Court's opinion in *Garcia* both unpersuasive and misplaced. In *Garcia*, the appellate court was

[4] The record is unclear as to how or why the circuit court was informed of Juror Two's verdict sheet. However, this fact is inconsequential to the analysis of this issue.

asked to review a case in which the trial judge had received multiple complaints about a juror who was refusing to deliberate with the other jurors because there was no evidence that would change his mind. *Id.* at 3. The foreperson reported that the juror at issue had told the others that he believed the outcome of the case would be a hung jury. *Id.* Upon examination, when the juror told the court that he hoped for a hung jury, he was promptly dismissed without further questioning. *Id.* On appeal, the Colorado Supreme Court said that the trial judge's questioning of the juror was insufficient to uncover "whether he was willing to follow the trial judge's instructions prior to deliberations or during the course of deliberations." *Id.* at 6.

Unlike in this case, *Garcia* dealt with a holdout juror. *See id.* at 4. Moreover, in *Garcia*, the trial court's questioning targeted whether the juror believed that there would be a hung jury. *See id.* at 4–5. That question expressly pried into confidential matters, such as the juror's beliefs about the sufficiency of the evidence and the juror's statements during deliberations. *See id.* at 4, 6–7 (citing *Thomas*, 116 F.3d 606). Here, the circuit court focused its questioning, not on Juror Two's belief about the outcome of the case, but on whether Juror Two could deliberate with the other jurors as the jury instructions required.

For these reasons, the trial court's determination to remove Juror Two was not arbitrary. The record shows that the court's decision was based on the juror's unwillingness to follow the court's instructions. We find no abuse of discretion in this decision. *See Cook*, 338 Md. at 616.

B. Dismissal Was Not Based on Juror Two's View of the Sufficiency of the State's Evidence.

Randall next argues that the circuit court abused its discretion by dismissing Juror Two in violation of Randall's right to a unanimous jury protected under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *See* U.S. Const. amend. VI; Md. Rule 4-327(a) ("The verdict of a jury shall be unanimous and shall be returned in open court."); *see also Jones v. State*, 384 Md. 669, 683 (2005) ("The requirement of unanimity is, of course, a constitutional right set forth in Article 21 of the Maryland Declaration of Rights, which states that 'every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.'").

In support, Randall outlines two standards to determine whether the discharge of a juror during deliberations was proper. The D.C. and Second Circuits share the first, more lenient test under which a court must deny the request to dismiss a juror "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence[.]" *Thomas*, 116 F.3d at 621–22; *accord. United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) ("[A] court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the government's evidence."). The Third, Ninth, and Eleventh Circuits, and Illinois and Washington States have favored a more stringent standard: a trial court may only dismiss a juror "when there is no reasonable possibility that the allegations of misconduct stem from the juror's view of the evidence." *United States v. Kemp*, 500

F.3d 257, 304 (3d Cir. 2007); *accord., e.g.*, *People v. Gallano*, 821 N.E.2d 1214, 1224 (2004) ("[W]here the record shows any reasonable possibility that the impetus for a juror's dismissal during deliberations stems from his views regarding the sufficiency of the evidence, the dismissal of that juror constitutes error." (quoting *United States v. Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999))). Randall argues that Juror Two's removal was improper under either test because the record shows that the *only* possible impetus for Juror Two's dismissal was the juror's views on the merits of the case, as marked on his verdict sheet.

The State responds that the impetus for Juror Two's removal was not his views concerning the merits of the State's case but, rather, his inability or unwillingness to follow the court's instructions about the duty to deliberate with the other jurors. The State asserts that, when it first moved to strike Juror Two from the jury, the juror's facial expressions and perceived hostility toward the State's case during closing arguments were raised, but the circuit court declined to dismiss the juror on those grounds. The State additionally notes that, when the court learned of the verdict sheet, the court did not immediately dismiss Juror Two; rather, the court questioned Juror Two regarding his failure to follow instructions. As the State emphasizes, it was only after the court's later examination, wherein the court asked Juror Two whether he felt he could "still go back and fairly and impartially with all of the jurors decide the case," and Juror Two's response was "No," that the court excused the juror. According to the State, this demonstrates that the impetus for the court's dismissal was Juror Two's clear communication that he would not follow the court's instructions regarding the duty to deliberate. We agree.

In *Gallano*, after deliberations had begun, a juror wrote a note to the judge in which he expressly stated that he could not find the defendant guilty and that "[his] mind [could] not be changed because [he] [felt] some reasonable doubt." 821 N.E.2d at 1221. Upon receiving the note, the State conducted a background check on the juror "based on [its] suspicions . . . that he was a holdout [juror.]" *Id.* Based on the information gleaned from the background check, the State argued that the juror had been untruthful during voir dire questioning and moved to have the juror excused. *Id.* Defense counsel objected, but the trial court dismissed the juror on the basis of the juror's untruthfulness during voir dire. *Id.* at 1222. The Illinois Appellate Court found that the trial court had dismissed the juror in error and reversed and remanded for a new trial. *Id.* at 1224–25. According to the Illinois Appellate Court, the record was clear that the true impetus for dismissal was the juror's note in which he plainly indicated that he was the lone holdout juror—not the juror's untruthfulness during voir dire. *Id.* at 1224. Without that information, the appellate court reasoned that the State never would have conducted a background check and discovered that the juror had been untruthful during voir dire—a revelation that the State could have learned prior to trial had it chosen to investigate the juror's background sooner. *Id.* The appellate court equated this to the trial court permitting the State to facilitate the prevention of a hung jury and rendering of a guilty verdict. *Id.* at 1225.

In this case, there is a clear distinction between the circuit court's response to the State's initial motion to strike Juror Two at the close of trial and the State's second motion to strike the juror following the verdict sheet issue and related questioning of Juror Two. The State initially moved to strike Juror Two because it was the State's position that Juror

Two had already made a decision about the State's case, and the court denied the request. While the court acknowledged that Juror Two might have been making facial expressions during the State's closing argument, raising the possibility that the juror disagreed with the State's case, the court reasoned jurors often have opinions prior to deliberations and having opinions about the case is not grounds for dismissal. The court only later questioned Juror Two upon learning the juror had failed to follow the court's instructions regarding the verdict sheets. The court did not inquire into Juror Two's thoughts or beliefs about the case based on his verdict sheet; it focused its inquiry on whether Juror Two believed he could continue serving as a juror in accordance with his duty to deliberate.

The court's examination and dismissal of Juror Two in this case is distinguishable from that of the juror in *Gallano*. First, the note at issue in *Gallano* was a direct message from the juror to the court in which the juror made clear that he was the holdout juror and that his mind could not be changed. 821 N.E.2d at 1221. Here, there was no name on the verdict sheet, and the record is unclear as to how the court obtained the sheet. Although the verdict sheet had markings next to "Not Guilty" for all three charges, there was nothing written on the verdict sheet that indicated Juror Two had definitively made his mind up about the case nor that he was the sole holdout juror. Here, the court merely had the information that Juror Two had failed to follow instructions regarding the verdict sheets, and it was within the court's discretion to inquire whether Juror Two could proceed with deliberations according to his duties as a juror. *See Cook*, 338 Md. at 607. Juror Two's

responses concerning his unwillingness or inability to deliberate were discernable grounds for dismissal.[5]

C. There Is No Clear Evidence in the Record that Juror Two's Dismissal Had a Coercive Effect on the Remaining Jurors.

Finally, Randall argues that the trial court abused its discretion in dismissing Juror Two because his removal may have had a coercive effect on the remaining jurors. *See Sanders v. Lamarque*, 357 F. 3d 943, 944–45 (9th Cir. 2004) ("Removal of a holdout juror is the ultimate form of coercion."). Randall relies upon *Garcia*, wherein the Colorado Supreme Court discussed the public policy concerns that arise when the removal of a holdout juror could be perceived as an effort to facilitate a guilty verdict. 997 P.2d at 8. The Colorado Supreme Court explained that "[e]ven if not truthful, such appearances have the potential to erode the public's confidence and trust in our criminal justice system" and "create[] unwarranted mistrust and suspicion among members of the public." *Id.* Randall suggests that Juror Two's dismissal poses the same public policy issues.

The State claims that Randall waived his ability to raise this argument on appeal. According to the State, Randall failed to object to the trial court's questioning of Juror Two and the court's subsequent decision to substitute Juror Two with an alternate juror. Aside from its preservation concerns, the State contends that Randall's argument should be

[5] Randall claims that the only possible impetus for Juror Two's dismissal was the court's review of the notations on the verdict sheet. Randall argues that, without first reviewing Juror Two's opinion of the case on the verdict sheet, the court never would have questioned Juror Two about his ability to deliberate fairly and impartially. However, because we have refrained from finding plain error as to the court's review of Juror Two's verdict sheet, *see supra* Section I, this argument is of no consequence.

rejected on the merits. The State highlights that, in each of the cases that Randall cites to in support, the dismissal was of a "holdout" juror in circumstances where the other jurors could infer or assume that the holdout was dismissed to facilitate a particular result. According to the State, the circumstances surrounding the dismissal in this case did not give rise to such an inference. Furthermore, the State argues that the court's explanation to the remaining jurors regarding the substitution of the alternate did not invoke Juror Two's views on the case and that any "coercive" effect that the decision might have had on the other jurors is therefore entirely hypothetical.

First, we reiterate that the State's preservation claim as to this issue is unwarranted. Randall made a general objection to the court's dismissal of Juror Two during trial, and Maryland Rule 4-323(c) does not preclude him from arguing, for the first time on appeal, specific grounds for that objection. Nonetheless, we find Randall's argument on this point unpersuasive. The only information that the circuit court provided the jurors regarding the dismissal was that "an issue [had come] up with juror number two," which had prompted the court to bring Juror Two in for questioning, resulting in Juror Two's excusal. There is no evidence to support the allegation that the remaining jurors were coerced into their verdict, and we do not find an abuse of discretion based on conjectured coercion.

III. WHETHER THE CIRCUIT COURT ERRED IN SEATING THE ALTERNATE JUROR AFTER DELIBERATIONS HAD COMMENCED WAS NOT PRESERVED FOR REVIEW.

Relying on Maryland Rule 4-312(g), Randall argues that the circuit court erred in seating the alternate juror after deliberations had begun. *See* Md. Rule 4-312(g)(3) ("When the jury retires to consider its verdict, the trial judge shall discharge any remaining

alternates who did not replace another jury member."). Randall cites to the Court of Appeals's analysis in *Hayes v. State*, 355 Md. 615 (1999), where the court held that "an alternate juror who remains qualified to serve may be substituted for a regular juror who is properly discharged, until such time as the jury enters the jury room to consider its verdict and closes the door." *Id.* at 635. Randall argues that the court below erred on two bases: (1) the court made the substitution after the jury room door had been closed, and (2) the court failed to examine the alternate juror to establish, on the record, that he remained qualified to serve despite being dismissed. Randall additionally claims that the circuit court erred when it asserted that it would be dismissing Juror Two and substituting the alternate without giving Randall the option to proceed with 11 jurors or move for a mistrial.

Relying on Maryland Rules 8-131(a) and 4-323(c), the State conversely maintains that, because Randall failed to assert a corresponding objection to seating the alternate juror, the present complaint is not preserved for appellate review. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); Md. Rule 4-323(c) ("[I]t is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.").

In *Hayes*, the Court of Appeals addressed whether the appellant's complaint regarding the substitution of an alternate juror at trial was preserved for appellate review. 355 Md. at 637. In that case, the trial judge had concurrently asserted that, if the original juror was dismissed, the court would substitute the alternate. *Id.* The dismissal and

substitution were essentially merged into one issue: whether to substitute the alternate juror. *Id.* The Court of Appeals found that defense counsel's subsequent and repeated general objection was sufficient to preserve both the dismissal and substitution issues for appellate review because the trial court had raised its intention to dismiss and substitute simultaneously. *Id.*

We conclude that this issue was not properly preserved for our review. *See* Md. Rule 8-131(a). Unlike in *Hayes*, the circuit court did not simultaneously assert its intention to dismiss Juror Two and replace him with the alternate. Rather, when the court stated that it was going to "have the alternate stay a moment," it was prior to the court establishing grounds for Juror Two's dismissal. Only following the court's examination of Juror Two did Randall object to the State's renewed motion to strike. Randall's objection was specifically directed toward the proposed dismissal, as the court had not yet asserted its intention to substitute the alternate: "I would ask that you allow him to continue, to go back into the jury room, deliberate with the jurors." When the court ultimately ruled to excuse Juror Two and substitute the alternate, Randall made no additional objection. When the court stated that the alternate juror would be replacing Juror Two, Randall neither objected nor requested a further examination to determine whether the alternate juror remained qualified to serve. Rather, Randall requested that the remaining jurors be brought back into the courtroom so that the court could apprise them of the substitution.

Therefore, the facts of this case are distinguishable from those of *Hayes*, wherein the defense attorney repeated a clear, general objection to the trial court's intention to seat the alternate juror. Because Randall failed to lodge an objection to the circuit court seating

the alternate, thus, precluding the court from addressing the matter in real time, we hold that this issue was not preserved for appellate review.

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