UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0191

September Term, 2016

VICTOR RAMON CHECCO-PENNA

v.

STATE OF MARYLAND

Wright,
Reed,
Friedman,

JJ.

Opinion by Wright, J.

Filed: February 13, 2017

By indictment filed in the Circuit Court for Worcester County on September 28, 2015, the State of Maryland charged appellant, Victor R. Checco-Pena, with two counts of second-degree rape, two counts of fourth-degree sexual offense, and one count of second-degree assault. Following a jury trial on February 11, 2016, Checco-Pena was convicted of one count of second-degree rape, one count of fourth-degree sexual offense, and second-degree assault. That same day, he was sentenced to a total of nine years' incarceration.

On February 24, 2016, Checco-Pena filed a motion for a new trial, arguing that the circuit court failed to give a proper *Allen*[1] charge after it received a note from the jury stating that they could "not reach a unanomous [sic] decision on any of the charges." In addition, Checco-Pena asserted that the jury verdict was inconsistent. Following a hearing on April 21, 2016, the circuit court denied Checco-Pena's motion, and this appeal followed.

Questions Presented

Checco-Pena asks:

1. Whether an instruction to a deadlocked jury of "Please continue to deliberate and try to reach a unanimous decision for now" constitutes an abuse of discretion?

2. Whether contradictory verdicts as to identical charges pertaining to two acts, virtually identical in nature and both turning on the credibility of the same witness, but slightly separated as to time and place, are inconsistent?

[1] *Allen v. United States*, 164 U.S. 492 (1896).

For the reasons that follow, we affirm the circuit court's judgments.

Facts

In the summer of 2015, the victim, a native of Taiwan, China,[2] was on a "working holiday" in Ocean City, Maryland. The victim was employed through an agency, which arranged for her to live in a three-bedroom house with seven other people, each from a different country.

At trial, the victim testified that in the early morning hours of July 31, 2015, Checco-Pena, who was one of her housemates, "held [her] down" and had sex with her twice – first on the living room sofa bed, and again in a nearby bathroom – despite her attempts to "get away." She further testified that she did not consent to his actions. A few hours later, at approximately 4:30 a.m., the victim relayed information about the incident to a friend, who reported it to the police. By 10:00 a.m., the victim moved out of the group home with the help of her friend.

Deputy First Class Michael Sand of the Worcester County Sheriff's Office and Detective Jessica Collins of the Berlin Police Department responded to the victim's friend's call. The victim, who was "visibly upset" and "crying," disclosed that she had nonconsensual sexual contact with one of her roommates. In addition, she provided the officers with the address of the house where the incident took place. Later that day, Det. Collins interviewed Checco-Pena at the Maryland Police State Barracks. Checco-Pena

[2] At trial, the victim sometimes testified in English, and at other times through a Chinese interpreter.

discussed the incident and admitted that the victim "said no" at certain times, but that he "kept going."

At about 3:30 p.m., the victim was treated at Atlantic General Hospital, where she received a sexual assault examination by Nettie Widgeon, a forensic nurse examiner, who was qualified as an expert without objection. During the head-to-toe physical examination, Nurse Widgeon observed "fresh" bright red tears to the victim's posterior fourchette, labia minor, and right hymen, which she explained are the three "most common sites for sexual assault injury." Although Nurse Widgeon acknowledged that tears could occur during consensual sex, she concluded that her findings were "abnormal" and "consistent with what [the victim] disclosed."

Checco-Pena testified that, at the time of the incident, he was a medical student from the Dominican Republic and enrolled in a student exchange program in the United States. He stated that prior to the incident in question, he and the victim were flirting, and when he tried to kiss the victim, she initially put her head down, but eventually kissed him back. Checco-Pena recalled that when he asked the victim if she wanted him to stop, she nodded her head, which he interpreted to mean that she was "allowing" him "to go on."

Additional facts will be included as they become relevant to our discussion, below.

Standard of Review

The denial of a motion for new trial is a matter within the sound discretion of the trial court. *See Washington v. State*, 424 Md. 632, 667 (2012) ("[t]he question [of] whether to grant a new trial is within the discretion of the trial court"). Thus, "[t]he

standard of review of the denial of a motion for new trial is abuse of discretion." *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012) (citing *Miller v. State*, 380 Md. 1, 92 (2004)).

"[A] claim that the verdict is against the weight of the evidence requires assessment of credibility and assignment of weight to evidence-a task for the trial judge." *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 60 (1992).

> "[I]t may be said that the breadth of a trial judge's discretion to grant or deny a new trial is not fixed or immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice."

Id. at 58-59. "Notably, '[a] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling.'" *Washington*, 424 Md. at 668 (quoting *Gray v. State*, 388 Md. 366, 383 (2005)).

Discussion

I. Jury Note

During the jury deliberation in this case, the jurors sent a note to the circuit court, stating: "We the jurors can not reach a unanomous [sic] decision on any of the charges." In response, the court instructed: "Please continue to deliberate and try to reach a unanimous decision for now." On appeal, Checco-Pena contends that the circuit court abused its discretion in not granting his motion for a new trial, arguing that the court's instruction improperly coerced the jury into reaching a unanimous decision, without

regard for each juror's duty to preserve his individual conscience and to use his best judgment.

The State responds, first, by arguing that Checco-Pena's claim is unpreserved. Alternatively, the State contends that even if preserved, Checco-Pena's claim fails on the merits. Because we agree that Checco-Pena did not preserve this claim, we need not reach the merits of his argument.[3]

In this case, after receiving the jury note at issue, the circuit court asked counsel to approach the bench, where the following ensued:

> THE COURT: . . . There's a note sent by the jury. I'm disposed to write on the note, please continue to deliberate in trying to reach a conclusion.
>
> Any objection to that?
>
> [DEFENSE COUNSEL]: I'd move for a mistrial.
>
> THE COURT: Well, how long have they been out, about - -
>
> THE CLERK: An hour and a half.
>
> THE COURT: An hour and a half.
>
> I'm going to write on this, and I'll show you what I've written. I have no idea how they are split.
>
> Penmanship was never my favorite class, and I hesitate to do this.
>
> (Whereupon the Court showed the note to both counsel.)

[3] Checco-Pena did not argue or address the issue of preservation in his brief, nor did he ask us to engage in plain error review. Neither in his brief nor at oral arguments does Chico-Penna properly address the non-preservation issue. *Garner v. State*, 183 Md. App. 122, 151-52 (2008). ("In that the appellant, strangely, does not even ask us to overlook non-preservation, this contention may qualify as an instance of non-preservation squared.")

[THE STATE]: Okay.

[DEFENSE COUNSEL]: Can we add one sentence, Your Honor? Can we just say, if you still are unable to, please let us know. I just don't want them to feel like they are being forced to make a decision.

THE COURT: I'll add just for now. Please continue in trying to deliberate in trying to reach a unanimous decision for now. Is that all right?

[THE STATE]: That's fine.

(Emphasis added).

Based on this record, we agree with the State that Checco-Pena's complaint about the instruction was waived because any error on the circuit court's part was invited. Checco-Pena asked for a modification to the proposed language, which he received, and he subsequently accepted the way in which the court phrased the modification. *See State v. Rich*, 415 Md. 567, 575 (2010) ("where a party invites the trial court to commit error, he cannot later cry foul on appeal") (citation omitted); *Smith v. State*, 218 Md. App. 689, 701-02 (2014) ("our courts have applied the invited error doctrine correctly where the alleged error arose from jury instructions the appellant requested") (citations omitted). Furthermore, when the circuit court explicitly asked if the proposed instruction was "all right," the State responded affirmatively, while Checco-Pena acquiesced in the court's action and lodged no objection. Accordingly, Checco-Pena waived any complaint to the language of the instruction and we need not address the merits of this issue on appeal. *Rich*, 415 Md. at 580 (explaining that unlike forfeiture of a right, waiver – or the intentional relinquishment or abandonment of a known right – is not reviewable for plain error); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue

unless it plainly appears by the record to have been raised in or decided by the trial court").

In sum, as we have previously made clear, "[i]f the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable." *Olson v. State*, 208 Md. App. 309, 365 (2012) (citation omitted). Such is the case here.

That Checco-Pena raised this claim in a motion for a new trial does not warrant a different conclusion. *Torres v. State*, 95 Md. App. 126, 134 (1993) ("A post-trial motion cannot be permitted to serve as a device by which a defendant may avoid the sanction for nonpreservation."); *accord Washington v. State*, 191 Md. App. 48, 120-21 n.22 (2010) ("Raising trial errors for the first time in a motion for a new trial is not a substitute for preservation."). The circuit court did not abuse its discretion in denying Checco-Pena's motion.

II. Consistency of Verdicts

Next, Checco-Pena argues that the jury's verdicts were inconsistent because the jurors reached a different result on "identical charges pertaining to two acts, virtually identical in nature and both turning on the credibility of the same witness, but slightly separated as to time and place." According to Checco-Pena, the jurors merely "compromise[d]" after the circuit court's instruction to try and "reach a unanimous decision for now," and reached a conclusion that "[d]ef[ied] logic." In response, the State asserts that this issue is waived, and if not, that the jury's verdicts were both factually and legally consistent. We agree with the State.

The Court of Appeals has previously made clear that in order "to preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position before the verdicts become final and the trial court discharges the jury." *Givens v. State*, 449 Md. 433, 472-73 (2016). "Under Maryland case law, a jury's verdict is final when the trial court accepts the verdict after the jury has hearkened to the verdict and/or been polled." *Id.* at 478 (citation omitted). When the jury rendered its verdict in this case, Checco-Pena lodged no objection to it at all. Defense counsel asked the circuit court to poll the jury, but he raised no further issues when the court asked whether there was "anything further before [it] excuse[d] the jury." Therefore, Checco-Pena failed to preserve this issue for our review.[4]

Even if Checco-Pena's claim had been preserved, his argument fails on the merits. In Maryland, factually inconsistent jury verdicts are allowed, but legally inconsistent verdicts are not. *McNeal v. State*, 426 Md. 455, 458 (2012) ("[Factually inconsistent] verdicts are illogical, but not illegal.") (Citation omitted). "Factually inconsistent verdicts are those where the charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge." *Id.* (citation and footnote omitted). By contrast, "[a] legally inconsistent verdict is one where the jury acts contrary to the instructions of the trial judge with regard to the proper application of the law." *Id.* (citation omitted). Such a verdict occurs when "a defendant

[4] As we explained in the previous section, that Checco-Pena raised this claim in a motion for a new trial does not retroactively preserve his argument.

is convicted of one charge, but acquitted of another charge that is an essential element of the first charge[.]" *Id.* (citation and footnote omitted). On appeal, "[w]e review *de novo* the question of whether verdicts are legally inconsistent." *Teixeira v. State*, 213 Md. App. 664, 668 (2013).

In this case, the charges at issue represented two series of events – one that transpired in the living room and the second in the bathroom. The first charge of second-degree rape and fourth-degree sexual offense, of which Checco-Pena was acquitted, were not essential elements of the other separate and distinct second-degree rape, fourth-degree sexual offense, and second-degree assault charges, of which he was convicted. Thus, the only conclusion that can be gleaned from the acquittal of one set of charges was that the State failed to prove those offenses beyond a reasonable doubt. *See Gibson v. State*, 328 Md. 687, 695 (1992) (stating that a defendant's "acquittal does not necessarily prove his innocence; rather, it reflects the State's inability to prove its case beyond a reasonable doubt") (citations omitted). The jury was entirely free to believe that the State proved beyond a reasonable doubt one series of events but not the other, that the victim consented to one of the two sexual encounters, or that she withdrew her consent. *See, e.g., State v. Baby*, 404 Md. 220, 260 (2008) (holding that "a woman may withdraw consent for vaginal intercourse after penetration has occurred and that, after consent has been withdrawn, the continuation of vaginal intercourse by force or the threat of force may constitute rape"). Therefore, assuming that this issue had been preserved, and assuming that any inconsistency existed, such inconsistency was factual and would not entitle Checco-Pena to relief. *See McNeal*, 426 Md. at 458.

For all of the foregoing reasons, we affirm the circuit court's judgments.

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