UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1350

September Term, 2014

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TAVON BARNETT

v.

STATE OF MARYLAND

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*Zarnoch,
Leahy,
Rodowsky, Lawrence, F.
(Retired, Specially Assigned),

JJ.

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Opinion by Zarnoch, J.

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Filed: October 7, 2015

*Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

After a jury trial in the Circuit Court for Baltimore City, Tavon Barnett, appellant, was convicted of first-degree murder, three counts of first-degree assault, and four counts of use of a handgun in the commission of a crime of violence. He received an aggregate sentence of life plus fifteen years. This timely appeal followed.

## QUESTIONS PRESENTED

Appellant presents the following questions for our consideration:

> I. Did the trial court deny appellant due process and a fair trial by excluding evidence that a witness identified another suspect as the shooter?
>
> II. Did the trial court err in providing the jury with written instructions of first-degree murder, premeditation, and second-degree murder, but not the entire set of instructions?

For the reasons that follow, we shall affirm.

## FACTUAL BACKGROUND

This appeal arises out of the shooting death of Terrence Seale on November 3, 2012. James Locke, an assistant medical examiner for the State of Maryland, testified that Mr. Seale's death was caused by multiple gunshot wounds and that the manner of death was homicide.

Mr. Seale's wife, Marie Ann Seale, testified that on the day of the shooting she and her husband lived in apartment 3A at 1231 Linworth Avenue in Baltimore City with their two young sons, Aramys, who was five years old, and Amaury, who was three years old and autistic. Mr. and Mrs. Seale made breakfast for the children and then Mr. Seale "stepped out" of the apartment. He returned to the apartment at 1:47 p.m., when Mrs. Seale was getting ready to go to a job interview. Mr. Seale left the apartment to go start the car,

but within seconds he returned with Barnett, who was wearing dark colored jeans and a navy blue hoodie. Mrs. Seale had never met Barnett before. They said hello and then Mrs. Seale walked back into her bedroom to continue getting ready for her interview. At one point, Mrs. Seale saw Barnett in the living room playing with the children. Barnett asked to use the bathroom, and Mrs. Seale showed him where it was.

As Mrs. Seale was putting on her shoes, she heard her husband scream followed by what sounded like an explosion. She ran into the living room and saw Barnett shoot Mr. Seale several times. Mrs. Seale screamed and told Aramys, who was closest to her, to run into his bedroom and close the door. At that point, Barnett "broke free from his fixation" on Mr. Seale and turned his gun on Aramys, but when he pulled the trigger it did not fire. Mrs. Seale was "sitting on the living room floor begging for [her] life" and begging Barnett to let her get Amaury. She told Barnett, "I didn't see anything. I won't say anything. Just let me get my children and leave."

Barnett pointed his gun at Amaury and held it at the child's head as he struggled to open the front door. He pulled the trigger, but the gun did not fire. He then pointed the gun at Mrs. Seale, but again, the gun did not fire. Barnett finally got the door open and ran down the stairs and out of the apartment building. Mrs. Seale ran after him and knocked on the doors of every apartment in the building. She then returned to her apartment and found her husband on the floor. She opened the balcony door and screamed for help. From the balcony, she saw Barnett meet up with a young man wearing dark jeans and a royal blue hoodie and watched as they both ran away together. Mrs. Seale then called 911. She

told the 911 operator that the shooter had a West Indian accent. She sat on the kitchen floor and held her husband in her arms as he took his final breath.

The police arrived and took Mrs. Seale to the police department. Mrs. Seale gave a recorded statement in which she told detectives, among other things, that her husband's assailant had a West Indian accent. Detectives showed Mrs. Seale a photographic array that did not include a photograph of Barnett. She identified a man named Daniel Horton as the person who had shot her husband.

The next day, Mrs. Seale contacted Detective Forsythe, the lead detective on the case, and told her that she had been mistaken in her identification of Horton as the shooter. Mrs. Seale provided Detective Forsythe with a photograph of the person she believed had killed her husband. Mrs. Seale was shown a new photographic array which contained a photograph of Barnett, and she immediately identified Barnett as the person who shot her husband.

At the time of trial, Deshawn Henry, who goes by the nickname "Vicious," had known Barnett, whom he called "Twin," for about five years. Henry testified at trial after having been granted immunity from prosecution in state and federal courts. Henry stated that he was with Barnett on the day of the shooting. Barnett and another man, whom Henry did not know, picked him up at the Alameda Shopping Center, and the three drove in Barnett's gold colored car to the Wheaton Apartments to buy marijuana. Henry gave Barnett $1,000 that he got from selling drugs and waited in the hallway while Barnett entered an apartment to purchase the drugs. After about ten or fifteen minutes, Henry heard

gunshots and immediately ran out of the apartment building and back to "the Alameda." As he was running, he heard a woman screaming.

Henry, who was wearing jeans and a hoodie that was the same color as the hoodie worn by Barnett, was picked up by police and taken downtown, where he was questioned by Detective Forsythe and denied knowing anything about the murder. At trial, Henry said that he had denied knowing anything about the murder because he had been buying drugs and was nervous and scared. Eventually, Henry was released. At some point, he met up with Barnett, who returned his $1,000.

On November 12, 2012, the police picked up Henry again and took him to the police station. Henry spoke to Detective Forsythe, who told him he could be charged. Thereafter, Henry proceeded to tell her what he knew about the shooting. Henry viewed a photographic array and pointed out Barnett, whom he knew as Twin. According to Henry, the third person who was in Barnett's car entered the apartment with Barnett. Henry claimed he never saw that person again.

Mye McCray-Bey testified that Daniel Horton is an employee at the Family Dollar store where she is the manager. On the day of the shooting, Horton was at the store doing online testing for his job. He arrived with his son sometime around noon or 1 p.m. and stayed for about an hour and a half.

Two witnesses testified for the defense. Officer Jonathan Faurelus responded to the call for a shooting at the Seales' apartment. He spoke with Mrs. Seale, and she told him that the man who shot her husband had an accent. Barnett's sister, Brittany Smith, testified

that Barnett and his parents were born in Baltimore, that none of their family members lives outside the United States, and that Barnett does not speak with an accent.

We shall include additional facts as necessary in our discussion below.

## DISCUSSION

### I.

Barnett contends that he was denied due process and a fair trial when the trial court excluded evidence that a witness, Crystal Beckford, identified another suspect as the person who shot Terrence Seale. This contention is not properly before us.

During defense counsel's cross-examination of Detective Forsythe, it was established that on the day of the shooting, Detective Forsythe and another detective spoke with Crystal Beckford, who provided a recorded statement. The following colloquy occurred:

> [Defense Counsel]: All right. You indicated that – was it November 4th, 2012 that Ms. Seale came into your division and she picked out – you said Darnell Horton, but Daniel Horton; correct?
>
> [Detective Forsythe]: Yes.
>
> Q. Okay. And is it also correct that Ms. Beckford picked out the same person?
>
> [Prosecutor]: Objection.
>
> THE COURT: Sustained.
>
> [Defense Counsel]: You interviewed Crystal Beckford in connection with this case; correct?
>
> [Detective Forsythe]: Yes.
>
> Q. Can you tell the jury who she is in connection with this case, if you know?

[Prosecutor]: Objection.

THE COURT: Sustained.

[Defense Counsel]: Do you know if Ms. Beckford has any relationship to the Seale family?

[Prosecutor]: Objection.

THE COURT: Sustained.

[Defense Counsel]: What drew your attention to talk to Ms. Beckford?

[Prosecutor]: Objection.

THE COURT: Sustained.

[Defense Counsel]: May we approach, Your Honor?

THE COURT: No. You can ask your next question.

[Defense Counsel]: Who is Ms. Beckford to Mr. Seale, if you know?

[Prosecutor]: Objection.

THE COURT: Sustained.

[Defense Counsel]: Let me ask you this, Detective Forsyth, where did you get Crystal Beckford's name?

[Prosecutor]: Objection.

THE COURT: Sustained.

Defense counsel was able to show Detective Forsythe a photograph that depicted someone other than Barnett, and the detective acknowledged that she showed that photograph to Beckford during her interview. The trial court did not allow the photograph to be admitted in evidence.

Relying on *Chambers v. Mississippi,* 410 U.S. 284 (1973), Barnett argues that the court's refusal to allow him to elicit testimony from Detective Forsythe about Beckford, her relationship to the Seale family, where she was and what she witnessed on the day of the shooting, and relevant facts surrounding her ability to identify a suspect "severely hampered [his] ability to present his defense" and prevented him from informing the jury about Beckford's identification. He asserts that his fundamental right to adduce exculpatory evidence outweighed any concerns about hearsay or other evidentiary rules.

This contention was not properly preserved for our consideration because Barnett never argued in the circuit court that notwithstanding the evidentiary issues that limited his cross-examination of Detective Forsythe, his constitutional rights to due process were violated. Recently, in *Peterson v. State*, 444 Md. 105 (2015), the Court of Appeals explained:

> The purpose of the preservation rule is "to prevent[] unfairness and requir[e] that all issues be raised in and decided by the trial court, and these rules must be followed in all cases[.]" Put another way, the rule exists "to prevent 'sandbagging' and to give the trial court the opportunity to correct possible mistakes in its rulings." An appeal is not an opportunity for parties to argue the issues they forgot to raise in a timely manner at trial. Nor should counsel "rely on this Court, or any reviewing court, to do their thinking for them after the fact."

*Peterson*, 444 Md. at 126 (Internal citations omitted).

Because Barnett's constitutional argument was not raised, initially, in the circuit court, it is not properly before us. 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").

Even if the issue had been preserved properly for our consideration, Barnett would fare no better. Barnett's reliance on *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Green v. Georgia*, 442 U.S. 95 (1979), and *Foster v. State*, 297 Md. 191 (1983), is misplaced. In each of those cases highly reliable hearsay evidence was excluded. In *Chambers* and *Green*, the courts excluded statements against penal interest, and in *Foster*, the trustworthy hearsay that was then inadmissible, is now subject to the residual exception to the hearsay rule. *See Wood v. State*, 209 Md. App. 246, 333-34 (2012) (noting that after *Foster* was decided, Maryland adopted the residual exception to the hearsay rule), *aff'd*, 436 Md. 276 (2013). In addition, in each of those cases, there was no alternative way to elicit the evidence, and the evidence was critical to the defense because it negated the defendants' criminal agency.

In the case at hand, Barnett does not argue that the excluded hearsay bore any indicia of trustworthiness. More importantly, however, Barnett had an alternative to the admission of hearsay evidence. He could have called Beckford as a witness and elicited from her all of the information he sought to elicit from Detective Forsythe. Likewise, Barnett could have elicited from Mrs. Seale the nature of the relationship between Beckford and the Seale family. Thus, Barnett was not denied the right to due process or the right to present a defense as a result of the trial court's evidentiary rulings.

**II.**

Barnett's next contention pertains to the trial court's response to a note from the jury that asked for "a written copy of the definitions of first degree murder, premeditation and second degree murder[.]" In response to that note, the trial court provided the jury with

the written instructions that were requested, but refused defense counsel's request to send the jury the entire set of jury instructions. In refusing defense counsel's request, the trial court stated:

> I hear you, but I'm only going to provide the ones that they asked me for and I'll note your objection to that on the record. They asked me for that. It is my practice that I read the instructions to them. There are some courts I realize that even though they read them, they still send them upstairs regardless to whether they ask for them or they don't. I believe that that's what I understand happens.
>
> But my practice is and people can look back in every single trial that they ask me for that definition, I send them that definition. I don't give them more than what they ask me for. And so I have no problem giving them that as opposed to giving them all of the instructions and that's what I will do.

Barnett argues that the trial court abused its discretion in reinstructing the jury on only part of the law dealing with the crimes charged because the "jury instructions should be presented as a whole, not piecemeal." He asserts that the procedure used by the trial court gave undue emphasis to one part of the instructions over all others and emphasized the State's theory of the case. In addition, Barnett maintains that Maryland Rule 4-326, unlike its predecessor, does not expressly permit a trial court to give the jury only parts of the instructions.[1] We disagree and explain.

[1] Maryland Rule 4-326(b) provides:

> Sworn jurors may take their notes with them when they retire for deliberation. Unless the court for good cause orders otherwise, the jury may also take the charging document and exhibits that have been admitted in evidence, except that a deposition may not be taken into the jury room without the agreement of all parties and the consent of the court. Electronically recorded instructions or oral instructions reduced to writing may be taken into the jury room only with the permission of the court. On request of a party or on the court's own initiative, the charging (continued…)

Jury instructions are governed Md. Rule 4-325, which provides, in relevant part:

> (a) The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. In its discretion the court may also give opening and interim instructions.
>
> (b) The parties may file written requests for instructions at or before the close of evidence and shall do so at any time fixed by the court.
>
> (c) The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are biding. The court may give instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

"The decision to give supplemental instructions is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *Roary v. State*, 385 Md. 217, 237 (2005) (relying on *Mitchell v. State*, 338 Md. 536, 540 (1995)). "Certainly, trial courts have a duty to answer, as directly as possible, the questions posed by jurors." *Appraicio v. State*, 431 Md. 42, 53 (2013). In addition, a trial court's supplemental instructions must not be ambiguous, misleading, or confusing. *Battle v. State*, 287 Md. 675, 685 (1980).

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> documents shall reflect only those charges on which the jury is to deliberate. The court may impose safeguards for the preservation of the exhibits and the safety of the jury.

Appellant directs our attention to *Hebb v. State*, in which we noted that former Rule 757e provided that "with the approval of the court (the jury) may take into the jury room those instructions or parts of instructions which have been reduced to writing." 44 Md. App. 678, 681 n.2 (1980). We also noted that "Rule 758 permits, again with court approval, 'all exhibits which have been admitted into evidence' and relevant parts of the charging document." *Id.*

In the instant case, the trial court did not abuse its discretion in supplying the jury with written copies of the specific instructions they requested. The Maryland Rules did not require the trial court to give the jury the entire set of written instructions. Contrary to Barnett's assertion, Rule 4-326(b) merely provides that instructions that are reduced to writing may be taken to the jury room with the court's permission. Nor does Rule 4-325 prohibit a jury from requesting or receiving a written copy of the instructions when oral instructions have been given. The instructions that were given to the jury did not emphasize the State's theory of the case, but merely stated what the State was required to prove for the first and second-degree murder charges. For all these reasons, we hold that the trial court did not abuse its discretion in sending to the jury written copies of the instructions containing the definitions of "first degree murder, premeditation and second degree murder[.]"

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**