Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000407

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1562

September Term, 2022

STACEY ERIC WILBURN

v.

STATE OF MARYLAND

Friedman,
Zic,
Curtin, Yolanda L.
(Specially Assigned),
JJ.

Opinion by Zic, J.

Filed: January 25, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

In 2017, a jury sitting in the Circuit Court for Anne Arundel County found Stacey Eric Wilburn, appellant, guilty of armed robbery, robbery, first- and second-degree assault, reckless endangerment, use of a firearm in the commission of a felony or crime of violence, wearing or carrying a handgun, and theft of property having a value of less than $1,000. In February 2018, the court sentenced Mr. Wilburn to seven years of active incarceration and additional suspended time.[1] His trial counsel failed to file a notice of appeal.

In September 2019, Mr. Wilburn filed pro se a postconviction petition, which was later supplemented with the assistance of counsel, raising, among other things, claims that trial counsel was ineffective in requesting two compound voir dire questions and failing to object to another, purportedly improper, question; failing to object to the trial court's failure to give a "no adverse inference" jury instruction, where Mr. Wilburn had exercised his right not to testify; and failing to file a notice of appeal. Following a hearing, the postconviction court granted relief on those claims, vacated Mr. Wilburn's convictions, and ordered a new trial.

The State filed an application for leave to appeal, which we granted, and we thereafter reversed the decision of the postconviction court except for its ruling granting

[1] The court sentenced Mr. Wilburn to twelve years' imprisonment, with all but seven years suspended, for armed robbery. It sentenced him to a concurrent term of twelve years' imprisonment, with all but five (mandatory) years suspended, for use of a firearm in the commission of a felony or crime of violence. Both sentences were to be followed by five years' supervised probation. The court merged the remaining convictions for sentencing purposes.

Mr. Wilburn the right to file a belated appeal. As for the other claims, we held that Mr. Wilburn had failed to prove prejudice. *State v. Wilburn*, Nos. 1346 and 1347, Sept. Term 2021, slip op. at 17-20, 20-22 (filed Sept. 23, 2022).[2]

Now, in this belated appeal, Mr. Wilburn's questions, presented verbatim, are as follows:

> 1. Did the trial court abuse its discretion by admitting evidence that during the investigation of this case Mr. Wilburn had been arrested for a separate crime with a similar motive?
>
> 2. Did the trial court abused its discretion in admitting insufficiently authenticated videos?
>
> 3. Did the trial court commit plain error by failing to instruct the jury on the election of [Mr. Wilburn] not to testify?
>
> 4. Did the trial court commit plain error by asking jurors compound questions during voir dire?

For the following reasons, we affirm the circuit court.

BACKGROUND

The victim in this case, Teresita Schell, was robbed at gunpoint outside her home in Hanover, Maryland, in Anne Arundel County. On the morning of January 27, 2017, she dropped off her husband at a commuter rail station, went to a gas station, and then to a supermarket. She then drove home, arriving at approximately 9:00 a.m.

[2] Mr. Wilburn was charged and convicted of three separate armed robberies with a similar modus operandi, two in Anne Arundel County and a third in Howard County. *Wilburn*, slip op. at 1 & n.1. He was granted postconviction relief in both Anne Arundel County cases, and we reversed in both cases except as to Mr. Wilburn's right to file a belated appeal in this case. *Id.*, slip op. at 22.

When Ms. Schell stepped out of her vehicle, "somebody," whom she identified as Mr. Wilburn, "was there with a gun." Mr. Wilburn demanded cash, and Ms. Schell gave him her "small bag" and cell phone. He opened the bag, took approximately $120 in cash, and discarded the rest. Mr. Wilburn then ran down the street and "disappear[ed]." After he fled, Ms. Schell entered her home, called her husband, and then called 911.

Mr. Wilburn committed two other armed robberies later that same day, one in Howard County and the other in Anne Arundel County. *Wilburn*, slip op. at 1-2. The following day, he was pulled over for a traffic stop (the legality of which is not at issue in this appeal), and he was arrested and charged in all three robberies. *Id.* at 2. "A handgun and ammunition were found inside his vehicle." *Id.* "During a police interview after his arrest," Mr. Wilburn confessed to the two Anne Arundel County robberies, including the one involving Ms. Schell. *Id.*

An eight-count indictment was filed, in the Circuit Court for Anne Arundel County, charging Mr. Wilburn with armed robbery, robbery, assault in the first degree, assault in the second degree, reckless endangerment, use of a firearm in the commission of a crime of violence, wearing, carrying, and transporting a handgun on his person, and theft of property having a value of less than $1,000.

Mr. Wilburn filed several pretrial motions, including a motion to suppress his statement and a motion to sever this case from Case No. C-02-CR-17-000406, the other Anne Arundel County robbery case. Following a motions hearing, the circuit court denied all his pretrial motions (including the motion to suppress) except his motion to sever, which the circuit court granted.

In October 2017, a two-day jury trial was held in this case. The State called six witnesses: Teresita Schell, the victim; Detective Jeff Golas of the Anne Arundel County Police Department, who showed a photographic array to Ms. Schell, from which she selected Mr. Wilburn; A neighbor of Ms. Schell ("Neighbor"), who provided surveillance video to the police, which depicted Mr. Wilburn's SUV approaching and then leaving Ms. Schell's home; Detective Jesse Pattana of the Anne Arundel County Police Department, who was the lead detective in the robbery of Ms. Schell; Donray Odell Cooper, an operations manager at Maryland Live! Casino, who testified about the extensive electronic and video surveillance systems at the casino, which tracked Mr. Wilburn's activities on the day of the robberies;[3] and Detective Zachary Renko of the Anne Arundel County Police Department, who interrogated Mr. Wilburn shortly after his arrest and elicited his confession. The defense called a single witness, Sharee D. Vance, Mr. Wilburn's fiancée.

The jury deliberated for approximately four hours. During that time, the jury submitted four notes to the court, three of which pertained to the action. The first note, submitted after approximately one hour of deliberations, requested that the court replay the video recording of Mr. Wilburn's statement; the court declined the request, instructing the jury to rely on its memory of what had been played in open court. The second note (without a time indicated) asked for the elements of each offense; the court

[3] Mr. Wilburn was a compulsive gambler who lost thousands of dollars at Maryland Live! All three robberies were committed within a few minutes' drive of the casino. *Wilburn*, slip op. at 1-2.

provided copies, presumably of the jury instructions. The third note indicated that the jury was deadlocked eleven-to-one in favor of guilty on all charges; in response, the court gave a modified *Allen* charge, Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 2:01 (Duty to Deliberate). The fourth note (without a time indicated) included two jurors' requests to make phone calls to inform people of the jurors' lateness. Approximately one hour later, the jury rendered its verdict, finding Mr. Wilburn guilty of all eight charges.

Additional facts are included where pertinent to the discussion.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE DURING THE INVESTIGATION OF THIS CASE THAT MR. WILBURN HAD BEEN ARRESTED FOR A SEPARATE CRIME WITH A SIMILAR MOTIVE BECAUSE THE DEFENSE OPENED THE DOOR AND THE EVIDENCE WAS PROPORTIONAL.

A. Parties' Contentions

Mr. Wilburn contends that the circuit court abused its discretion in admitting evidence that, during the investigation of this case, he had been arrested for a separate crime with a similar motive. According to Mr. Wilburn, the probative value of that evidence was substantially outweighed by the possibility of unfair prejudice accruing to him. Moreover, according to Mr. Wilburn, the trial court compounded its error; after overruling defense counsel's objection to the prosecutor's question, eliciting that Detective Pattana had turned over the investigation to a different detective because an arrest had been made "on a separate investigation," the court permitted the prosecutor to elicit Detective Pattana's testimony that the person arrested was Mr. Wilburn and that the

crime alleged in that "separate investigation . . . had a similar motive." Mr. Wilburn further contends that the "opening the door" doctrine did not justify the circuit court's ruling and that the error was not harmless, given that the jury had been deadlocked, and the court, in response, had delivered a modified *Allen* charge.

The State counters that Mr. Wilburn's defense counsel opened the door to the admission of the contested evidence by raising, during cross-examination, the issue of whether Detective Pattana had been thorough in performing his investigation. The State points out that the "detective's answers were limited and tailored solely to explain why the investigation was transferred—no other information regarding the second incident was brought to light." In addition, the State maintains that any error in admitting the contested evidence was harmless because any prejudicial impact it may have had "was dwarfed" by the remaining evidence, which included, among other things, a recorded statement by Mr. Wilburn in which he confessed to the crime.

B. Additional Facts Pertaining to the Claim

During cross-examination of Detective Pattana, the lead investigator in this case, defense counsel sought to impeach him for an alleged lack of thoroughness in the investigation:

> [DEFENSE COUNSEL]: Was the Crime Lab brought out to Ms. Schell's house?
>
> [DETECTIVE PATTANA]: Yes.
>
> [DEFENSE COUNSEL]: Was the purse dusted for prints?
>
> [DETECTIVE PATTANA]: I do not know if the purse was.

[DEFENSE COUNSEL]: The credit cards?

[DETECTIVE PATTANA]: I don't believe so.

[DEFENSE COUNSEL]: Were any of those swiped for DNA?

[DETECTIVE PATTANA]: I would have to refer to the Evidence Technician's report but I don't know as far as the extent of what they processed.

[DEFENSE COUNSEL]: And part of your duties as a detective is you can request those things, correct?

[DETECTIVE PATTANA]: Yes.

[DEFENSE COUNSEL]: And you can basically direct your crime scene technicians as to what you want done on a scene like this, correct?

[DETECTIVE PATTANA]: Yes. If I remember correctly, I do believe that I think some of those items were already moved prior to the evidence technician arriving.

[DEFENSE COUNSEL]: And you personally did not request any prints or DNA to be done?

[DETECTIVE PATTANA]: No.

[DEFENSE COUNSEL]: What about any clothing recovered from my client?

[DETECTIVE PATTANA]: I wasn't aware of any clothing recovered from your client.

[DEFENSE COUNSEL]: Okay. And you personally never spoke to my client, correct?

[DETECTIVE PATTANA]: I did not.

[DEFENSE COUNSEL]: And did you ever do any subpoenas for any of his bank accounts?

[DETECTIVE PATTANA]: No.

[DEFENSE COUNSEL]: Any subpoenas for any of his credit cards?

[DETECTIVE PATTANA]: No.

[DEFENSE COUNSEL]: Any subpoenas for his work records?

[DETECTIVE PATTANA]: No.

[DEFENSE COUNSEL]: Any subpoenas for his W-2s or income for the last year or two?

[DETECTIVE PATTANA]: I did not.

During re-direct examination, the State sought to rehabilitate Detective Pattana:

[PROSECUTOR]: And the Defense attorney asked you quite a few questions about things you didn't do during your investigation. Did you hand your investigation off to Detectives Renko and Furrow?

[DETECTIVE PATTANA]: Yes.

[PROSECUTOR]: And why did they pick up the investigation?

[DETECTIVE PATTANA]: They had made an arrest on a separate investigation --

[DEFENSE COUNSEL]: Objection. May we approach, Your Honor?

(Counsel approached the bench, and the following ensued:)

[DEFENSE COUNSEL]: First of all I'm going to move for a mistrial. Talking about another arrest is beyond the scope of my cross whatsoever. None of this came out on direct. There's no need for this testimony.

THE COURT: Well, before the State responds what's the basis of your mistrial is the real question.

[DEFENSE COUNSEL]: He's blurting out about the other arrest.

THE COURT: There's no mention of who.

[DEFENSE COUNSEL]: Okay.

THE COURT: So I'm going to deny that. But didn't you open the door by questioning his involvement in this case?

[DEFENSE COUNSEL]: No. I just asked him --

THE COURT: Overruled.

(Counsel returned to the trial tables, and the following ensued in open court:)

[PROSECUTOR]: You may continue, Detective.

[DETECTIVE PATTANA]: They --

[DEFENSE COUNSEL]: My continuing objection to --

THE COURT: I understand.

[DEFENSE COUNSEL]: -- any questions in this area, Your Honor.

THE COURT: Okay.

[PROSECUTOR]: You may continue, Detective.

[DETECTIVE PATTANA]: They made an arrest on a separate investigation that had a similar motive.

[DEFENSE COUNSEL]: Objection again, Your Honor. Move to strike.

THE COURT: Overruled.

[PROSECUTOR]: And, if you know, who did they arrest?

[DETECTIVE PATTANA]: They arrested Stacey Wilburn.

[DEFENSE COUNSEL]: Continuing objection and move to strike.

THE COURT: Overruled.

C. Analysis

"The open door doctrine is based on principles of fairness and serves to 'balance any unfair prejudice one party [may] have suffered.'" *State v. Robertson*, 463 Md. 342, 351-52 (2019) (quoting *Little v. Schneider*, 434 Md. 150, 163 n.6 (2013)). It "authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection." *State v. Heath*, 464 Md. 445, 459 (2019) (quoting *Clark v. State*, 332 Md. 77, 84-85 (1993)). "Put another way, 'opening the door' is simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'" *Id.* (quoting *Clark*, 332 Md. at 85) (cleaned up).

"'The doctrine of opening the door has limitations.'" *Robertson*, 463 Md. at 357 (quoting *Little*, 434 Md. at 163-64). "'It allows for the introduction of otherwise inadmissible evidence, but only to the extent necessary to remove any unfair prejudice that might have ensued from the original evidence.'" *Id.* (quoting *Little*, 434 Md. at 164).

"Given that the open door doctrine is a matter of relevancy, which is a legal issue," an appellate court "reviews the question of whether a party opened the door to introduce rebuttal evidence *de novo*." *Id.* at 353. If we conclude that the door has been

opened, we review the "secondary question of proportionality" for abuse of discretion. *Id.* at 358; *Heath*, 464 Md. at 458.

In determining whether defense counsel's cross-examination opened the door to the State's response, eliciting Detective Pattana's testimony that he handed off the investigation after Mr. Wilburn had been arrested for a similar crime, we begin with the observation that, prior to trial, the circuit court had granted a defense motion to sever this case from the other "similar" case. Accordingly, the State was required to take care not to introduce evidence of the severed case during its case-in-chief.[4] Under these circumstances, the defense cross-examination was an unfair attempt to exploit the severance by creating a misleading impression that Detective Pattana had conducted a sloppy, incomplete investigation in this case. We hold that the defense opened the door to the State's rehabilitation of Detective Pattana during re-direct examination.

As for the proportionality of the response that was permitted, we note that no details of the severed case were even mentioned. Detective Pattana was allowed to testify only that Mr. Wilburn had been arrested, and that the arrest had been "on a

[4] One noteworthy example was the manner in which the State introduced Mr. Wilburn's recorded statement to the jury. Because that statement was relevant to both cases, the State was constrained to play isolated snippets of the statement, in several instances; this substituted the prosecutor's summary of Mr. Wilburn's remarks for the remarks themselves, undoubtedly blunting the effect of that evidence on the jury. Moreover, the statement, which otherwise was deemed fully admissible was not itself admitted into evidence. The same motions judge who had granted the severance had denied Mr. Wilburn's motion to suppress the statement. Subsequently, during deliberations, the jury asked to "see the DVD showing the Police interview with [Mr. Wilburn]," but the court declined, declaring that the "actual video is not in evidence" and instructing the jury "to rely on [its] memory."

separate investigation that had a similar motive." Moreover, we reject Mr. Wilburn's contention that the court should have limited the State to eliciting the fact that Detective Pattana had handed off the investigation. As the State points out, such a limitation "would have been insufficient to rehabilitate fully the detective's credibility" and could have led the jury to conclude that "the investigation was handed off due to incompetence."

We further reject Mr. Wilburn's contention that Detective Pattana's testimony failed to rehabilitate the investigation because the other detectives likewise failed to perform any of the investigatory steps outlined during the cross-examination of Detective Pattana. We agree with the State that Detective Pattana's re-direct testimony served to rehabilitate him[5] and that the reason he took no further steps "was because he was not assigned to the case anymore."

We hold that the circuit court did not err in permitting the State to rehabilitate Detective Pattana under the "opening the door" doctrine, and we further hold that the circuit court did not abuse its discretion in permitting the State's tailored response.

[5] The commissions and omissions of the other detectives were irrelevant to Detective Pattana's rehabilitation. Undoubtedly, the detectives had their own reasons for the ensuing steps they took in their investigation, foremost among the reasons was that Mr. Wilburn confessed to the crimes during his interrogation.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE SURVEILLANCE VIDEOS.

A. Parties' Contentions

Mr. Wilburn contends that the circuit court abused its discretion in admitting insufficiently authenticated surveillance videos. The videos at issue were admitted through the testimony of Neighbor and depicted the front of Neighbor's home on the day of the robbery. According to Mr. Wilburn, the videos lacked time and date stamps, and Neighbor's testimony could not cure that absence, because "without the date and time stamp she would have had no more way of knowing that it came from the date and time in question than the jury did."

The State counters that Neighbor "described steps sufficient to authenticate the footage under the 'silent witness' theory." Specifically, Neighbor, in the State's words, "explained that her computer included" the time and date information and "allowed her to download the relevant footage." She further "explained that she had watched videos from her system before and never found the system inaccurate" and that she has exclusive access to the video camera and its recording software. Therefore, according to the State, the trial court did not abuse its discretion in finding that the surveillance videos had been properly authenticated.

B. Additional Facts Pertaining to the Claim

The State elicited testimony from Neighbor to authenticate two video recordings obtained from her home surveillance system. Neighbor testified that she lived "right down the street" from the victim's home and scene of the robbery. Shortly after the

robbery, police officers canvassing the neighborhood observed that Neighbor's home had a surveillance system that recorded video of the outside of her house. Neighbor testified that she provided Anne Arundel County Police officers with surveillance videos from approximately 9:00 to 9:30 a.m. on January 27, 2017, the time and date of the crime.

Just before trial began, Neighbor looked at the videos for the first time. She explained that she was familiar with the video recording system and always had found it accurate; that she did not alter the videos "in any way" before giving them to the police, nor would she "even know how to alter a video"; and that, in viewing the videos earlier that morning, she found them to be "accurate."

At that point, the prosecutor moved to admit State's Exhibit 5, a DVD containing recordings of the surveillance videos, into evidence. Defense counsel objected on authentication grounds, asserting that "there is no date, there is no time stamp, . . . there is not even a sequence on there to give you any idea of what date and time" and that, therefore, there was no basis for finding that the video was "reliable" or that it "fairly and accurately" depicted the crime scene at the relevant time and date. The trial court remarked that defense counsel's objection went to the weight, not the admissibility, of the videos, and it further noted that Neighbor's testimony that "[s]he pulled the video from that morning" "help[ed]" in establishing a foundation. The circuit court then overruled the defense objection and admitted the videos into evidence.

On cross-examination, Neighbor testified that she "remember[ed] the day of the incident when it happened"; that no one except her had access to the video recorder; and that the surveillance system recorded video of "the front door, the front stairs[,]" and "a

little bit of" the driveway. On re-direct examination, Neighbor explained that she determined the date and time of the video by "look[ing] . . . on [her] computer."[6]

C. Analysis

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Md. Rule 5-901(a). A court "need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Jackson v. State*, 460 Md. 107, 116 (2018) (quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006)) (emphasis in original). "The threshold of admissibility is, therefore, slight." *Id.* (citation omitted). We review a trial court's ruling on authentication of evidence for abuse of discretion. *Donati v. State*, 215 Md. App. 686, 740 (2014). Abuse of discretion occurs where the trial court's ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Mainor v. State*, 475 Md. 487, 499 (2021) (citations omitted). In other words, abuse of discretion occurs where "no reasonable person would take the view adopted by the circuit court." *Id.* (citations omitted).

[6] Taking this testimony in a light most favorable to the State, we infer that Neighbor could readily observe metadata (such as the time and date of the recording) associated with the video recordings stored on her computer. Our interpretation also is consistent with Neighbor's testimony on re-cross examination, in which she explained that, in the police officers' presence, she selected the appropriate videos from the time and date information and emailed the videos to the police.

"[F]or purposes of admissibility, a videotape is subject to the same authentication requirements as a photograph." *Jackson*, 460 Md. at 116 (citing *Washington v. State*, 406 Md. 642, 651 (2008)). "Photographs and videotapes may be authenticated through first-hand knowledge, or, as an alternative, as a mute or silent independent photographic witness because the photograph speaks with its probative effect." *Id.* (internal quotation marks and citations omitted). The latter "silent witness method" of authentication "allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Washington*, 406 Md. at 652 (citations omitted).

"Generally, surveillance tapes are authenticated under the silent witness theory, and without an attesting witness." *Id.* at 653 (citation omitted). "Courts have admitted surveillance tapes and photographs made by surveillance equipment that operates automatically when a witness testifies to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." *Id.* (internal quotation marks and citations omitted).

In the present case, Neighbor testified, among other things, that she personally pulled the videos from her recording system, which displayed the desired times and dates; that she has exclusive access to the system; that she recovered the videos in the police officers' presence and emailed them to the police at that time; that she was familiar with her surveillance system and always had found it to be accurate; and that, shortly before trial, she had viewed the video recordings on State's Exhibit 5 and determined that they fairly and accurately depicted the area in front of her home at the time and date in

question. The absence of a time and date stamp on those video recordings does not, standing alone, render them inadmissible; that absence goes to weight, not admissibility. *See Jackson*, 460 Md. at 117 (noting that there are no "'rigid, fixed foundational requirements' for admission of evidence under the 'silent witness' theory") (quoting *Dep't of Pub. Safety & Corr. Services v. Cole*, 342 Md. 12, 26 (1996)). *See also Jackson*, 460 Md. at 117 (noting that a "foundational basis may be established through testimony relative to 'the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system'") (quoting *Washington*, 406 Md. at 653) (citation omitted).

Given the deferential standard of review we must apply, and the legal principle that the State's burden to show authentication is "slight," *Jackson*, 460 Md. at 116, we conclude that the trial court's ruling was not "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Mainor*, 475 Md. at 499. We therefore hold that the circuit court did not abuse its discretion in finding that State's Exhibit 5 was properly authenticated.

III. WE DECLINE TO RECOGNIZE PLAIN ERROR WITH REGARD TO THE "NO ADVERSE INFERENCE" INSTRUCTION.

A. Parties' Contentions

Mr. Wilburn contends that the circuit court committed plain error by failing to give the jury a "no adverse inference" instruction after he had elected not to testify. He points out that, when he was examined in open court concerning his election whether to testify, trial counsel explained that he was entitled to the instruction if he elected not to

do so. Moreover, among the requested jury instructions defense counsel submitted to the court was MPJI-Cr 3:17 (Election of Defendant Not to Testify). We thus may infer that "defense counsel and Mr. Wilburn clearly did not intend for the instruction to be omitted," or in other words, this was a case of forfeiture, not an intentional waiver of the right to the instruction. According to Mr. Wilburn, the trial court's failure to give the instruction "allowed the jury to hold the fact that [he] did not testify against him in convicting him of the crimes charged" and therefore affected his substantial rights.

The State counters that we previously held, in Mr. Wilburn's postconviction proceeding, that he failed to prove that he was prejudiced by trial counsel's failure to object to the trial court's failure to give a "no adverse inference" instruction. The State points out that the entitlement to a "no adverse inference" instruction is waivable, and it should not be given over defense objection. *Hardaway v. State*, 317 Md. 160, 166-67 (1989). The reason the entitlement is waivable by the defendant is because the instruction may not always be in a defendant's best interest, *id.* at 167, and therefore, "[t]he desirability of the instruction is a matter of trial strategy," which will "vary from case to case." *Id.* at 168 (internal quotation marks and citation omitted). Because the entitlement to the instruction is waivable, an appellate court should be especially reluctant to recognize plain error in failing to give the instruction. Accordingly, the State urges that we decline to exercise our discretion to review this unpreserved claim for plain error.

B. Additional Facts Pertaining to the Claim

When Mr. Wilburn was examined on the record about his right to testify, the following colloquy took place:

> [DEFENSE COUNSEL]: Now, under the Fifth Amendment of the U.S. Constitution, you have a right to testify in this case. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> [DEFENSE COUNSEL]: You also have, under that same Fifth Amendment, a right to remain silent. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> [DEFENSE COUNSEL]: Whichever one you choose, testifying or remaining silent, His Honor [], and the jury, cannot hold that against you or use that to sway their decision in any way, shape or form. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> [DEFENSE COUNSEL]: And His Honor will instruct the jury on that, depending on whether you testify or not. There is an instruction to the jury for that. Do you understand that?
>
> THE DEFENDANT: Yes.

Mr. Wilburn subsequently elected not to testify. Defense counsel's representation notwithstanding, the trial court did not give a "no adverse inference" jury instruction. After the court had concluded its instructions, it asked whether the instructions were "satisfactory." Defense counsel replied. "Yes, Your Honor."

C. Analysis

At the time of Mr. Wilburn's trial, Maryland Rule 4-325(e) (2017) provided[7]:

> **(e) Objection.** 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. Upon request of any party, the court shall receive objections out of the hearing of the jury. 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.

Because trial counsel failed to object at trial, Mr. Wilburn asks that we exercise our discretion to notice plain error. Plain error is reserved for those rare circumstances where an unpreserved error "vitally affects a defendant's right to a fair and impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009) (internal quotation marks and citations omitted). There are four prongs to plain error review, the first three of which must be satisfied before the fourth (which invokes our discretion) comes into play. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (2018); *see also Newton v. State*, 455 Md. 341, 364 (2017). First, there must have been error, that is, a "[d]eviation from a legal rule" that has not been affirmatively waived. *United States v. Olano*, 507 U.S. 725, 732-33 (1993). Second, the error must have been "clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009). Third, the error must have affected the defendant's substantial rights, which "ordinarily" requires that the

[7] Current Maryland Rule 4-325(f) (2021) is identical.

defendant "'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." *Rosales-Mireles*, 138 S. Ct. at 1904-05 (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)). Finally, if the first three prongs have been established, "an appellate court may grant relief if it concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" *Greer v. United States*, 141 S. Ct. 2090, 2096-97 (2021) (quoting *Rosales-Mireles*, 138 S. Ct. at 1905).

In this case, it is not clear that the trial court erred in not giving a "no adverse inference" jury instruction. In *Hardaway*, the Supreme Court of Maryland held that, "absent special circumstances," giving a "no adverse inference" instruction over defense objection is error. 317 Md. at 161. That necessarily implies that a trial court generally must refrain from sua sponte giving such an instruction; rather, the obligation to seek the instruction rests with trial counsel. Plain error, however, presumes that a trial court committed some legal error, that is, a "[d]eviation from a legal rule" that has not been affirmatively waived, *Olano*, 507 U.S. at 732-33, and that trial counsel did not preserve the claim of error through a contemporaneous objection. But, under *Hardaway*, 317 Md. at 167-69, a trial court that gives a "no adverse inference" instruction when trial counsel did not request it risks reversal.[8] Regardless, even if we were to assume that the trial

[8] For example, it is not difficult to imagine a scenario where the trial court, under circumstances analogous to those in this case, gives the instruction, and at the conclusion of instructions, the defendant objects, at which point the only feasible remedy is a mistrial, or, if the trial court should deny a motion for mistrial, a reversal on appeal.

court erred in not giving the instruction under the circumstances of this case, we do not believe that any assumed error was "clear or obvious." *Puckett*, 556 U.S. at 135.

Moreover, Mr. Wilburn has failed to establish that the purported error affected his substantial rights. This case is in an unusual procedural posture because Mr. Wilburn's postconviction proceedings were concluded prior to his belated appeal. In that postconviction proceeding, Mr. Wilburn claimed that trial counsel was ineffective for failing to request a "no adverse inference" jury instruction. *Wilburn*, slip op. at 21. We held that, given the "overwhelming evidence" of Mr. Wilburn's guilt and his failure to "provide any proof that [his] trial was fundamentally unfair or unreliable," he had failed to show that he suffered prejudice because of trial counsel's failure to request the jury instruction. *Id.* at 22. Given our holding in Mr. Wilburn's postconviction proceeding on his claim of ineffective assistance predicated on the same underlying omission (the failure to give the jury instruction), we conclude that he has failed to show that the claimed error affected his substantial rights.[9] *Greer*, 141 S. Ct. at 2096; *Dominguez Benitez*, 542 U.S. at 81-82. We therefore decline to recognize plain error.

[9] The U.S. Supreme Court has observed that there is "[o]ne significant difference" between plain error claims raised on direct appeal and claims under *Strickland v. Washington*, 466 U.S. 668 (1984), or *Brady v. Maryland*, 373 U.S. 83 (1963), in that "the latter may be raised in postconviction proceedings," which "permit greater development of the record." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004) (citations omitted). Because, in his postconviction proceeding, which afforded Mr. Wilburn an opportunity to enlarge the record, he failed to establish a reasonable probability that, but for trial counsel's failure to request a "no adverse inference" jury instruction, the outcome of his trial would have been different, it stands to reason that he cannot satisfy the same prejudice standard in his plain error claim.

IV. THE TRIAL COURT DID NOT ERR WITH REGARD TO THE VOIR DIRE QUESTIONS.

A. Parties' Contentions

Finally, Mr. Wilburn contends that the trial court committed plain error in propounding compound questions during voir dire, in violation of *Dingle v. State*, 361 Md. 1 (2000), and its progeny. Although he acknowledges that trial counsel failed to object to these questions, Mr. Wilburn contends that inasmuch as the error involved his constitutional right to a fair and impartial jury, that there was "no telling how many jurors failed to disclose relevant information" because they self-determined their ability to be fair and impartial, and that the Supreme Court of Maryland has expressly condemned the form of the questions given, we should excuse non-preservation and grant plain error relief.

The State counters that, in unqualifiedly accepting the empaneled venire, Mr. Wilburn affirmatively waived any claim of voir dire error, thereby foreclosing even the possibility of plain error review. But, even if we were to construe his unqualified acceptance of the empaneled jury as a forfeiture instead of a waiver, we should still, as the State urges, decline to review this unpreserved claim for plain error because the "catch-all" question is not disapproved, and Mr. Wilburn invited the error in giving the remaining compound questions. In addition, according to the State, Mr. Wilburn cannot demonstrate that the claimed errors affected his substantial rights given our holding in his postconviction proceeding that he failed to prove prejudice in his derivative ineffective assistance claim. *Wilburn*, slip op. at 20.

B. Additional Facts Pertaining to the Claim

Prior to trial, the parties submitted suggested written voir dire questions to the circuit court. Among the questions included in the "Defense Request for Voir Dire" were the following:

> 2. Does any member of the jury panel have such strong feelings about the charges in this case, and more specifically the alleged use of handgun, that it would affect your ability to render fair and impartial verdict?
>
> 5. Do you or anyone in your immediate family work in the Federal Government in an Agency that would affect your ability to render fair and impartial verdict?

Included among the voir dire questions the circuit court ultimately propounded to the venire were the following:

> Has any member of this panel had something happen to you in the past which would prevent you from rendering either a verdict of guilty or not guilty in a criminal case under any circumstances? In other words, what we want are people who can come to this trial totally independent -- all right, why don't you come on up, ma'am . . .
>
> Does any member of this panel have strong feelings regarding possession of firearms -- and I'm going to add, to the point where it would affect your ability to render a fair and impartial verdict based only on the evidence that you hear?
>
> Does any member of this panel or your immediate family work in the federal government in any agency that would affect your ability to render a fair and impartial verdict?

Defense counsel did not object to any of these questions. At the conclusion of voir dire, defense counsel indicated, in response to the trial court's query, his unqualified acceptance of the empaneled jury.

C. Analysis

Initially, we assume, without deciding, that this claim was forfeited rather than affirmatively waived when defense counsel failed to object to the empaneled jury at the conclusion of voir dire.[10] That avails Mr. Wilburn nothing, however. Two of the compound questions he requests that we review for plain error, the strong feelings question and the question concerning employment in federal agencies, were propounded in substantially the same form that defense counsel requested; that is to say, any error the trial court may have committed in propounding those questions was invited by the defense. In *State v. Rich*, 415 Md. 567 (2010), the Supreme Court of Maryland held that

[10] In reviewing a defendant's request to review an unpreserved claim for plain error, we observe that "error" is incompatible with "waiver" in the narrow sense, that is, an "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). In other words, forfeited rights, that is, rights that are *inadvertently* abandoned by the "failure to make a timely assertion of" them, *id.*, "are reviewable for plain error, whereas waived rights are not." *Yates v. State*, 202 Md. App. 700, 722 (2011), *aff'd*, 429 Md. 112 (2012).

"Waiver," however, is an amorphous concept that can range from a knowing and intentional relinquishment of rights to an inadvertent failure to lodge a timely objection. *See*, *e.g.*, *Curtis v. State*, 284 Md. 132, 141-42 (1978) (observing that "waiver" is an "ambiguous" term, whose meaning depends upon the context in which it is used). It is far from clear whether "waiver," in the context of preservation of claims of voir dire error, is coextensive with "waiver," in the context of plain error. In *State v. Stringfellow*, 425 Md. 461 (2012), the Supreme Court of Maryland held that the voir dire error at issue had been waived through the defense's unqualified acceptance of the empaneled jury, *id.* at 469-71, but that, in the alternative, even had the error been preserved, it was harmless beyond a reasonable doubt, primarily because any potential prejudice was cured by the jury instructions. *Id.* at 473-77. Although the Court did not expressly so state, it would appear that in applying harmless error review, it may have regarded the defense's unqualified acceptance of the empaneled jury as a forfeiture rather than as an intentional waiver. *See also Kelly v. State*, 195 Md. App. 403, 431-34 (2010) (treating unpreserved claim of voir dire error as forfeiture but declining to notice plain error); *James v. State*, 191 Md. App. 233, 242-47 (2010), *cert. denied*, 415 Md. 338 (2010).

an invited error is ineligible for plain error review, *id.* at 575-81, and that holding is dispositive here.

As for the other question, we agree with the State that this is a "catch-all" question, which the Supreme Court of Maryland has not disapproved. *See*, *e.g.*, *Collins v. State*, 463 Md. 372, 400 (2019) (declaring that "a trial court may ask the 'something in the past,' 'sympathy, pity, anger, or any other emotion,' and 'catchall' questions[,]" although such questions do "not substitute for properly-phrased 'strong feelings' questions"). Therefore, propounding this question does not even rise to the level of error.

Regardless, we held in Mr. Wilburn's postconviction proceeding that he had "failed to meet his burden of proving that he was prejudiced by his counsel's request for improper voir dire questions and failure to object to another improper question." *Wilburn*, slip op. at 20. Under these circumstances, Mr. Wilburn cannot show that the claimed error affected his substantial rights. *Greer*, 141 S. Ct. at 2096; *Dominguez Benitez*, 542 U.S. at 81-82.

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