Circuit Court for Baltimore City
Case Nos. 193232035 & 193232038

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3232

September Term, 2018

JOHN E. ARTIS

v.

STATE OF MARYLAND

Leahy,
Freidman,
Shaw Geter

JJ.

Opinion by Leahy, J.
Concurring Opinion by Friedman, J.

Filed: March 16, 2020

On August 20, 1993, John Artis, the appellant, was arrested and charged in the Circuit Court for Baltimore City with multiple handgun offenses and counts of murder under four separate indictments, which resulted in three separate jury trials. In the spring of 1994, a jury found Artis guilty of first-degree murder and use of a handgun in the commission of a crime of violence under criminal indictment number 193232035 (the "-035 case"), and a second jury found Artis guilty of first-degree murder and use of a handgun in the commission of a crime of violence under criminal indictment number 193232038 (the "-038 case"). A third jury convicted Artis of multiple counts under criminal indictments numbers 193232036 and 193232037 (the "-036/037 case"), but those convictions are not part of this appeal.[1] A sentencing hearing was held for all three cases on September 9, 1994 and Artis was sentenced to two life sentences plus 140 years.

The same judge presided over the successive trials and gave the juries for the -035 and -038 cases a similar "reasonable doubt" instruction. Artis's defense counsel did not raise any exceptions. Artis's appellate counsel likewise did not challenge the jury instructions, and this Court affirmed Artis's convictions in an unreported opinion filed on July 20, 1995. Artis's post-conviction counsel, in proceedings between 1997 and 2001, alleged that trial counsel failed to object to the reasonable doubt instructions, but did not

[1] Criminal indictments numbers 193232036 and 193232037 were tried together and the jury convicted Artis of two counts of attempted second degree murder; two counts of wearing, carrying, or transporting a handgun; and two counts of use of a handgun in the commission of a crime of violence. Artis was sentenced to 50 years under indictment number 193232036, and to 50 years under indictment number 193232037, to run consecutively for a total of 100 years.

allege that appellate counsel erred in failing to direct appeal, as plain error, the constitutionality of the instructions. In 2013, Artis filed a motion to re-open his post-conviction proceedings. The circuit court granted his motion, but ultimately denied his re-opened petition for post-conviction relief, in 2017, following a hearing on the matter.

Artis filed an application for leave to appeal the denial of his petition, which this Court granted in part and denied in part. We vacated the circuit court's denial of Artis's petition for post-conviction relief and remanded the matter with instructions to address whether Artis's post-conviction counsel erred by failing to "post-convict" his appellate counsel for failing to raise, as plain error, the reasonable doubt jury instructions. After a hearing on the 2017 remand order, the circuit court, on December 13, 2018, granted Artis's reopened petition for post-conviction relief. The court determined that a belated appeal was warranted because Artis's "post-conviction counsel made prejudicial error by failing to 'post-convict' appellate counsel for failing to direct appeal plain error by the trial judge upon his constitutionally defective reasonable doubt jury instruction in both trials[.]"

Artis's timely appeal to this Court followed on January 10, 2019. He presents three questions for our review:

> I. Did the trial court's instructions on the standard of proof violate due process and trial by jury where those instructions reduced the State's burden of proof to below the constitutionally required standard of beyond a reasonable doubt?
> II. Did the trial court's instructions on the definition of reasonable doubt in the two cases now before th[is] Court contain error of Constitutional dimension [that] was structural in nature [and] is now worthy of this Court's exercise of its discretion to take cognizance of the error as plain?
> III. Did the case of *Himple v. State*, 101 Md. App. 579 (1994), create a procedural or substantive standard not theretofore recognized, which such

> standard was intended to be applied retrospectively and would thereby affect the validity of Appellant's conviction?

As the State correctly identifies in its brief, our review of the jury instruction in this appeal is under the plain error doctrine.[2] Accordingly, we have consolidated Artis's questions presented to the limited question before us: Did the reasonable doubt instructions given in Artis's March and April 1994 trials constitute error of constitutional dimension warranting plain error review? For the reasons discussed below, we reverse and remand the -035 and -038 cases for new trials.

BACKGROUND

In light of the issues raised in this appeal, we need only give a cursory account of the evidence offered during Artis's trials. We shall briefly address some of the relevant facts adduced, but we focus on the procedural background that explains how the two belated appeals from the 1994 jury trials are before us today.

In August 1993, Artis was charged under four separate indictments, which resulted in three separate jury trials. Two of the indictments, numbers 193232036 and 193232037, were tried together (the "-036/037 case") and are not part of this appeal.

[2] As a result of our 2017 remand order, the Circuit Court for Baltimore City considered only the issue of whether Artis's post-conviction counsel erred by failing to "post-convict" his appellate counsel for failing to challenge, as plain error, the jury instructions. The court determined that post-conviction counsel did err, and that Artis was entitled to a new appeal on the issue of plain error. Thus, we need only consider Artis's arguments regarding plain error review.

Because Artis's trial counsel failed to preserve the instructional error, we would be limited to plain error review even in the absence of the remand order. As stated by the Court of Appeals, "appellate review of unpreserved instructional errors is limited to circumstances warranting plain error review, regardless of the nature of the error." *Savoy v. State*, 420 Md. 232, 243 (2011).

Beginning on March 29, 1994, Artis was tried first, in the -035 case, for the murder of Dorian Brown. Zena Brown, the victim's wife, testified that "someone ran up behind [her] and [her] husband and shot him in his head" as the couple walked home from her nephew's funeral on July 15, 1993. Ms. Brown identified Artis as the assailant and identified the weapon used as a "Glock 9 mm, a black gun." Detective Donald Ossmus, the detective in charge of the investigation, testified that he arrested Artis in a makeshift bedroom, where he recovered two weapons from the mattress—a Glock 9 mm and a .38 caliber handgun. As part of his investigation, Detective Ossmus recovered shell casings from the crime scene and bullet fragments from Mr. Brown's body. Ronald Stafford, a firearms identification expert, testified that some of the shell casings and one of the bullet fragments matched the Glock found in the mattress. After hearing testimony from the remaining witnesses, the jury, on April 4, 1994, found Artis guilty of first-degree murder and use of a handgun in the commission of a crime of violence.

Artis faced charges for the murder of Michael Tillman in a four-day trial for the -038 case, which began on April 21, 1994. Rita Frost testified that she, Mr. Tillman, and three others were sitting on the front steps of a house on the 500 block of Gold Street on July 10, 1993, when two men approached, "stopped in front of [them], and [] just started shooting [Mr. Tillman]." She identified Artis as one of the assailants in a photo array conducted several days after the shooting, and again in court. Officer George Doxzen testified that he responded to the 500 block of Gold Street and found Mr. Tillman "lying on his back[.]" Officer Doxzen also recovered shell casings from the scene. Mr. Stafford testified that shell casings recovered from the 500 block of Gold Street and bullet

specimens that were removed from Mr. Tillman matched the Glock that was recovered from under Artis's mattress. The jury was presented with additional evidence, including testimony from Artis in his own defense. On April 26, 1994, the jury found Artis guilty of first-degree murder and use of a handgun in the commission of a crime of violence.

Following a consolidated sentencing hearing for the -035, -037/037, and -038 cases, Artis was sentenced to two life sentences plus 140 years.[3]

[3] The following is a breakdown of Artis's sentence under the four indictments:

Indictment No. 193232035			
Count 1	First degree murder	Balance of natural life	
Count 2	Use of a handgun in the commission of a crime of violence	20 years	Consecutive to -035 Count 1
Indictment No. 193232036			
Count 1	Attempted second degree murder	30 years	Consecutive to -038 Count 2
Count 3	Wear, carry, or transport a handgun	Merges with -036 Count 4	
Count 4	Use of a handgun in the commission of a crime of violence	20 years	Consecutive to -036 Count 1
Indictment No. 193232037			
Count 1	Attempted second degree murder	30 years	Consecutive to -036 Count 4
Count 3	Wear, carry, or transport a handgun	Merges with -037 Count 4	
Count 4	Use of a handgun in the commission of a crime of violence	20 years	Consecutive to -037 Count 1
Indictment No. 193232038			
Count 1	First degree murder	Balance of natural life	Consecutive to -035 Count 1
Count 2	Use of a handgun in the commission of a crime of violence	20 years	Consecutive to -038 Count 1

Jury Instructions

The court delivered, in relevant part, the following reasonable doubt instruction in the -035 case:[4]

> Now, the test of reasonable doubt is that the evidence that the State has produced must be **so convincing that it would enable you to act on an important piece of business in your everyday life.**
>
> The words "to a moral certainty" do not mean absolute or mathematical certainty, but **a certainty based upon a convincing ground of probability.**
>
> The phrase "beyond a reasonable doubt" does not mean beyond any doubt and all possible doubt, but as the words indicate, beyond a doubt that is reasonable.

[4] The entirety of the reasonable doubt instruction given in the -035 case was as follows:

> I further instruct you the defendant is presumed innocent of all the charges against him until proven guilty beyond a reasonable doubt, to a moral certainty. The defendant comes into court clothed with this presumption of innocence, which remains with him from the beginning to the end of the trial as though it were testified to and supported by evidence that the defendant is innocent.
>
> The burden of proving the defendant guilty is upon the prosecution from the beginning to the end of the trial, for every element of the crimes charged. The defendant has no burden; does not to prove his innocence . . .
>
> After the jury has fairly and carefully reviewed all the evidence in this case, if you feel that the State has failed to prove beyond a reasonable doubt, to a moral certainty all the facts necessary to constitute the crimes charged, then the defendant must be acquitted.
>
> Now, the test of reasonable doubt is that the evidence that the State has produced must be so convincing that it would enable you to act on an important piece of business in your everyday life.
>
> The words "to a moral certainty" do not mean absolute or mathematical certainty, but a certainty based upon a convincing ground of probability.
>
> The phrase "beyond a reasonable doubt" does not mean beyond any doubt and all possible doubt, but as the words indicate, beyond a doubt that is reasonable.

(Emphasis added). The same judge gave a substantially similar instruction on reasonable doubt in the -038 case:[5]

> The test of reasonable doubt is that the evidence that the State has produced must be **so convincing that it would enable you to act on an important piece of business in your every-day life.**
>
> The words "to a moral certainty" do not mean absolute or mathematical certainty, but **a certainty based upon convincing grounds [of] probability.**
>
> The phrase "beyond a reasonable doubt" does not mean beyond any doubt and/or all possible doubt, but as the words indicate, beyond a doubt that is reasonable.

[5] The entirety of the reasonable doubt instruction given in the -038 case was as follows:

> I further direct you that the defendant is presumed innocent of the crimes charged until proven guilty beyond a reasonable doubt, to a moral certainty. The defendant comes into court clothed with this presumption of innocence, which remains with him from the beginning to the end of the trial, and the presumption is fixed as though it were testified to and supported by evidence that the defendant is innocent.
>
> The burden of proving the defendant guilty is upon the prosecution from the beginning to the end of the trial, beyond a reasonable doubt for every element of the crimes charged. The defendant has no burden to sustain, and he does not have to prove his innocence. . . .
>
> After the jury has fairly and carefully reviewed all the facts in this case, if you feel that the prosecution has failed to prove beyond a reasonable doubt, to a moral certainty all the facts necessary to constitute the crimes charged, then the defendant must be acquitted.
>
> The test of reasonable doubt is that the evidence that the State has produced must be so convincing that it would enable you to act on an important piece of business in your every-day life.
>
> The words "to a moral certainty" do not mean absolute or mathematical certainty, but a certainty based upon convincing grounds and probability.
>
> The phrase "beyond a reasonable doubt" does not mean beyond any doubt and/or all possible doubt, but as the words indicate, beyond a doubt that is reasonable.

(Emphasis added). Defense counsel requested additional instructions during both trials but had no other exceptions to the instructions given, including the foregoing reasonable doubt instructions.

Post-Trial Proceedings

After his sentencing hearing on September 9, 1994, Artis timely noted an appeal for all three cases on September 16, 1994. Artis raised seven issues before this Court but did not challenge the reasonable doubt instructions. This Court affirmed Artis's convictions in an unreported opinion filed on July 20, 1995.

In April 1997, Artis filed a pro se petition for post-conviction relief for the -035 and -038 cases in the Circuit Court for Baltimore City. The petition was dismissed without prejudice. A few months later, in August, Artis again filed a pro se petition for post-conviction relief in both cases, which was dismissed without prejudice on June 30, 1998. Based on the record before us it appears that, between February 1999 and spring of 2000, Artis amended his petitions for post-conviction relief in the -035 and -038 cases arguing, for the first time, that trial counsel erred in failing to object to the reasonable doubt instructions on the basis of this Court's opinion in *Himple v. State*, 101 Md. App. 579 (1994). The circuit court held a hearing in January 2001 and denied the petitions a few months later. In July 2001, Artis filed an application for leave to appeal, which the court denied as untimely.

Years later, in 2011, Artis filed a pro se motion to correct an illegal sentence, but that motion was denied following a hearing. Then, on September 19, 2013, Artis filed a motion to reopen his post-conviction proceedings in the interest of justice. He alleged

ineffective assistance of counsel, based on his post-conviction counsel's failure to challenge his appellate counsel's failure to raise as plain error the "reasonable doubt" instructions. The motion was heard on January 7, 2016 and, about a month later, the court ordered that Artis's post-conviction proceedings be reopened in both the -035 and -038 cases. On April 12, 2017, however, the court denied Artis's reopened petition for post-conviction relief.

Artis filed an application for leave to appeal the denial of his reopened petition for post-conviction relief with this Court on May 5, 2017. On September 28, 2017, we vacated the circuit court's judgment denying Artis's petition for post-conviction relief and remanded the matter, instructing the circuit court to:

> consider, on its merit, [Artis's] contention that his prior post-conviction counsel made a prejudicial serious attorney error by failing to "post-convict" his appellate counsel for failing to raise, on direct appeal from his convictions, the contention that the trial court made a plain error when instructing the jury on the "beyond a reasonable doubt" burden of persuasion[.]

On May 7, 2018, the circuit court "held a hearing after remand to determine the sole issue of whether post-conviction counsel erred in failing to post convict appellate counsel's failure to raise *Himple* on appeal." The court granted Artis's reopened petition for post-conviction relief on December 13, 2018, ruling that a new appeal was warranted because Artis "[wa]s prejudiced by the lack of any opportunity to argue *Himple* before the Court of Special Appeals." More specifically, the court found "that post-conviction counsel made prejudicial error by failing to 'post-convict' appellate counsel for failing to direct appeal plain error by the trial judge upon his constitutionally defective reasonable doubt jury

instruction in both trials . . . in these cases (193232035 and 193232038[]).” Accordingly, the court ruled that Artis was entitled to file a belated appeal in the -035 and -038 cases.

Artis’s timely appeal to this Court followed on January 10, 2019. We will provide additional details in the discussion below.

DISCUSSION

Artis argues that “the trial court in both trials committed two [] errors in its instructions to the jury on the definition of reasonable doubt when it: (a) compared the important decisions of a layman’s every-day life to the reasonable doubt standard, and (b) defined moral certainty as a certainty based upon convincing grounds and probability.” According to Artis, the reasonable doubt instructions he challenges bear a “striking resemblance” to the reasonable doubt instructions that were recognized to be plain error in *Himple* and in *Savoy v. State*, 420 Md. 232 (2011). Artis notes that his trial counsel failed to object to the instructions, and that his appellate counsel failed to raise the errors on direct appeal. He asks us to “take cognizance of the error in the circuit court’s instruction as plain error material to [his] rights . . ., and that such instructions, as a whole, were structural errors of constitutional dimension entitling [him] to a new trial.”

The State counters that Artis has not established plain error. First, the State asserts that in the -035 case “defense counsel affirmatively waived any claim of error by stating that he had ‘no exceptions’ to the instructions the trial court gave.” Second, the State argues that the “alleged legal error in the reasonable doubt instruction given in both trials was not clear at the time because the case law that Artis now cites had not yet been issued.”

Artis, in reply, points out that the *Himple* decision was issued 12 days after he filed his notice of appeal—well before briefs were due or oral argument was scheduled. According to Artis, *Himple* involved the same judge, similar instructions, and a trial that occurred in the same year as his, which "should have caught the attention of appellate counsel." Artis asserts that he "did not waive plain error review because the *Himple* decision had not yet been issued[,]" and that the "errors were clear and obvious by the time of the direct appeal."

I.

Appellate Review of Instructional Errors

Maryland Rule 4-325(e) governs objections to jury instructions. The Rule provides:

> No 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 . . . An 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.

Consistent with the general rule requiring preservation of claims by contemporaneous objection, *see* Md. Rule 8-131, Rule 4-325(e) "requires contemporaneous objection in order to challenge instructional error on appeal, as a matter of right." *Savoy v. State*, 420 Md. 232, 243 (2011). The Rule "makes clear that an objection to a jury instruction is not preserved for review unless the aggrieved party makes a timely objection after the instruction is given and states the specific ground of objection thereto." *Taylor v. State*, 236 Md. App. 397, 447 (2018) (citation omitted). For *unpreserved* instructional errors,

appellate review "is limited to circumstances warranting plain error review, regardless of the nature of the error." *Savoy*, 420 Md. at 243.

Because the parties agree that Artis's trial counsel failed to preserve the instructional error through contemporaneous objection, our review is limited to plain error review. *See id.* "Plain error review is '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) (citation omitted). As such, "appellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003). "[I]n the context of erroneous jury instructions, the plain error doctrine has been used sparingly." *Taylor*, 236 Md. App. at 447 (citation omitted).

Four conditions must be met before an appellate court can exercise discretion to find plain error:

> (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 district court proceedings; and (4) the error must seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings.

Newton, 455 Md. at 364 (citing *State v. Rich*, 415 Md. 567 (2010)) (internal quotation marks omitted). "Because each one of the four conditions is, in itself, a necessary condition for plain error review, the appellate 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). "For the

same reason, the court's analysis need not proceed sequentially through the four conditions; instead, the court may begin with any one of the four and may end its analysis if it concludes that that condition has not been met." *Id.*

II.

Plain Error Review

We will consider Artis's case as if it were the Spring of 1994 because "this case comes to us as a direct, albeit much belated, appeal." *Savoy*, 420 Md. at 255.

A. Error and Waiver

The first step of our analysis of Artis's request for plain error review is to determine whether there is 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." *Newton*, 455 Md. at 364 (citation omitted). In other words, "[r]eview for plain error requires an initial step that the instruction contain error." *Savoy*, 420 Md. at 244.

1. Waiver

We address first the State's claim that Artis cannot establish plain error in the -035 case because his trial counsel affirmatively waived any objection to the jury instructions. *See Yates v. State*, 202 Md. App. 700, 722 (2011) (addressing, as an initial matter, the State's claim that appellant cannot seek plain error review because he affirmatively waived it). The State asserts that defense counsel waived any claim of error by "expressing his satisfaction with the instructions." The State relies on trial counsel's statement to the court, following the jury instructions, that "I have no exceptions, but I would request the missing witness instruction and submit."

In *Choate v. State*, we declined to "take the extraordinary step of noticing plain error where[] the appellant affirmatively (as opposed to passively) waived his objection by expressing his satisfaction with the instructions as actually given." 214 Md. App. 118, 130 (2013). The appellant in *Choate* had agreed with the State that the jury should be instructed on factors (i) and (iii) for first degree rape but objected to an instruction on factor (ii). *Id.* at 129. The court found that the victim's testimony generated factor (ii), so the State again requested that the court instruct on all three factors and the appellant agreed. *Id.* We noted that appellant did not renew his objection to a jury instruction on factor (ii), and that appellant's counsel replied, "Satisfied, Your Honor," when the court asked counsel whether they were satisfied with the instructions. *Id.*

In *Booth v. State*, the Court of Appeals concluded similarly that plain error analysis was not required in response to the petitioner's challenge to the trial court's allocution instruction because "defense counsel affirmatively advised the court that there was no objection to the instruction which the court immediately thereafter gave to the jury." 327 Md. 142, 180 (1992). The court had "specifically asked" defense counsel if he had any objections to the State's proffered allocution instruction, and defense counsel said, "Actually, no. We would not have any objection to that." *Id.* at 178. According to the Court, the circumstances presented "more [] than the simple lack of an objection to the instruction as given[,]" and, as such, the Court concluded that "[e]rror, if any, ha[d] been waived." *Id.* at 180.

Although this Court also declined to undertake plain error review in *Yates v. State*, we came to a different conclusion on the issue of waiver. 202 Md. App. 700, 722-23

(2011). In *Yates*, appellant's trial counsel had told the court that he had no objections to the jury instructions, but appellant argued on appeal that the trial court erred in its instruction regarding second degree felony murder. *Id.* at 718-19. The State asserted that appellant could not seek plain error review before this Court because he "affirmatively waived his appellate complaint by declaring that he was satisfied with the jury instructions[.]" *Id.* at 719. To address the State's claim, we noted the distinction between waiver and forfeiture: "[a] forfeiture involves a party's failure to make a timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right. Forfeited rights are reviewable for plain error, whereas waived rights are not." *Id.* at 722 (internal citations and quotation marks omitted). We determined that counsel's "acquiescence to the instruction" was not an "affirmative waiver of his right to challenge the jury instruction. Rather, his failure to object constituted a *forfeiture* of his right to raise the issue on appeal, but it did not preclude this [C]ourt from deciding whether to exercise its discretion to engage in plain error review." *Id.* at 722 (emphasis added).

We conclude similarly that the acquiescence by Artis's trial counsel in the -035 case was a *forfeiture* of his right to raise the issue on appeal, rather than a waiver. The circumstances can be distinguished from those in *Choate*, where appellant's counsel had previously objected to the instruction that appellant challenged on appeal and thus could be found to have intentionally abandoned a known right. *See* 214 Md. App. at 129. This case also does not present the situation found in *Booth*, where defense counsel, right before the instruction in question was given to the jury, affirmatively advised the court that he had no objection. *See* 327 Md. at 180. Instead, like appellant's counsel in *Yates*, Artis's trial

counsel did no more than acquiesce to the instructions, merely "fail[ing] to make a timely assertion of a right." *See Yates*, 202 Md. App. at 722. Because Artis's counsel did not affirmatively waive Artis's right to challenge the reasonable doubt instructions, we are not precluded from engaging in plain error review. *See Id.*

2. Error or Defect

In *Himple*, our predecessors considered, under plain error review, the same question before us now—whether "the trial court err[ed] in instructing the jury regarding the reasonable doubt standard[.]" 101 Md. App. at 580. The reasonable doubt instruction before this Court in *Himple* was as follows:

> The burden of proving the defendant guilty is upon the prosecution from the beginning to the end of the trail [sic]. The defendant has no burden to sustain, does not have to prove his innocence.
>
> . . .
>
> The charges against the defendant are not evidence of guilt, they are merely a complaint to let the Jury and the defense know what the charges are. **The test of reasonable doubt is the evidence that the State has produced must be so convincing that it would enable you to act on an important piece of business in your everyday life.** The words, to a moral certainty, do not mean absolute or mathematical certainty, ***but a certainty based upon a convincing ground of probability***.

Id. at 581 (italics in original, bold emphasis added). We perceived two errors with the instruction given by the trial court:

> That instruction does not contain the "without reservation" language the Court of Appeals deemed acceptable, though not absolutely required, in *Wills v. State*, 329 Md. 370, 382-84[] (1993).[6] More important, the trial court's

[6] In *Wills v. State*, the Court held that the explanation of reasonable doubt given by the trial judge was erroneous. 329 Md. 370, 388 (1993). The judge had instructed the jury that

> additional instruction as to "convincing ground of probability" is in conflict with any reasonable doubt standard.

Id.

The Court of Appeals in *Savoy v. State* also addressed, as part of plain error review, the issue of whether the trial court's instruction to the jury on the standard of proof was erroneous. 420 Md. 232, 235 (2011). The Court had before it the following reasonable doubt instruction:

> The burden of proving the defendant guilty is upon the prosecution from the beginning to the end of the trial for every element of the crime charged. The defendant has no burden to sustain and does not have to prove his innocence.
>
> The charges against the defendant are not evidence of guilt, they are merely complaints to let you and the defendant know what the charges are.
>
> After the jury has fairly and carefully reviewed all the evidence in this case, if you feel that the prosecution has failed to prove beyond a reasonable doubt **and to a moral certainty** all of the evidence necessary to convict, then you must acquit the defendant.
>
> *The test of reasonable doubt is that the evidence that the State has produced must be so convincing that it would enable you to act on an important piece of business in your everyday life.* **The words "to a moral certainty" do not**

> [w]hen you make a major decision, you generally have a nagging doubt, but if you weigh all of the factors, if you weigh the things that say, I should do it, and the things that say, I shouldn't do it, and you decide to go forward, then you don't have a reasonable doubt.

Id. at 386. That explanation, the Court determined, was "confusing and misleading because it lean[ed] towards the preponderance standard rather than the reasonable doubt standard." *Id.* at 387. The trial judge stated further that "[a] reasonable doubt is the type of doubt that would cause you to hesitate and not act in an important decision in your own life[.]" *Id.* The Court, having considered the language "without reservation" in the 1991 Maryland Criminal Pattern Jury Instruction 2:02, "d[id] not believe that a 'nagging doubt' is the equivalent of acting 'without reservation' (the better phrase) or even with the 'hesitation' phrases accepted in the past." *Id.* at 383, 388. Accordingly, the Court concluded that "the instruction as a whole did not measure up to an acceptable explanation of the reasonable doubt standard." *Id.* at 388.

> **mean an absolute or mathematical certainty but a certainty based upon convincing grounds of probability.** The phrase "beyond a reasonable doubt" does not mean beyond any doubt or all possible doubt. But as the words indicate, beyond a doubt that is reasonable.

Id. at 236-37 (bold emphasis in original, italics added). Before undertaking a plain error analysis, the Court of Appeals took note of the parties' agreement that the reasonable doubt instruction given at the petitioner's trial contained erroneous language. *Id.* at 239.

Artis asserts that the reasonable doubt instructions he challenges in this appeal are "nearly identical" to those at issue in *Himple* and in *Savoy*.[7] We agree. Notably, the instructions given in the -035 and -038 cases contain the same test for reasonable doubt—whether the State's evidence would enable a member of the jury to act on an important piece of business in his or her everyday life. Also, the instructions given in all four cases include the same definition of "to a moral certainty"; namely, that it is a certainty based upon a convincing ground, or convincing grounds, of probability.

Consequently, Artis contends that the instructions were erroneous because they "(a) compared the important decisions of a layman's every-day life to the reasonable doubt standard, and (b) defined moral certainty as a certainty based upon convincing grounds and probability." We conclude that the instructions given in the -035 and -038 trials suffered from the same defects as the instructions under consideration in *Himple* and *Savoy*. There was no "without reservation" language in the test for reasonable doubt, and the definition

[7] The case in *Himple* was similarly tried in the Circuit Court for Baltimore City in the early 1990s before the same judge that presided over the underlying case. As Artis summarized in his brief: "The same judge, the same courtroom, and the same instructions." The *Savoy* case was also tried before a jury in the Circuit Court for Baltimore City in the spring of 1994, although a different judge presided over that trial.

for "to a moral certainty" equated "convincing ground of probability" with "reasonable doubt." *See Himple*, 101 Md. App. at 581. Accordingly, we hold that the jury instructions contained significant defects that were not affirmatively waived by trial counsel. *See Newton v. State*, 455 Md. 341, 364 (2017).

B. Clear or Obvious

The next step in our plain error review is to determine whether the legal error was "clear or obvious, rather than subject to reasonable dispute." *Newton*, 455 Md. at 364. The State argues that the error was not "clear or obvious" at the time the instructions were given in April 1994. In support, the State cites case law for the proposition that, in order for a legal error to be clear or obvious, "the error must have been obvious under case law issued before the instruction was given." The State then notes that "in arguing that the trial court committed plain error in giving the reasonable doubt instructions, Artis relies almost exclusively on cases issued after the trials at issue in this case." We are not persuaded by the State's argument.

The fundamental principle of the burden of proof in criminal cases "existed under the common law at least since around the time of the country's founding." *Kazadi v. State*, __ Md. __, No. 11, Sept. Term 2019, slip op. at *42-43 (filed Jan. 24, 2020). In *Wills v. State*, a case predating Artis's trials, the Court of Appeals set forth guidelines for the "difficult to explain" reasonable doubt standard:

> Our opinions have refrained from adopting a boiler plate explanation of reasonable doubt, but when an explanation is given to the jury, whether at the instance of the judge or at the request of a party, **it must be such as does not tend to confuse, mislead or prejudice the accused**. . . . The State is not required to prove guilt beyond all possible doubt or to a mathematical certainty, **but it is not enough if the**

> **evidence shows that the defendant is *probably* guilty.** Nor is it sufficient that reasonable doubt is defined only by its own terms. The explanation should focus on the term "reasonable doubt," so as to bring home to the jury clearly that the corpus delicti of the crime and the criminal agency of the accused must be proved *beyond* a reasonable doubt.

329 Md. 370, 382-83 (1993) (italics in original, bold emphasis added). The reasonable doubt instructions Artis challenges do exactly what the Court of Appeals condemned in *Wills*—they suggest it is "enough if the evidence shows that the defendant is probably guilty," *see id.*, by equating a convincing ground of probability to reasonable doubt. As stated by this Court in *Himple* in regard to the nearly identical instruction, "the jurors were instructed that if they were convinced that it was *probable* that appellant committed the offense, they could convict him of the charges. That is not the standard." 101 Md. App. at 582-83 (emphasis added).

Considering the balance of the reasonable doubt instructions at issue in the -035 and -038 cases, we conclude that they do not convey adequately the reasonable doubt standard. By describing the test for reasonable doubt as whether the State produced evidence convincing enough to enable jurors to act on an important piece of business in their everyday life, the instructions "appear[] to equate the degree with which people make important decisions in their everyday life with the reasonable doubt standard." *Himple*, 101 Md. App. at 583. The instructions thus draw an inaccurate comparison, as the "legal reasonable doubt standard and the decision making process in respect to important personal matters in a layman's life are not the same." *Id.* As noted above, "it is not enough if the evidence shows that the defendant is *probably* guilty." *Id.* (citing *Wills*, 329 Md. at 383). Accordingly, the comparison is made proper through the addition of the language "without

reservation," which "tends to impart to the jury the degree of certainty that elevates the comparison in the direction of the reasonable doubt standard." *Himple*, 101 Md. App. at 583.

The importance of the language "without reservation," or similar qualifying language, was clear at the time of Artis's trial. The 1991 Maryland Criminal Pattern Jury Instruction (MPJI-CR) provided the following test for the reasonable doubt standard:

> A reasonable doubt is a doubt founded upon reason. It is not a fanciful doubt, a whimsical doubt, or a capricious doubt. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief **without reservation** in an important matter in your own business or personal affairs. However, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

MPJI-CR 2:02 (1991) (emphasis added).

Artis's trial predates *Ruffin v. State*, in which the Court of Appeals held that, going forward from the date of the decision, "in every criminal jury trial, the trial court is required to instruct the jury on the presumption of innocence and the reasonable doubt standard of proof which closely adheres to MPJI-CR 2:02. Deviations in substance will not be tolerated." 394 Md. 355, 373 (2006). *See also Savoy v. State*, 420 Md. 232, 245-46 (2011) ("[W]e pause to repeat that Petitioner was tried in 1994. . . . Because we made clear in *Ruffin* that our holding has only prospective application, it has no bearing on Petitioner's case."). Although *Ruffin* does not apply in Artis's case to have required that the trial court use the language of MPJI-CR 2:02, the pattern instruction nonetheless demonstrates that the error should have been noticed during Artis's trials. As stated by our predecessors in *Himple*, "[n]one of our many trial court embellishments, if objectively analyzed, better

explain the concept [of reasonable doubt] than the pattern instruction whose stark simplicity was created by the bench and the bar in order to avoid the problems of embellishment." 101 Md. App. at 585. Indeed, it is a long-held principle that a reasonable doubt instruction "must be such as does not tend to confuse, mislead or prejudice the accused."[8] *Wills*, 329 Md. at 382.

We cannot say that the errors in the instructions given at Artis's trials were "subject to reasonable dispute" and we hold, therefore, that the errors were clear or obvious. *Newton*, 455 Md. at 364.

[8] The concurrence would find the reasonable doubt instructions given in Artis's trials to be "acceptable," suggesting that research discussed in the Court of Appeals' recent decision, *Kazadi v. State*, "would support a finding that jurors are unable or unwilling to distinguish between small distinctions in the definitions provided in jury instructions." Concurring op. at n.3. But the Court's discussion of these studies in *Kazadi* only underscores why careful wording of a reasonable doubt instruction is so critical to ensuring that there can be "no reasonable likelihood that the jury would have interpreted the instruction as requiring proof that is less stringent than proof beyond a reasonable doubt." *Savoy v. State*, 420 Md. 232, 250 (2011).

In *Kazadi*, the Court overruled the holding in *Twining v. State*, 234 Md. 97 (1964), that "a trial court need not ask during *voir dire* whether any prospective jurors would be unwilling to follow jury instructions on the presumption of innocence and the State's burden of proof." __ Md. __, No. 11, Sept. Term 2019, slip op. at *45 (filed Jan. 24, 2020). In its analysis, the Court referred to studies showing that "not all jurors are willing and able to follow jury instructions on the presumption of innocence and the burden of proof." *Id.* at *32. The Court reasoned that, "although jury instructions may inform a juror of a defendant's fundamental rights, jury instructions cannot cure a juror's inability to understand, or unwillingness to follow the instructions." *Id.* at *34. It follows that jurors who may be predisposed to disregard instructions about a defendant's fundamental rights would be even more likely to fasten their own flawed predispositions to any ambiguity in a reasonable doubt instruction. *Kazadi* only reinforces the wisdom of the decisions in *Himple* and *Savoy*, and compels the same result in the underlying cases in which the jurors were not asked whether they would be unwilling to follow reasonable doubt instructions.

C. Substantial Rights

We next "consider whether the error was 'plain' and 'material' to [Artis's] right to a fair trial; that is, we must consider whether the error in the instruction lowered the burden of proof and thereby created error that was clear and 'fundamental to assure the defendant a fair trial.'" *Savoy*, 420 Md. at 244 (citing *Miller v. State*, 380 Md. 1, 29 (2004)) (internal quotation marks omitted). "The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights guarantee that a criminal defendant shall only be convicted upon proof beyond a reasonable doubt." *Ruffin*, 394 Md. at 363. The Court of Appeals has "warned that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error." *Williams v. State*, 322 Md. 35, 42 (1991) (citation omitted). Instead, a constitutionally deficient reasonable doubt instruction qualifies as "structural error," and "structural defects in the constitution of the trial mechanism[] defy analysis by harmless-error standards[.]" *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993) (citation and internal quotation marks omitted).

Because the instructions given in Artis's trials failed to instruct the juries on the necessity of proof of guilt beyond a reasonable doubt, "we cannot say that, in viewing the instruction as a whole, there is no 'reasonable likelihood that the jury had applied the challenged instruction in a way that violates the Constitution.'" *Savoy*, 420 Md. at 254 (citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). The errors were not harmless, but "self-evidently plain and material to [Artis's] fundamental right to a fair trial." *Savoy*, 420 Md. at 254. Accordingly, we hold that the errors in the reasonable doubt instructions

delivered during Artis's trials were of constitutional dimension and, under *Sullivan*, 508 U.S. at 282-83, constituted structural error. *See Savoy*, 420 Md. at 254-55.

D. Fairness, Integrity, or Public Reputation of Judicial Proceedings

In *Himple*, we reversed the appellant's conviction and remanded for a new trial, holding that the reasonable doubt instruction was "plain and prejudicial error." 101 Md. App. at 585. The Court of Appeals in *Savoy* analyzed the *Himple* opinion and came to a similar conclusion. 420 Md. at 236, 251-54. The Court explained,

> The instructional error was serious, as it undermined a core value of constitutional criminal jurisprudence: that a person charged with a crime shall not be convicted on less than proof beyond a reasonable doubt. The prejudice to Petitioner's case is presumed. *Sullivan*, 508 U.S. at 280[.]

Id. at 255. Accordingly, the Court held that the error was "worthy of the exercise of [its] discretion to take cognizance of the error as 'plain'" and that the petitioner was "entitled to a new trial as a result." *Id.* at 235-36.

We come to a similar conclusion. The instructions given in Artis's trials were clearly prejudicial because they created the possibility that the jury convicted Artis upon something less than proof beyond a reasonable doubt. As this Court stated in *Himple*, "the risk of reversal arises when an instruction departs from the pattern instruction and the risk of reversal increases with the degree of departure from that pattern instruction." 101 Md. App. at 585. Consequently, we hold that the reasonable doubt instructions at issue constitute plain error, and because the errors in the instructions are of constitutional dimension and structural in nature, we reverse and remand the -035 and -038 cases for new trials.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASES 193232035 AND 193232038 REMANDED FOR NEW TRIALS; COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE CITY.

Circuit Court for Baltimore City
Case Nos. 193232035 & 193232038

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3232

September Term, 2018

JOHN E. ARTIS

v.

STATE OF MARYLAND

Leahy,
Friedman,
Shaw Geter,

JJ.

Concurring Opinion by Friedman, J.

Filed: March 16, 2020

I concur in the judgment only. I believe that because Artis specifically accepted the jury instructions, there is a strong argument that he waived his right to challenge them, but that position is foreclosed by our opinion in *Yates v. State*, 202 Md. App. 700 (2011) (holding that accepting the jury instructions doesn't necessarily waive the ability to later challenge them).[1] I would hold that in the pre-*Ruffin* world (in which Artis's jury was instructed),[2] Judge Ward's reasonable doubt instruction was acceptable, but that argument is foreclosed by our opinion in *Himple v. State*, 101 Md. App. 579 (1994) (holding a similar reasonable doubt instruction to the one in Artis's case to be improper).[3] I would subject

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[1] In my view, as we noted in *Martin v. State*, "[t]he plain error hurdle, high in all events, nowhere looms larger than in the context of assumed instructional errors." 165 Md. App. 189, 198 (2005). *Yates* seems to me to lower that hurdle. I note that the State fails to mention *Yates* in its brief or offer any suggestion why it should not control.

[2] In *Ruffin v. State*, the Court of Appeals required, in every case, "close[] adhere[nce]" to the pattern jury instruction regarding reasonable doubt and the presumption of innocence as a matter of the non-constitutional criminal law of Maryland. 394 Md. 355, 373 (2006). The debate here makes clear to me that *Ruffin*, in highlighting the need for uniformity among reasonable doubt jury instructions, was right.

[3] The *Himple* Court identified three errors with the reasonable doubt instruction given there and in Artis's case:

> - *The analogy error*: "The instruction[] … draw[s] an inaccurate comparison, as the 'legal reasonable doubt standard and the decision making process in respect to important personal matters in a layman's life are not the same.'" Slip op. at 20 (quoting *Himple v. State*, 101 Md. App. 579, 583 (1994)). A similar comparison, however, remains in the current pattern jury instruction: "Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs." MPJI-Cr. 2:02 PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT. If the analogy is impermissible in the reasonable doubt instruction given in *Himple*—which I

don't think it should be—it also ought to be impermissible in the pattern instructions.

- *The "Convincing Ground of Probability" Error*: Judge Ward instructed, as was customary at the time, that the reasonable doubt standard was equivalent to proof to a "moral certainty" and then went on to define "moral certainty" to not mean "absolute or mathematical certainty" but a "certainty based upon a convincing ground of probability." Slip op. at 6 n.4, 7 n.5. The *Himple* Court focused on the word "probability" and, taking that word out of context, interpreted it to mean that the jury could convict if the defendant was *probably* guilty. *Himple*, 101 Md. App. at 582-83; *see also Savoy v. State*, 420 Md. 232, 252-54 (2011). In context, however, given that it was used to modify the word "certainty," I don't think it lowers the standard at all.
- *The "Without Hesitation" or "Without Reservation" Error*: Even the *Himple* Court was at pains to note that the omission of the language "without hesitation" (or its better substitute, "without reservation") in the reasonable doubt instruction wasn't by itself plain error. *Id*. at 583-84. I agree.

I also note that at the time of *Himple*, appellate courts accepted reasonable doubt instructions that were "in some way erroneous" so long as "taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury." *Wills v. State*, 329 Md. 370, 380, 384 (1993) (quoting *Holland v. U.S.*, 348 U.S. 121, 140 (1954)). In a recent case, *Kazadi v. State*, the Court of Appeals relied on new legal and social science research that suggests juries have a harder time than previously understood in understanding and applying jury instructions regarding reasonable doubt and the presumption of innocence. __ Md. __, No. 11, Sept. Term 2019, slip op. at *32 (filed Jan. 24, 2020). As a result, the Court made mandatory certain *voir dire* questions to allow defendants the opportunity to identify prospective jurors with an unwillingness or inability to adhere to jury instructions. *Id*. at 43. I respectfully suggest that the same research discussed in *Kazadi* would support a finding that jurors are unable or unwilling to distinguish between small distinctions in the definitions provided in jury instructions. Thus, but for the stare decisis effect of *Himple*, I would find the reasonable doubt instruction given in this case to be acceptable.

Artis's claim to a harmless error analysis but that is precluded by the Court of Appeals' opinion in *Savoy v. State*, 420 Md. 232 (2011) (holding that deficient reasonable doubt instructions create structural error and are not subject to harmless error analysis).[4] The

[4] I understand that structural errors include those errors that are "of a constitutional dimension," such as preventing a defendant from having a fair trial. *Savoy*, 420 Md. at 254. Had the trial court not given a reasonable doubt instruction, for example, Artis would not have had a fair trial. Given what I see as minor errors in the reasonable doubt instruction (if they were errors at all), I would not say that Artis was in any way deprived of receiving a fair trial. As such, I would subject his claim to the normal harmless error analysis. *See Newton v. State*, 455 Md. 341, 353, 364 (2017) (describing reversal under harmless error review as appropriate when "an appellate court finds that the trial court erred" and determines that the error influenced the outcome and also noting that even under plain error review, an appellant is required to show that she was harmed by the error, *i.e.*, that it affected the decision of the trial court); *see also* Steven M. Shepard, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1205-14 (2008) (identifying the consequence of the automatic reversal analysis as applied to structural errors in creating inconsistency among courts attempting to determine which errors warrant reversal and resulting in too narrow a rule for automatic reversal). Here, in evaluating whether the error was harmless, we can look to our prior opinion. In that case, we were evaluating whether allowing the jury to hear Artis's nickname ("Frank Nitti" or "Little Nitti"—after Al Capone's enforcer of the same name) had been prejudicial. We said:

> At [Artis's] first trial, the victim's wife, who knew [Artis] for six months prior to the murder, identified [Artis] as the man who shot her husband. Yvonne Ford, who had known [Artis] for approximately one year, testified that the man that ran past her in the alley "shooting" looked like [Artis]. Finally, Mr. Stafford, a ballistics expert, testified that the bullets removed from the victim and the shell casings found at the crime scene matched the 9 mm Glock recovered from under the bed in which [Artis] was sleeping when he was arrested.
>
> At the second trial, Darlene Johnson and Reginald Taylor identified [Artis] as the man who shot them. Again, Mr. Stafford testified that the shell casings found at the crime scene matched the 9 mm Glock recovered from [the basement apartment at which Artis lived].

Artis v. State, No. 1781, Sept. Term, 1994, slip op. at 18-19 (unreported opinion) (filed July 20, 1995). We held there that, given the overwhelming evidence of guilt, allowing the jury to hear Artis's nickname was harmless "beyond a reasonable doubt." *Id.* at 19. Similarly,

result of these three opinions is that precisely where this Court's discretion to do justice in a particular case should be at its zenith, we have none. With my hands thus tied, I concur in the judgment only.

if permitted, I would find that the minor deviations in the reasonable doubt instruction given here, *see supra* n.3, were harmless beyond a reasonable doubt.