UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2346

September Term, 2013

TYLENE COCKRELL

v.

STATE OF MARYLAND

Meredith,
Reed,
**Hotten, Michelle D.

JJ.

Opinion by Reed, J.

Filed: December 15, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

**Michele D. Hotten, J., participated in the hearing of this case while still an active member of this Court but did not participate in either the preparation or adoption of this opinion.

Appellant, Tylene[1] Cockrell, was charged by criminal information in the Circuit Court for Prince George's County of second degree assault in violation of Md. Code (2002, Repl. Vol. 2012), § 3-203 of the Criminal Law Article ("C.L"). Following a two-day trial, on September 24, 2013, appellant was convicted by a jury and sentenced to five years' imprisonment with all but sixty months suspended. Appellant was released, and he filed a timely appeal. He raises the following questions for our review, the first of which we have rephrased for clarity[2]:

1. Did the circuit court err in allowing the victim/witness to remain in the courtroom while another State's witness, who is romantically involved with the victim witness and had a history of abuse against the victim witness, to testify?

2. Whether it is reversible error for a trial court to exclude evidence in an assault case of one combatant's prior violent history where the defendant claims self-defense and where that violent history is relevant to a second witness' potential bias.

3. Whether a bailiff's communication with the jury regarding the votes they have taken without input from counsel regarding that communication constitutes reversible error.

[1] Appellant's name is spelled "Tyleen" in the case caption and throughout the record, but appellant's reply brief states that the correct spelling of her name is "Tylene."

[2] The first question presented by appellant is the following:

1. Whether it is reversible error, in a case built solely on witness testimony, for a complainant who intends to testify to remain in the courtroom during the testimony of the State's lead witness where that lead witness had both a prior history of violent abuse against the complainant and a substantial interest in the outcome of the case.

For the following reasons, we answer the first question in the affirmative, and strike appellant's conviction, and remand the case for retrial. We decline to answer the second and third questions.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are derived from trial testimony:

On August 18, 2012, Princess Hughes and Jerome Davis attended a hair show at the Stonefish Grill in Bowie, Maryland. Mr. Davis is a barber at Drake's Place, a barbershop and salon. The attendees at the hair show included a few of his co-workers. Appellant was a regular customer of Drake's Place, and attended the hair show to support her friend Makalla Wilson, who also works at Drake's Place.

Mr. Davis testified that as he and Ms. Hughes entered the Stonefish Grille, appellant said "congratulations on the baby" to Ms. Hughes, in a sarcastic tone. After the hair show ended, Mr. Davis went outside and placed his food on the table where his coworkers and appellant were seated. According to Mr. Davis, appellant became "belligerent," cursed at him, and told him that he needed to get his food off of the table. Mr. Davis responded that he would remove his food after he lit his cigar. As he attempted to light his cigar, appellant stated "don't you light your cigar in front of me, don't smoke no mother fucking cigar," and Mr. Davis responded, "look, tonight is not about you, I'm here for Makalla and Kabox, I'm not going to entertain with you out here doing [sic], I'm chilling with my fiancé, our first night out after having our baby . . . . " Mr. Davis testified that this set appellant off. At this time, Ms. Hughes walked over and asked, "what's going on, because the only person

that argues with my man is me." Mr. Davis testified that this prompted appellant to tell Ms. Hughes to "get out of her business."

Mr. Davis testified that appellant then hocked spit at him and Ms. Hughes, and that Ms. Hughes spit back at appellant. Appellant then ran around the table and "charge[d]" at him, and Mr. Davis immediately pushed her away. People grabbed Mr. Davis, and appellant "jumps on [Ms. Hughes], grabs her by the head, and starts trying to fight her, starts trying to assault her. And when [appellant] gets [Ms. Hughes] to the ground, [appellant] bites [Ms. Hughes] in the face and [Ms. Hughes] immediately . . . [says], 'she's biting me in the face.'" Mr. Davis and an officer pulled appellant off of Ms. Hughes.

Mr. Davis testified that Ms. Hughes had fainted, so he helped sit her up on a chair. Mr. Davis also testified that appellant tried to hit him with her car, and that she sprayed him with mace. Mr. Davis returned to his truck with Ms. Hughes, called the police, and followed appellant so that he could retrieve her license plate number. An ambulance arrived to treat Ms. Hughes, but she refused any medical attention. The paramedics advised Mr. Davis and Ms. Hughes to go to the Bowie Medical Center so that they could be seen immediately.

Mr. Davis testified that Ms. Hughes did not immediately file charges against appellant because they did not know her full name. They ultimately obtained appellant's name when appellant filed charges against Mr. Davis.

When Mr. Davis was called as the State's first witness, a bench conference occurred at which time appellant's counsel objected to Ms. Hughes's presence in the courtroom

during Mr. Davis's testimony. The circuit court overruled the objection, and the following exchange took place:

> [Appellant's Counsel]: I understand that the victim has a right to be here, we assume they were going to call the victim first, if they're not going to call the victim first, and she's going to be testifying, we would ask because she's also a witness, that the rule of witness apply to her.
>
> [State's Attorney]: Well, Your Honor, you know the rules on witnesses what it says, the exception about the victim being here.
>
> THE COURT: There certainly does.
>
> [Appellant's Counsel]: I understand that, but because I've been doing this for the last two days, but I guess we'll roll with it.
>
> THE COURT: Yeah, but the -- you know, the victim has a right to be here under the rules, so the legislature, until they change it or the rule committee changes it--
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> [Appellant's Counsel]: They have some work to do. Thank you.
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> THE COURT: Well, I (indiscernible) --
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> [Appellant's Counsel]: No, I agree, Your Honor.
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> THE COURT: Well, when you're with State, I'm sure you liked it.
>
> [Appellant's Counsel]: I always called my victim first but --
>
> THE COURT: Oh, okay.
>
> [Appellant's Counsel]: -- different strokes for different folks.
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> . . . .
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> THE COURT: Objection is overruled.

Ms. Hughes testified to the same facts as Mr. Davis. Ms. Hughes testified that appellant sarcastically congratulated her on having the baby and stared at her from time to time during the hair show. She testified that after Mr. Davis set his food on the table where appellant was seated, appellant started yelling and cursing at Mr. Davis about his food on the table. When Mr. Davis responded that he would remove his food after lighting his cigar, appellant continued to curse at Mr. Davis. In an attempt to diffuse the situation, Ms. Hughes stated "what's going on, why are you arguing with my fiancé, the only person that argues with him is me." According to Ms. Hughes, appellant then jumped up, told her to "mind your business," spit towards her and Mr. Davis, and rushed at Mr. Davis. After Mr. Davis pushed appellant, Ms. Hughes testified that she saw appellant running towards her, so she took her heels off and "brace[d]" herself. Appellant started punching her and grabbed her by her hair. Ms. Hughes stated that she tried to defend herself. At this point, the railing broke, and both parties fell to the ground. Ms. Hughes's head hit the concrete, and appellant fell on top of her. Ms. Hughes felt somebody biting her eye, and immediately yelled to Mr. Davis to get appellant off of her. Finally, Mr. Davis and the police officer pulled appellant off of Ms. Hughes.

Ms. Hughes testified that the police officer refused to get appellant's information, so she and Mr. Davis went to their car and followed appellant to retrieve her license plate number. At this time, Mr. Davis called 911 and told the operator that appellant was attempting to flee the scene. After they retrieved her license plate number, they returned to the Stonefish Grille where they were met by an ambulance. Shortly thereafter, Ms. Hughes

and Mr. Davis went to the Bowie Health Center. Photographs of Ms. Hughes's injuries were submitted as evidence.

On cross-examination, the State's attorney objected to appellant's counsel's question, "And you've seen a punched woman before, haven't you?" The court sustained the objection. A bench conference occurred, at which time appellant's counsel specified her objection. She stated that "[Ms. Hughes] filed a protective order against Mr. Davis," and that the line of questioning relating to the protective order was relevant because "[i]t's questioning her veracity because they dropped the case. So she's filed complaints before, and then not followed through with them." The circuit court held that the questioning was related to a collateral matter, and sustained the State's objection.

Christopher Rothchild, also an employee at Drake's Place, also attended the hair show event. He also testified that appellant and Mr. Davis were engaged in a banter over the food Mr. Davis placed on the table. He felt spit and realized the situation was more serious than he initially thought. He saw appellant "head[]" towards Mr. Davis, and Mr. Davis "extend[ed] his arms." Appellant then came towards Mr. Rothchild. Mr. Rothchild grabbed Mr. Davis to prevent him from getting involved. He testified that "apparently behind me, [appellant] and [Ms. Hughes] beg[a]n to rumble. So I hear [Mr. Davis], she's biting me, and that's when . . . [appellant] was on top of [Ms. Hughes] . . . . And I see everyone pulling [appellant] up, and then we see [Ms. Hughes] with the blood . . . ." Mr. Rothchild held on to Mr. Davis, but Mr. Davis got away and started arguing with a police officer. After the altercation between appellant and Ms. Hughes ended, Mr. Rothchild testified that he saw Mr. Davis head towards appellant's car. When the window rolled

down, he saw appellant pull out a little vile, which he later realized was mace, and shoot it at Mr. Davis's face.

At the close of the State's case, appellant moved for a Judgment of Acquittal, which was denied.

Appellant then presented her case, which consisted of her own testimony. Appellant testified that she met Mr. Davis at Drake's place, and that he was attempting to date her. She denied congratulating Ms. Hughes on having a child. Appellant testified that Mr. Davis placed his food directly in front of her, and she asked him to move it. Mr. Davis ignored her, so appellant asked him again. According to appellant, Mr. Davis stated "no, I'm not moving my . . . mother fucking food, I'm not doing shit, and then he just continued." Appellant testified that instead of responding to Mr. Davis, she ignored him. They began to argue, and Mr. Davis got closer to her. Appellant stood up, raised her hand, and told him to "get out of my face[.]" According to appellant, Mr. Davis then spit in her face, and she "returned the spit[.]" Appellant testified that Mr. Davis then punched her in the face, and that she fell to the ground. She got up and, feeling like "there was more to come," took her shoes off in preparation. Ms. Hughes and Mr. Davis then jumped on appellant, and appellant bit Ms. Hughes.

Appellant further testified that after the parties were pulled apart, Mr. Davis grabbed appellant by the hair and dragged her across the concrete. Mr. Rothchild pulled Mr. Davis off of appellant. The police officer told appellant to leave, but she said her belongings were on the table. She saw Mr. Davis throw her phone down on the ground and stomp on it. As she walked to her car, Mr. Davis followed her and threatened her. Appellant saw Mr. Davis

kick her car and spit on it. Mr. Davis got in his vehicle and tried to hit the tail lights of appellant's car. Appellant finally retrieved her belongings, but her necklace was missing and her cell phone was broken. As she drove off, Mr. Davis and Ms. Hughes followed her. This eventually turned into a chase. She finally "lost them" and arrived at the "commissioner's office" to "file the assault charges on Mr. Davis." After filing charges, she went to the Southern Maryland Hospital to be seen for her injuries. Appellant testified that as a result of the altercation, she had bloody knees and a swollen face. Photos of her bloody knee, bloody left foot, and broken phone were submitted as evidence.

A few days later, after finding Mr. Davis's business card and realizing she had filed charges against Mr. Davis under an incorrect last name, she refiled the charges. She filed charges against Ms. Hughes as well, but only after Ms. Hughes had filed charges against appellant. According to appellant, she did not know Ms. Hughes's name before that point, so she could not file charges any earlier. At the conclusion of the case, appellant moved for another judgment of acquittal, which was also denied. The case was submitted to the jury, resulting in the conviction and sentence described at the outset of this opinion.

DISCUSSION

WAIVER

Parties' Contentions

Appellant contends that the circuit court erred in permitting the victim, Ms. Hughes, to remain in the courtroom during Jerome Davis's testimony, and, therefore, appellant's conviction must be reversed. We agree. Appellant argues that pursuant to Maryland Code (2008 Repl. Vol.), Crim. Proc. § 11-302, the victim's right to remain present in the

courtroom arises only after the victim testified. Here, however, Mr. Davis testified before Ms. Hughes. Appellant argues that Ms. Hughes was particularly subject to Mr. Davis's influence and likely to alter her testimony because she was engaged to Mr. Davis at the time of trial and had a child with him at the time of their fight with appellant. In addition, Ms. Hughes filed for a temporary protective order against Mr. Davis, in which Ms. Hughes stated that Mr. Davis punched her in her eye and stole her phone. Further, at the time of the altercation with appellant, Mr. Davis was on probation, and if he was deemed the aggressor in the altercation, it would have provided support for a subsequent finding that he violated his parole. Appellant argues that this issue was preserved because appellant objected in a timely fashion. Appellant also argues that even if the objection is deemed insufficient, this Court should exercise its discretion and review the claim as plain error.

The State counters that appellant's claim that the circuit court violated the sequestration rule was affirmatively waived and abandoned. The State argues that appellant abandoned his argument at trial by agreeing with the court that Ms. Hughes had a right to be present during Mr. Davis's testimony. The State argues that appellant cannot now offer a new theory of objection, namely that the application of the relevant statute undermined the application of the witness sequestration. Further, the State counters that appellant waived her argument because she failed to object at the time that Ms. Hughes was called to testify.

Analysis

In the present case, when Mr. Davis was called as the State's first witness, a bench conference occurred. During the bench conference, appellant's counsel objected to Ms.

Hughes's presence in the courtroom during Mr. Davis's testimony. At the conclusion of the following exchange, the circuit court overruled the objection that was based on a violation of the sequestration rule:

> [Appellant's Counsel]: I understand that the victim has a right to be here, we assume they were going to call the victim first, if they're not going to call the victim first, and she's going to be testifying, we would ask because she's also a witness, that the rule of witness apply to her.
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> [State's Attorney]: Well, Your Honor, you know the rules on witnesses what it says, the exception about the victim being here.
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> THE COURT: There certainly does.
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> [Appellant's Counsel]: I understand that, but because I've been doing this for the last two days, but I guess we'll roll with it.
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> THE COURT: Yeah, but the -- you know, the victim has a right to be here under the rules, so the legislature, until they change it or the rule committee changes it--
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> [Appellant's Counsel]: They have some work to do. Thank you.
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> THE COURT: Well, I (indiscernible) --
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> [Appellant's Counsel]: No, I agree, Your Honor.
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> THE COURT: Well, when you're with State, I'm sure you liked it.
>
> [Appellant's Counsel]: I always called my victim first but --
>
> THE COURT: Oh, okay.
>
> [Appellant's Counsel]: -- different strokes for different folks.
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> . . . .

THE COURT: Objection is overruled.

The State then proceeded with their case against appellant. After Mr. Davis testified, the State called Ms. Hughes to the stand. Appellant did not object at this time. However, we do not find appellant's failure to make a second objection to be legally significant because at this point during the trial, the damage had been done. Ms. Hughes had already heard the testimony of Mr. Davis. Moreover, because there was no sequestration order in place to begin with there was no need to object to the State calling Ms. Hughes to the stand. Counsel had already objected to Ms. Hughes being called to the stand out of order under the law.

In *White v. State*, 66 Md. App. 100 (1986), upon learning of the State's rebuttal expert, the defendant's counsel objected to the expert's testimony based on a violation of the sequestration order. *Id.* at 115. The objection was overruled, and the rebuttal expert remained in the courtroom. *Id.* Later, when the rebuttal expert testified, the defendant had not objected and no continuing objection was noted. *Id.* The defendant had a similar argument that because the "State's rebuttal expert was allowed to be present in the courtroom, during testimony, the sequestration order was violated and the witness should not have been allowed to testify." *Id.* This Court held that appellant failed to "preserve[] the sequestration issue for appeal because the objection was not renewed when [the rebuttal expert] was actually called and no continuing objection was noted originally." *Id. See* Rule 4-323 ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."); *see* Rule 8-131(a) (stating that we normally will not address an

issue "unless it plainly appears by the record to have been raised in or decided by the trial court"); *see also Wheeler v. State*, 88 Md. App. 512, 534 (1991) ("Considering the limited nature of appellant's objection to the victim remaining in the courtroom, and his failure to object to her being called as a rebuttal witness, we hold that he has failed to preserve an objection to her rebuttal testimony." (citations omitted)). The case at bar is distinguishable from the *White* case because there was no sequestration order in place in this case. This case is also distinguishable because Appellant's counsel did object to Mr. Davis being called before Ms. Hughes.

We do not hold that appellant's counsel's conduct of agreeing with the court, dropping the subject, and never raising it again was legally significant. Ordinarily if a sequestration order has been imposed, Appellant's counsel's conduct would indicate a withdrawal of the prior objection. *See Grandison v. State*, 305 Md. 685, 764-65 (1986), *cert. denied*, 479 U.S. 873 (1986) ("The right of appeal may be waived where there is acquiescence in the decision from which the appeal is taken or by otherwise taking a position inconsistent with the right to appeal. By dropping the subject and never again raising it, Grandison waived his right to appellate review of this issue." (internal quotation marks and citations omitted)).

The circumstances of the present case are distinguishable from cases where the trial court made its ruling and the defendant politely or passively acquiesced. *See Elliott v. State*, 185 Md. App. 692, 710-11 (2009) (rejecting the State's argument that "maintaining a courteous and professional dialogue with the court" is equivalent to acquiescence to the court's ruling, and holding that "although defense counsel thanked the court after it heard

argument on the State's use of its jury strikes, defense counsel's response was merely obedient to the court's ruling and obviously [was] not a withdrawal of the prior [Batson] objection." (alterations in original) (internal quotation marks omitted)). Rather, the record shows appellant acknowledged the circuit court's ruling that Ms. Hughes was entitled to remain in the court, but argued that the Legislature must address the issue. *Compare with Boyd v. Bowen*, 145 Md. App. 635, 665 (2002) ("[A] voluntary act of a party which is inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review." (internal quotation marks and citation omitted)); *Choate v. State*, 214 Md. App. 118, 130, *cert. denied*, 436 Md. 328 (2013) (declining to "exercise [] discretion to undertake plain error review" and explaining "[w]e are especially disinclined to take the extraordinary step of noticing plain error where, as here, the appellant affirmatively (as opposed to passively) waived his objection by expressing his satisfaction with the instructions as actually given"). Here counsel did not clearly state that he was acquiescing in the calling of Mr. Davis as a witness before Ms. Hughes testified. Furthermore, because the witness was not in violation of a sequestration order, there was no basis for defense counsel to object when she was called as a witness.

We hold that under the particular circumstances of the case, the circuit court's decision denying appellant's witness sequestration request was not harmless error. *See Taylor v. State*, 352 Md. 338, 346 (1998) ("[I]t is now well settled that the harmless error principle is applicable to a violation of the criminal procedure rules[.]") (citations omitted).

"In order to find an error harmless in a criminal case, we conduct an independent review of the record and must be able to declare beyond a reasonable doubt that the error

did not influence the verdict." *Stoddard v. State*, 423 Md. 420, 438 (2011) (citations omitted). The State, as beneficiary of the alleged error, must demonstrate "that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Frobouck v. State*, 212 Md. App. 262, 284 (2013), *cert. denied*, 434 Md. 313 (2013) (internal quotation marks and citation omitted).

The mandatory language of Md. Rule 5-615 in its initial sentence provides that "upon the request of a party made before testimony begins, the court *shall* order witnesses excluded so that they cannot hear the testimony of other witnesses." (Emphasis added).

The latter part of the rule applies to witnesses who have already testified, and does not contain the mandatory language of the first sentence. That part provides:

> The court *may* order the exclusion of a witness on its own initiative or upon the request of a party at any time. The court *may* continue the exclusion of a witness following the testimony of that witness if a party represents that the witness is likely to be recalled to give further testimony.

(Emphasis added). Consequently, while the exclusion of a witness prior to testifying is mandatory, after a witness testifies, exclusion is discretionary.

The Court of Appeals has stated that the general purpose of the sequestration of witnesses rule "has been to prevent . . . witnesses from being taught or prompted by each other's testimony". Additionally, the object of Maryland Rule 5-615 "is to prevent one prospective witness from being taught by hearing another's testimony; its application avoids an artificial harmony of all the testimony; it may also avoid the outright manufacture of testimony." *Tharp v. State*, 362 Md. 77, 95 (2000) (citations omitted). *See Edmonds v.*

State, 138 Md. App. 438, 448-49 (2001). The Rule further provides that certain witnesses cannot be excluded, including "a victim of a crime or a delinquent act . . . to the extent required by statute." Md. Rule 5-615(b)(5).

One of the statutes that Rule 5-615(b) cross-references is Section 11-302 of the Criminal Procedure Article of the Maryland Code (2001). That section provides, in relevant part, that "after initially testifying, a victim has the right to be present at the trial of the defendant[.]" *Id.* at § 11-302(c)(2) (emphasis added). Thus, while Ms. Hughes had the right to be present in the courtroom "after initially testifying," she did not have that right before she took the stand.

Based on the applicable statutes, it is clear that the circuit erred in permitting Ms. Hughes to remain in the courtroom during Mr. Davis's testimony, which was provided before she testified. Our analysis, however, does not conclude here. We next must determine whether Ms. Hughes altered her testimony after hearing Mr. Davis's testimony. Based on the record, we cannot rule that out as a possibility.

In the case at bar, because this case clearly turned on the credibility of the defendant and whether or not the jury believed her contention that she was not the aggressor, we cannot conclude that the refusal to sequester was harmless beyond a reasonable doubt. Neither Ms. Hughes's romantic involvement with Mr. Davis nor his recent abuse of her can be overlooked in determining whether Ms. Hughes's testimony, and ultimately the verdict, were inappropriately influenced.

Because we are not persuaded beyond a reasonable doubt that the circuit court's erroneous decision denying appellant's witness sequestration request had no influence upon the verdict, we hold that the error was not harmless.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED. THE CASE IS REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.