

Circuit Court for Queen Anne's County  
Case No. C-17-CR-20-000304

UNREPORTED  
IN THE APPELLATE COURT OF  
MARYLAND\*

No. 1684

September Term, 2021

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DONTAE DAVON DENNIS

v.

STATE OF MARYLAND

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Beachley,  
Albright,  
Battaglia, Lynne A.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Battaglia, J.

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Filed: January 4, 2023

\*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

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.

Dontae Davon Dennis, Appellant, was convicted in the Circuit Court for Queen Anne’s County of distribution of fentanyl in violation of Section 5-602(1) of the Criminal Law Article, Maryland Code (2002, 2012 Repl. Vol., 2018 Supp.) (Count 1);<sup>1</sup> possession with intent to distribute fentanyl in violation of Section 5-602(2) of the Criminal Law Article (Count 2); knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article (Count 3); possession of fentanyl in violation of Section 5-601(a)(1) of the Criminal Law Article (Count 4); conspiracy to distribute fentanyl in violation of the Common Law of Maryland (Count 5); conspiracy to possess with intent to distribute fentanyl in violation of the Common Law of Maryland (Count 6); reckless endangerment in violation of Section 3-204(a)(1) of the Criminal Law Article (Count 7); and manslaughter in violation of Section 2-207(a) of the Criminal Law Article (Count 8). Dennis’s appeal relates to only Count 3, knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article,<sup>2</sup> which alleged that Dennis:

[D]id knowingly distribute to Sidneysia Roy, a controlled dangerous substance containing fentanyl, contrary to the form of the Act of the Assembly in such case made and provided, in violation of Criminal Law Article, Section 5-608.1(a) of the Annotated Code of Maryland and against the peace, government and dignity of the State.

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<sup>1</sup> All statutory references to the Criminal Law Article are to the Maryland Code (2002, 2012 Repl. Vol., 2018 Supp.).

<sup>2</sup> Section 5-608.1(a) of the Criminal Law Article provides:

- (a) A person may not knowingly violate § 5-602 of this subtitle with:
- (1) A mixture that contains heroin and a detectable amount of fentanyl or any analogue of fentanyl; or
  - (2) Fentanyl or any analogue of fentanyl.

Prior to trial, the State and Dennis’s counsel submitted proposed jury instructions, which, among others, included Maryland Criminal Pattern Jury Instruction 4:24, “Narcotics and Controlled Dangerous Substance-Possession,”<sup>3</sup> Maryland Criminal Pattern

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<sup>3</sup> Maryland Criminal Pattern Jury Instructions 4:24, “Narcotics and Controlled Dangerous Substance—Possession” (2d ed. 2012, 2018 Supp.) provided:

The defendant is charged with the crime of possession of (controlled dangerous substance). [It is unlawful for any person to possess any controlled dangerous substance unless such substance was obtained pursuant to a valid prescription or order from a physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, administer, or conduct research on a controlled dangerous substance, while that person was acting in the course of [his] [her] professional practice.]

In order to convict the defendant of possession of (controlled dangerous substance), the State must prove:

- (1) that the defendant knowingly possessed the substance;
- (2) that the defendant knew the general character or illicit nature of the substance; and
- (3) that the substance was (controlled dangerous substance).

Possession means having control over something, whether actual or indirect. [The defendant does not have to be the only person in possession of the substance. More than one person may have possession of the same substances at the same time.]

A person has actual possession of a substance when the person has both direct control over the substance and the intention to exercise that control.

A person not in actual possession, who has both the power and the intention to exercise control over something, either personally or through another person, has indirect possession. In determining whether the defendant had indirect possession of the substance, consider all of the surrounding circumstances. These circumstances include the distance between the

(continued...)

Jury Instruction 4:24.1, “Narcotics and Controlled Dangerous Substance-Possession with Intent to Distribute,”<sup>4</sup> and Maryland Criminal Pattern Jury Instruction 4:24.2, “Narcotics and Controlled Dangerous Substance-Distribution.”<sup>5</sup>

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(...continued)

defendant and the substance, whether the defendant had some ownership or possessory interest in the [place] [vehicle] where the substance was found, and any indications that the defendant was participating, alone or with others in the use and enjoyment of the substance.

<sup>4</sup> Maryland Criminal Pattern Jury Instruction 4:24.1, “Narcotics and Controlled Dangerous Substance-Possession with Intent to Distribute” (2d ed. 2012, 2018 Supp.) provided:

The defendant is also charged with the crime of possession of (controlled dangerous substance) with intent to distribute. In order to convict the defendant, the State must prove:

- (1) that the defendant possessed (controlled dangerous substance) and
- (2) that the defendant possessed (controlled dangerous substance) with the intent to distribute some or all of it.

Distribute means to sell, exchange, or transfer possession of the substance, or to give it away. No specific quantity is required for you to find the intent to distribute. There is no specific amount below which the intent to distribute disappears and there is no specific amount above which the intent to distribute appears. You may consider the quantity of the controlled dangerous substance along with all other circumstances in determining whether the defendant intended to distribute the controlled dangerous substance.

<sup>5</sup> Maryland Criminal Pattern Jury Instructions 4:24.2, “Narcotics and Controlled Dangerous Substance—Distribution” (2d ed. 2012, 2018 Supp.) provided:

The defendant is charged with the crime of distribution of (controlled dangerous substance), which is a controlled dangerous substance. In order to convict the defendant, the State must prove:

(continued...)

The State requested in each of Maryland Criminal Pattern Jury Instructions 4:24, 4:24.1, and 4:24.2, that the phrase “(controlled dangerous substances)” would be replaced with “**fentanyl**.” The court asked counsel for Dennis if he had any objection to the proposed change in the instructions, and he stated, “No.” After the court went through each requested instruction, the court asked Dennis’s counsel again whether there was anything else, and he responded, “No, your Honor.”

The trial court then delivered Maryland Criminal Pattern Jury Instructions 4:24, 4:24.1, and 4:24.2, among others, to the jury and provided each juror with a typed copy of each instruction. After the court instructed the jury, the judge asked Dennis’s counsel if he had any “final objections or other suggestions [to the instructions],” and Dennis’s counsel again responded, “No, sir.”

The jury convicted Dennis of all eight counts, and he was subsequently sentenced to twenty years for distribution of fentanyl in violation of Section 5-602(1) of the Criminal Law Article (Count 1); ten years for knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article, all suspended (Count 3); one year for possessing fentanyl in violation of Section 5-601(a)(1) of the Criminal Law Article, to run concurrently with Count 1 (Count 4); and ten years for manslaughter in violation of Section

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(...continued)

- (1) that the defendant sold, exchanged, transferred, or gave away (controlled dangerous substance); and
- (2) that the substance was (controlled dangerous substance).

2-207(a) of the Criminal Law Article, all suspended (Count 8). Dennis was also sentenced to five years of supervised probation upon release.<sup>6</sup>

On appeal, Dennis challenges only his conviction on Count 3, knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article, and he presents this Court with three questions for review, which we have renumbered:

1. Did the trial court commit plain error in failing to instruct the jury as to the crime charged in count three, to wit, knowingly distributing fentanyl to Sidneysia Roy in violation of CL § 5-608.1?
2. Is the sentence imposed on count three illegal where Dennis was never convicted of the crime charged in count three, to wit, knowingly distributing fentanyl to Sidneysia Roy in violation of CL § 5-608.1?
3. Is the evidence insufficient to sustain a conviction for knowingly distributing fentanyl to Sidneysia Roy in violation of CL § 5-608.1?

We shall hold that the trial judge plainly erred by failing to give a separate jury instruction on Count 3, knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article, and we shall vacate Dennis's conviction on that count.<sup>7</sup>

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<sup>6</sup> For sentencing purposes, Count 1 was merged with Count 2, possession with intent to distribute fentanyl in violation of Section 5-602(2) of the Criminal Law Article, Count 5, conspiracy to distribute fentanyl in violation of the Common Law of Maryland, and Count 6, conspiracy to possess with intent to distribute fentanyl in violation of the Common Law of Maryland. Count 8 was merged with Count 7, reckless endangerment in violation of Section 3-204(a)(1) of the Criminal Law Article.

<sup>7</sup> Because of our holding related to the jury instruction issue in Question 1, we need not and will not address Questions 2 and 3.

## DISCUSSION

In addressing the issue of whether a separate jury instruction should have been given with respect to Count 3, knowingly distributing a substance known to be fentanyl, we are mindful that, “Maryland Rule 4-325(c)<sup>[8]</sup> imposes a requirement that instructions be given in respect to the applicable law in a case.” *Patterson v. State*, 356 Md. 677, 684 (1999). “The main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury’s deliberations, and to help the jury arrive at a correct verdict.” *Chambers v. State*, 337 Md. 44, 48 (1994). *See General v. State*, 367 Md. 475, 485 (2002) (“Jury instructions direct the jury’s attention to the legal principles that apply to the facts of the case.”); *Carter v. State*, 366 Md. 574, 587 (2001). “A defendant is entitled to an instruction on every essential question or point of law supported by evidence.” *Chambers*, 337 Md. at 48 (quoting *Sims v. State*, 319 Md. 540, 550 (1990)). *See Cousar v. State*, 198 Md. App. 486, 522 (2011) (“It is generally well recognized that a defendant is entitled to instructions on the law when generated by the evidence and not covered by instructions actually given.” (quoting *Sydnor v. State*, 133 Md. App. 173, 183 (2000), *aff’d*, 365 Md. 205 (2001))); *Green v. State*, 119 Md. App. 547, 562 (1998) (“It is beyond cavil that a trial court must properly instruct the jury on a point of law that is supported by some

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<sup>8</sup> Maryland Rule 4-325(c) provides:

**(c) How Given.** 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 binding. The court may give its 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.

evidence in the record.”); *Robertson v. State*, 112 Md. App. 366, 385 (1996) (“The court’s instructions should fairly and adequately protect an accused’s rights by covering the controlling issues of the case.”); *Wright v. State*, 70 Md. App. 616, 620 (1987) (“The ‘bottom line’ is that, if a prima facie case is generated on a particular point of law, the defendant is entitled to a jury instruction on that point.”).

“It is the duty of the trial judge to instruct the jury concerning the law applicable to the case.” *Fleming v. State*, 373 Md. 426, 432 (2003). *See Wood v. State*, 436 Md. 276, 293 (2013) (“[T]he onus is on the trial judge to discern and ensure that the jury instructions encompass the substantive law applicable to the case.” (quoting *Collins v. Nat’l R.R. Passenger Corp.*, 417 Md. 217, 228 (2010))). It follows, therefore, that jury instructions must include the elements of a charged offense to properly cover the applicable law. *See Lawrence v. State*, 475 Md. 384, 398 (2021) (explaining that an appellate court’s role on review of a jury instruction “is to determine whether the instruction correctly identified the elements of the statutory crime.”).

The elements of knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article are identified through interpretation of its plain language and legislative intent. *See Carter v. State*, 236 Md. App. 456, 475 (2018) (“To determine the elements of a statutory offense, we use the standard tools of statutory interpretation.”); *State v. Bey*, 452 Md. 255, 265 (2017) (“The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature.” (quoting *State v. Johnson*, 415 Md. 413, 421 (2010))). “We begin our analysis by first looking to the normal,



plain meaning of the language of the statute[.]” *Ray v. State*, 410 Md. 384, 404 (2009) (citing *Barbre v. Pope*, 402 Md. 157, 172 (2007)).

Section 5-608.1 of the Criminal Law Article, the statute with which we are concerned, provides:

**§ 5-608.1. Penalties—Fentanyl or analogue of fentanyl, or heroin mixture**

- (a) A person may not *knowingly* violate § 5-602 of this subtitle with:
  - (1) A mixture that contains heroin and a detectable amount of fentanyl or any analogue of fentanyl; or
  - (2) Fentanyl or any analogue of fentanyl.
- (b) A person who violates this section is guilty of a felony and, in addition to any other penalty imposed for a violation of § 5-602 of this subtitle, on conviction is subject to imprisonment not exceeding 10 years.
- (c) A sentence imposed under this section shall be consecutive to and not concurrent with any other sentence imposed under any other provision of law.

Section 5-602 of the Criminal Law Article, to which there is an internal reference in Section 5-608.1 of the Criminal Law Article, states:

**§ 5-602. Manufacturing, distributing, possession with intent to distribute, or dispensing controlled dangerous substance**

Except as otherwise provided in this title, a person may not:

- (1) distribute or dispense a controlled dangerous substance; or
- (2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance.

Read together, any sentence imposed under Section 5-608.1 of the Criminal Law

Article is in addition to a penalty imposed under Section 5-602 of the Criminal Law Article. A person convicted for a violation of Section 5-608.1 of the Criminal Law Article can only be so were there proof that he knew the controlled dangerous substance was fentanyl.<sup>9</sup>

The relationship between Sections 5-602 and 5-608.1 of the Criminal Law Article and the requirement to address each separately was explored by Judge Kathryn Graeff in *White v. State*, 250 Md. App. 604 (2021), *cert. denied*, 475 Md. 717 (2021). In *White*, White argued that his sentence for violating Section 5-608.1 of the Criminal Law Article

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<sup>9</sup> In 2017, Senate Bill 539, now codified as Section 5-608.1 of the Criminal Law Article, was enacted as an emergency measure to address the growing concern of fentanyl use in Maryland. 2017 Md. Laws, ch. 569. The bill, titled “Distribution of Controlled Dangerous Substances—Fentanyl,” provides:

FOR the purpose of prohibiting a person from knowingly distributing a certain mixture of controlled dangerous substances; establishing certain penalties for a violation of this Act; requiring a sentence for the distribution of a mixture of certain controlled dangerous substances to be consecutive to any other sentence imposed; making this Act an emergency measure; and generally relating to controlled dangerous substances.

2017 Md. Laws, ch. 569, 3295-3296.

As originally introduced, Senate Bill 539 was titled “Distribution of Opioids Resulting in Death” and “prohibit[ed] a person from distributing certain opioids or opioid analogues, the use of which causes the death of another[.]” S.B. 539, 2017 Leg., 437th Sess. (Md. 2017). After its first reading, Senate Bill 539 was amended to the current language of Section 5-608.1 of the Criminal Law Article, focusing specifically on fentanyl. 2017 Md. Laws, ch. 569.

The Fiscal and Policy Note for Senate Bill 539 indicated the basis for its emphasis on fentanyl: “[t]he number of fentanyl-related deaths increased by 83% between 2014 and 2015 and has increased nearly twelvefold since 2012,” and “for January through September 2016, ...the number of fentanyl-related deaths increased nearly fourfold compared to the same period in 2015.” Dep’t Legis. Servs., *Fiscal and Policy Note, Senate Bill 539*, at 2 (2017 Session), [https://mgaleg.maryland.gov/2017RS/fnotes/bil\\_0009/sb0539.pdf](https://mgaleg.maryland.gov/2017RS/fnotes/bil_0009/sb0539.pdf), archived at <https://perma.cc/83WE-AW4S>.

should have merged with his sentence under Section 5-602 of the Criminal Law Article, because both convictions arose under the same act of possession with intent to distribute a controlled dangerous substance containing a heroin and fentanyl mixture. *Id.* at 638-40.

In determining that Section 5-608.1 of the Criminal Law Article was an offense separate from Section 5-602 of the Criminal Law Article, and for which merger was inapplicable, Judge Graeff noted that the plain language of Section 5-608.1 of the Criminal Law Article provides many requirements of a “stand-alone” crime: the elements of an offense, the felony conviction that may result, the penalty to be imposed, and the consecutive nature of the sentence. *Id.* at 639-40. As a result, Judge Graeff recognized that Section 5-608.1 of the Criminal Law Article was not a sentence enhancement but had established “a separate offense” from Section 5-602 of the Criminal Law Article, “for which a defendant may be separately charged, convicted, and sentenced,” and that “the Legislature specifically authorized multiple punishments when the single act of possession with intent to distribute violates CR §§ 5-602 and 5-608.1.” *Id.* at 639, 642 (“Indeed, as the State points out, ‘that was the entire point for enacting [CR] § 5-608.1 in the first place, *i.e.*, to allow for more severe punishment in cases where a person knowingly violates [CR] § 5-602 with a heroin/fentanyl mixture.’”). Accordingly, *White* stands for the proposition

that Section 5-608.1 of the Criminal Law Article is a separate, “stand-alone” criminal offense to be charged on its own.<sup>10</sup>

In the present case, each of the parties concede that a separate jury instruction was not given with respect to Count 3, knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article. The omission of that jury instruction was an error.

We have previously held that the omission of *an element* of an offense in an instruction is an error. *Nottingham v. State*, 227 Md. App. 592 (2016). In *Nottingham*, a criminal case, we held that “affray is a viable common law offense in Maryland and that, when charged, and if the evidence justified, a defendant is entitled to an instruction that contains both inherent elements of the crime— “in a public place” and “to the terror of the people.”<sup>11</sup> 227 Md. App. at 607-608. Because the instruction omitted the element of “to the

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<sup>10</sup> Previously, in *Singh v. State*, 247 Md. App. 322, 332 n. 7 (2020), we also noted that Section 5-608.1 of the Criminal Law Article “created an additional offense,” but did not explore further.

After *White* was decided, this Court had occasion to remark on the distinction between Sections 5-608.1 and 5-602 of the Criminal Law Article again. In *Manuel v. State*, 252 Md. App. 241 (2021), Judge Kevin Arthur noted in a footnote that a conviction under Section 5-608.1 of the Criminal Law Article required proof not only of distribution of fentanyl, but also of knowledge that it was fentanyl. The footnote stated:

By contrast, to prove that [the defendant] “knowingly” distributed fentanyl in violation of Crim. Law § 5-608.1, the State was required to show that [the defendant] knew that he was distributing fentanyl, and not just any illicit substance.

*Manuel*, 252 Md. App. at 256 n. 3.

<sup>11</sup> “Affray is ‘the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people.’” *Nottingham*, 227 Md. App. at 602 (quoting *Dashiell v. State*, 214 Md. App. 684, 689 (2013)).

terror of the people,” “which, like any element of a charged offense, must be proven by the State,” we concluded that the omission of an element in the instruction was an error. *Id.* at 604, 607.

In the case at bar, the trial judge failed to provide *any* instruction for Count 3, knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article. Although Dennis was charged separately for a violation of Section 5-608.1 of the Criminal Law Article, as *White* had mandated, the jury was not instructed that a violation of that Section requires proof that Dennis knew that the substance he was distributing contained fentanyl or was fentanyl. Accordingly, the failure to give a separate jury instruction for Count 3, knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article, was an error.

The State suggests, without reference to any analysis or authority, that a separate jury instruction was not necessary because “knowingly” distributing fentanyl could have been inferred from the distribution instruction regarding Section 5-602 of the Criminal Law Article. We disagree<sup>12</sup> and conclude that the trial judge’s failure to give the jury an instruction as to Count 3, knowingly distributing fentanyl, was an error.

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<sup>12</sup> Distribution of controlled dangerous substances in violation of Section 5-602 of the Criminal Law Article does not require that the defendant know which *specific* substance he possessed or distributed, but rather only knowledge of the “general character or illicit nature of the substance.” See *Manuel*, 252 Md. App. at 255-56 (explaining that under Section 5-602 of the Criminal Law Article, “the State is not required to prove that the defendants knew exactly *which* illegal substance they possessed. The element of knowledge is satisfied when the evidence demonstrates that the defendants are aware of the ‘general character or illicit nature of the substance.’” (quoting *Dawkins v. State*, 313 Md. 638, 651 (1988))).

Having decided that the jury should have been instructed as to the elements of Section 5-608.1 of the Criminal Law Article, we are faced with the dilemma of whether it was “plain” error, because Dennis did not submit a specific instruction nor object to the absence of a specific instruction as to Count 3.

Maryland Rule 4-325(f) states 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.” Under Maryland Rule 4-325(f), an appellate court has discretion to address unpreserved issues, because “[a]n appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.” Maryland Rule 4-325(f).

“Plain error is ‘error which vitally affects a defendant’s right to a fair and impartial trial.’” *Diggs v. State*, 409 Md. 260, 286 (2009) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)). Appellate courts can exercise plain error review “when the ‘unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.’” *Kelly v. State*, 195 Md. App. 403, 432 (2010) (quoting *Turner v. State*, 181 Md. App. 477, 483 (2008)). “Factors to consider in that determination include ‘the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention.’” *Savoy v. State*, 420 Md. 232, 243 (2011) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). “The responsibility for avoiding such error rests with the trial

judge.” *Cousar v. State*, 198 Md. App. 486, 520 (2011) (citing *Hutchinson*, 287 Md. at 203).

Our Supreme Court (at the time named the Court of Appeals of Maryland<sup>13</sup>) has identified four factors relevant to whether discretion to utilize plain error review should be exercised:

First, 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. Second, the legal error must be clear and obvious, rather than subject to reasonable dispute. Third, 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 district court proceedings.” Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error—discretion which ought to be exercised only if the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”

*State v. Rich*, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

An error is plain if it is “clear or obvious, rather than subject to reasonable dispute.” *Rich*, 415 Md. at 578 (quoting *Puckett*, 556 U.S. at 135). In the present case, the decision in *White* and the comments in *Singh* and *Manuel* had been rendered before Dennis’s trial

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<sup>13</sup> At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) (“From and after December 14, 2022, any reference in these Rules, or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland....”).

and the giving of the jury instructions.<sup>14</sup> Also, we note that the State charged Dennis with a violation of Section 5-608.1 of the Criminal Law Article separately, as had been required in *White*. The error, thus, was obvious.

The error was material because it “affected the appellant’s substantial rights,” meaning it “affected the outcome of the [] court proceedings,” *Rich*, 415 Md. at 578 (quoting *Puckett*, 556 U.S. at 135), and “precluded an impartial trial.” *Diggs*, 409 Md. at 286 (citing *Trimble v. State*, 300 Md. 387, 397 (1984)). Certainly, the failure to instruct the jury that knowledge of fentanyl was required under Count 3 was material, as the jury was not charged to consider all of the elements of Section 5-608.1 of the Criminal Law Article, and most importantly, whether Dennis knew the substance contained fentanyl or was fentanyl.<sup>15</sup>

The final prong of the plain error evaluation also was met in the present case, because the failure to give a jury instruction “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Rich*, 415 Md. at 578 (quoting *Puckett*, 556 U.S. at 135). Prior to trial, we had established that Section 5-608.1 of the Criminal Law Article

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<sup>14</sup> The Appellate Court of Maryland (at the time named the Court of Special Appeals of Maryland) filed *White v. State*, 250 Md. App. 604 (2021) on May 26, 2021, archived at <https://perma.cc/5TKR-MN7D>, *Singh v. State*, 247 Md. App. 322 (2020) on August 26, 2020, archived at <https://perma.cc/9UPC-MTNP>, and *Manuel v. State*, 252 Md. App. 241 (2021) on September 2, 2021, archived at <https://perma.cc/DP66-5W3Q>. The jury trial in the present case occurred on September 29 and 30, 2021, and the jury was instructed on September 30, 2021.

<sup>15</sup> The State contends that because Dennis’s defense was that he did not distribute anything, the omission of an instruction specifically for Count 3 was immaterial. The argument is specious, because the failure to instruct on a charged offense can never be immaterial.



was a separate offense in which an additional ten-year sentence was available. To conflate two offenses, Section 5-602 and Section 5-608.1 of the Criminal Law Article, and not require a separate instruction on the elements of Section 5-608.1 of the Criminal Law Article, for which there appears to be no proof to which the State can point to support that Dennis knew that it was fentanyl that he was distributing, clearly offends the fairness and integrity of the judicial proceedings.

As a result, we exercise our discretion to engage in plain error review in the present case and hold that the circuit court's failure to instruct the jury on Count 3, knowingly distributing fentanyl in violation of Section 5-608.1 of the Criminal Law Article, was an error requiring us to vacate Dennis's conviction for knowingly distributing fentanyl (Count 3).

**CONVICTION FOR COUNT 3,  
KNOWINGLY DISTRIBUTING  
FENTANYL, VACATED. COSTS TO BE  
PAID BY QUEEN ANNE'S COUNTY.**