UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1279

September Term, 2016

LAMONT KENDALL AYERS

v.

STATE OF MARYLAND

Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: May 8, 2017

Appellant, Lamont Kendall Ayers, was convicted by a jury, in the Circuit Court for Montgomery County (McGann, J.), of theft of a motor vehicle and theft over $1,000. Appellant was sentenced to ten years' incarceration for theft over $1,000, to be served consecutively with appellant's sentence in another case.[1] Appellant filed the instant appeal in which he asks our review of the following questions, which we rephrase:

> 1. Did the trial court err by not conducting an on-the-record inquiry of appellant's waiver of his right to testify?
>
> 2. Did the trial court err in omitting the element of "physical taking" for the crime of theft of a motor vehicle from the jury instructions?

FACTS AND LEGAL PROCEEDINGS

Background

Raci Say, a resident of Montgomery County, testified that, on the night of October 1, 2015, she parked her car, a Lexus 350, but when she looked for it the next morning, it was no longer there. Ms. Say did not know appellant or Marguerite Thomspon and had not given either permission to use her car. Montgomery County Police Officer Steve Maiko was driving his patrol vehicle on Rockville Pike on October 7, 2015, at approximately 12:30 a.m., when he saw a Lexus automobile being driven by Marguerite Thompson. Appellant was in the front passenger seat. Officer Maiko testified that "both occupants were watching me very closely to see where I was headed." The Lexus changed lanes and, as a result, a truck was between it and Officer Maiko's patrol car. The Lexus then made a

[1] The trial court imposed a five-year sentence for theft of a motor vehicle, but then merged it with the sentence for theft over $1,000.

U-turn and Officer Maiko was unable to turn his vehicle to follow it until the next exit because of the truck that was now between the Lexus and Officer Maiko's car. Officer Maiko entered the registration plate number of the Lexus into the mobile computer in his patrol car. The computer indicated that the Lexus had been reported stolen. Officer Maiko then called Police Dispatch and requested confirmation. Officer Maiko caught up to the Lexus when he saw that it had pulled into a gas station. It was stopped next to a set of pumps and appellant was standing outside of the car. Officer Maiko pulled up about 20 yards away. The highway was right behind him and, although it was nighttime, cars were passing by. Officer Maiko testified that he could not remember if music was emanating from the Lexus or if there were other cars in the gas station. When appellant proceeded to get back into the Lexus, Officer Maiko, who was standing next to his own vehicle, ordered him to stop, but appellant nevertheless proceeded to get into the Lexus. Officer Maiko testified that he drew his gun when he asked appellant to stop; however, he acknowledged that his police report did not reflect that he had. Officer Maiko testified that, from where he was standing, he could see appellant "motioning for the driver to leave the scene." The Lexus drove away "at a high rate of speed." At that point, Police Dispatch responded to Officer Maiko's inquiry and confirmed that the Lexus had been reported stolen.

Officer Maiko followed the Lexus in his patrol car and a chase ensued across highways and local roads for five or six miles. Eventually, the Lexus reached a sharp turn and Thompson lost control of the vehicle, which resulted in the car striking a guard rail on its passenger side. According to Officer Maiko, the vehicle was traveling over 120 miles

per hour. Both appellant and Thompson had "fled" by the time Officer Maiko reached the abandoned vehicle. Officer Maiko testified that he eventually caught appellant at approximately "200 yards west on the opposite side of the roadway." However, in his report, Officer Malko indicated that appellant was apprehended a "short" distance away and that he was apprehended without incident.

Ms. Say testified that her vehicle was twelve years old and that she did not attempt to operate it or have it repaired after it was returned to her because "it was completely damaged," "crushed" and "destroyed." She had "no idea what it was worth" at the time it was stolen, but her automobile insurance company paid her $4,000. Officer Maiko testified that he did not believe the car was seriously damaged and noted that, despite its high rate of speed at the time of the crash, it only suffered "minor dents."

Trial

After the conclusion of the State's case, the defense moved for judgment of acquittal, which was denied. The following colloquy ensued:

> THE COURT: Are you going to call any witnesses?
>
> [DEFENSE COUNSEL]: I do not expect the defendant to testify. We have no other witnesses.
>
> THE COURT: Okay, when you say, you don't expect, you are the only guy that would know.
>
> [DEFENSE COUNSEL]: Huh?
>
> THE COURT: Are you saying he's not going to testify?
>
> [DEFENSE COUNSEL]: I don't, I don't expect him to. I think there were some

things—

THE COURT: Well, do you have any other witnesses?

[DEFENSE COUNSEL]: No, no.

THE COURT: Well, this would be the moment of truth, though.

[DEFENSE COUNSEL]: Yes, yes, I just didn't ask him before I walked up here.

THE COURT: Oh.

[DEFENSE COUNSEL]: But, I don't think he's going to testify.

THE COURT: Do you want to ask him with the husher on or not?

[DEFENSE COUNSEL]: Sure.

THE COURT: Because what I will do is I will say Defense and then you can either say rest or call him. Now, it's 12:15, do you want to recess and come back at 1:30 and make the call?

[DEFENSE COUNSEL]: I would prefer that, give me a few minutes to talk to him.

THE COURT: That way you can talk to him in private without everybody staring at him.

[PROSECUTOR]: No objection.

THE COURT: [Assistant State's Attorney], like glaring at him.

[PROSECUTOR]: This intimidating mug of mine.

THE COURT: Yes, tightening up his tie, like a noose. That's the way you always do it, isn't it?

[PROSECUTOR]: It is, Your Honor, you know me well.

THE COURT: All right, and you will talk to Callie [THE JUDGE'S CLERK] about any instructions or verdict sheet and that kind of thing.

[PROSECUTOR]: Yes, Your Honor.

[DEFENSE COUNSEL]: Yes.

(Bench conference concluded.)

After the luncheon recess, the Court ordered that they go back on the record, at which time the Court and counsel engaged in the following colloquy:

> [DEFENSE COUNSEL]: Thank you, your Honor. Your Honor, we are going to roll out on the presumption of innocence.
>
> THE COURT: All right, so are you resting?
>
> [DEFENSE COUNSEL]: Yes.

The court heard and denied counsel's renewed motion for judgment of acquittal. The court then proceeded to propound jury instructions.

DISCUSSION

I.

Appellant contends that the trial court erred in failing to conduct an on-the-record examination of appellant's waiver of his right to testify in order to determine that his waiver was knowing and voluntary. Appellant cites *Stevens v. State*, 232 Md. 33 (1963), which held that, when an accused is represented by counsel, there is a presumption that he has been informed of his rights and voluntarily waives those rights when he testifies on his own behalf. However, appellant asserts that, "*Stevens* is no longer good law" and that this Court should not apply its legal principles to the instant case. Specifically, appellant looks to case law after *Stevens* and notes that "[n]one of those cases . . . involved a silent record . . . the

defendant was given some on-the-record information—by either his attorney or the court—about his right to testify and/or to remain silent." Appellant then concludes that, "[t]he oft-repeated rule in Maryland . . . that the trial court is not required to inform a represented defendant of his right to testify[] is based on a case that is more than fifty years old, . . . that did not involve a great deal of analysis and that failed to mention, much less to reconcile, its holding with the Supreme Court's pronouncements in *Johnson* [*v. Zerbst*, 304 U.S. 458 (1938).]"

The State responds that recent Maryland case law, *i.e.*, *Savoy v. State*, 218 Md. App. 130 (2014) and case law cited by appellant, do not indicate "that *Stevens* is not good law or should be revisited." Citing *Savoy*, the State asserts that, in reviewing the waiver of the right to testify, the "court presumes that the advice took place and nothing requires that it be put on the record."

The right to testify is enshrined in the United States Constitution. *Tilghman v. State*, 117 Md. App. 542, 553 (1997) (citing *Rock v. Arkansas*, 483 U.S. 44, 51–53 (1987) ("The Fifth, Sixth and Fourteenth Amendments to the United States Constitution guarantee the accused, in a criminal case, the right to testify on his own behalf."). Furthermore, "[t]he right to testify is 'a necessary corollary to the Fifth Amendment's guarantee against compelled testimony.'" *Id.* (quoting *Rock*, 483 U.S. at 52).

In *Savoy, supra*, we analyzed an accused's right to testify and the court's role when an accused waives this right. The following analysis is instructive:

The defendant's right to testify is a personal right which may be waived only by the

> defendant, and not by counsel. Courts around the country differ in the manner in which the defendant's right is protected . . . .
>
> In Maryland, when a defendant is represented by counsel, there is no obligation on the part of the court to advise the defendant of the right to testify. Ordinarily, we recognize a presumption, premised on the permitted inference that an attorney, as an officer of the court, follows the law and performs his or her duties [and] that a represented defendant has been told by counsel of his or her constitutional rights. Moreover, even though the right to testify is personal to the defendant, and must be waived by the defendant personally, the trial court may assume that counsel has advised the defendant about that right and the correlative right to remain silent and, if the defendant does not testify, that the defendant has effectively waived the right to do so.
>
> The law is different as to self-represented defendants. In that case, in Maryland, the trial court must advise the defendant of the constitutional right to testify and to remain silent to enable the defendant to make an informed choice as to whether to testify or to waive the right to do so.

218 Md. App. at 148–49 (citations omitted).

However, we further noted, in *Savoy*, that "[t]here are times . . . when a court has a duty to act, even when a defendant is represented by counsel." *Id.* at 149. Citing *Tilghman, supra,* we examined several such cases: *Hamilton v. State*, 79 Md. App. 140, 150–51 (1989) (holding that the mentally limited defendant failed to grasp that no guilt could be inferred by his lack of testimony and, therefore, the court was required to "take some further action to assure itself that the defendant was properly advised and does understand the nature and consequences" of his waiver); *Gilliam v. State*, 320 Md. 637, 656 (1990) (rejecting the notion that the ambiguous statement, *i.e.* "nor will the court find you guilty if you elect to remain silent," required reversal when there was no evidence that the statement impacted the accused's decision and when there was "ample" evidence that he

had been previously advised concerning his right to testify); *Oken v. State*, 327 Md. 628, 640–42 (1992) (holding that there was no indication that a trial court's gratuitous, albeit incorrect, advice to a defendant as to his right to testify actually influenced his decision and, therefore, could not be convinced that the defendant "did not knowingly, intelligently or voluntarily" waive his right); *Thanos v. State*, 300 Md. 77, 91–92 (1993) (holding that "an ambiguity in an on-the-record colloquy between the defendant and his counsel concerning the right to testify will not necessarily undermine a knowing and intelligent waiver of that right").

In *Tilghman*, we concluded that

> the presumption of proper advice by counsel, which encompasses a presumption that the defendant has been informed correctly about his right to testify, will only be overcome, and a duty on the part of the trial court to take steps to make certain that the defendant is correctly advised of his rights will only arise, *if it becomes clear to the court* that the defendant does not understand the constitutional right that he is deciding to exercise or to waive. The defendant's state of mind alone does not obligate the trial court to intervene. Rather, the court must be placed on *clear notice* that the represented defendant does not understand his rights before such a duty will arise.

117 Md. App. at 561 (Emphasis supplied).

In analyzing when a court is "on notice," we reasoned in *Tilghman* that, when "words and conduct of the defendant evidenc[e] confusion about his testimonial rights," the court is "on notice that action must be taken to avert a constitutional violation." *Id.* at 563 (citing *Hamilton, supra*). Furthermore, "[t]here is logic to this, as a defendant who does not understand what he has been told will usually exhibit outward signs of confusion, as occurred in *Hamilton*, or will indicate that he does not understand the advice that he has

been given." *Id.*

However, we also reiterated that

> [w]here the defendant is represented by counsel and it is not evident that a constitutional violation is imminent, the court should not be made to undertake an inquiry into the defendant's understanding of his risk of impeachment that might result in judicial participation in trial strategy and intrusion by the court into the relationship between attorney and client.

Id.

In the instant case, appellant does not assert that the court was on "clear notice," *i.e.*, there was evidence of such confusion as to the understanding, *vel non*, of his waiver of the right to testify as to precipitate an imminent constitutional violation. Rather, appellant focuses his appellate argument on changing Maryland legal precedent to require an on-the-record inquiry by the court.

As the State notes in its appellate brief, when certain constitutional rights are waived, they do require on-the-record examination by the court or another party. *See e.g.*, MD. RULE 4–242(c) Plea of Guilty ("The court may not accept a plea of guilty, including a conditional plea of guilty until, after an examination of the defendant on the record in open court conducted by the court . . . ."); MD. RULE 4–246(b) Waiver of Jury Trial ("The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court . . . ."); MD. RULE 4–215(b)[2] Waiver of Counsel ("If a defendant who is not represented by counsel indicates a desire to waive counsel, the court

[2] Amended by 2017 MARYLAND COURT ORDER 0001 (C.O. 0001).

may not accept the waiver until after an examination of the defendant on the record conducted by the court . . . .").

However, in Maryland, the law does not require an on-the-record inquiry by the court to assess a defendant's waiver of the right to testify, absent any indicia of confusion that would put the court on "clear notice." *Tilghman*, *supra.* As appellant has failed to provide any evidence that such confusion was extant in his case, we hold that there was no error when the trial court did not conduct an on-the-record inquiry into appellant's understanding of his waiver of the right to testify.

Furthermore, appellant has failed to persuade us as to why *Stevens*, *supra* and its progeny should be overturned. The principle of *stare decisis*

> is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

Perry v. State, 357 Md. 37, 96, (1999) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992)).

"The tests for departing from *stare decisis* are extremely narrow in Maryland," *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 64 (2010), and the Court of Appeals has recognized two instances when *stare decisis* may be overturned:

> First, this Court may strike down a decision that is, 'clearly wrong and contrary to established principles.' Further, 'previous decisions of this court should not be disturbed . . . unless it is plainly seen that a glaring injustice has been done or some egregious blunder committed.'
>
> Second, precedent may be overruled when there is a showing that the precedent has been superseded by significant changes in the law or facts. *Harrison v. Montgomery*

> *County Bd. of Educ.*, 295 Md. 442, 459 (1983) (allowing departure from *stare decisis* when there are 'changed conditions or increased knowledge that the rule has become so unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people').

(Some citations omitted).

Appellant has failed to explicate how either of these two instances are applicable in the case *sub judice*. Appellant dedicates three and one half pages of his appellate brief to analyzing differences in the Maryland law from other jurisdictions, but he fails to argue why the current Maryland law is "clearly wrong and contrary to established principles" so as to be "plainly seen" as a "glaring injustice" or an "egregious blunder" or why "the precedent has been superseded by significant changes in the law of facts" so that it has become a "vestige of the past, no longer suitable to our people." *DRD Pool Serv., supra.*

Finally, appellant argues that *Stevens, supra*, failed to "reconcile" its holding with Supreme Court decision, *Johnson v. Zerbst, supra*. *Johnson*, however, concerns the waiver of the right to counsel. Appellant incorrectly conflates the "knowing and intelligent" waiver of the right to counsel, in *Johnson*, with the waiver of the right to testify in the instant case.

II.

Preservation

Although the State does not raise this issue, appellant states, in his appellate brief, that his trial counsel failed to contemporaneously object to the jury instruction that appellant now claims is erroneous on appeal. Maryland Rule 2–520(e)[3] requires a party to

[3] MD. RULE 2–520(e). Objections. No party may assign as error the giving or the failure to

make a prompt, on-the-record objection to a jury instruction in order to preserve it for review.

> The purpose of the rule is to enable the trial court to correct any inadvertent error or omission in the instructions, as well as to limit the review on appeal to those errors which are brought to the trial Court's attention. Generally, objections under this rule must be precise because the trial judge must know the exact nature and grounds of the objection to correct the instructions. However, counsel need not make a precise objection after the instructions are read to the jury when the ground for objection is apparent from the record and the circumstances, . . . such that a renewal of the objection after the court instructs the jury would be futile or useless.

Houghton v. Forrest, 183 Md. App. 15, 31 (2008) (citations omitted) (internal quotation marks omitted), *aff'd in part, vacated in part on other grounds*, 412 Md. 578 (2010).

In the instant case, appellant provides no argument that there was an objection, but instead contends that a precise objection was not necessary. Because appellant concedes that no objection was made at the time of the jury instruction, his argument regarding the failure of counsel to object to the jury instruction has not been preserved for our review.

Plain Error Review

Despite appellant's lack of preservation, he requests that this Court review the issue for plain error. Specifically, appellant contends that the absence of instruction to the jury concerning the "physical taking" of the vehicle constituted reversible error as it concerned a fundamental element of the convicted crime, *i.e.*, theft of a motor vehicle.

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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.

The State, on the other hand, asserts that "there was no error, much less plain error" because the circuit court read the appropriate instruction for a charge under Md. Code Ann., Crim. Law (C.L.) § 7–105, theft of a motor vehicle. Specifically, the State notes that "physical taking" is not a mandatory element of theft of a motor vehicle and that it is only required to prove unauthorized use of a vehicle to obtain a conviction under the statute. Finally, the State asserts that, if the trial court did err, it is not reversible error because appellant was convicted and sentenced under C.L. § 7–104(g)(1)(i) for theft of property with a value of at least $1,000, but less than $10,000, with which the court merged his conviction for theft of a motor vehicle, the lesser included offense. The State maintains that plain error review concerns "fundamental errors" that only affect the "outcome of the proceeding" and, therefore, is inappropriate for review of a lesser included offense which "had no effect on the outcome" of the proceeding.

In considering when this Court's exercise of plain error review is appropriate, we find our reasoning in *Kelly v. State*, 195 Md. App. 403 (2010) instructive:

> Plain error is error which vitally affects a defendant's right to a fair and impartial trial. Appellate courts will exercise their discretion to review an unpreserved error under the plain error doctrine only when the unobjected to error is compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial. Appellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.
>
> * * *
>
> Plain-error review—involves four steps, or prongs. First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third,

> the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [lower] court proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate] court . . . has the discretion to remember the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

195 Md. App. at 431–32 (citations omitted) (internal quotation marks omitted).

"[T]he main purpose of jury instructions is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations and to help the jury arrive at a correct verdict." *Gen. v. State*, 367 Md. 475, 485 (2002). "The court's instructions should fairly and adequately protect an accused's rights by covering the controlling issues of the case." *Robertson v. State*, 112 Md. App. 366, 385 (1996).

> The premise for such appellate action is that a jury is able to follow the court's instructions when articulated fairly and impartially. It follows, therefore, that when the instructions are lacking in some vital detail or convey some prejudicial or confusing message, however inadvertently, the ability of the jury to discharge its duty of returning a true verdict based on the evidence is impaired.

State v. Brady, 393 Md. 502, 507 (2006) (quoting *State v. Hutchinson*, 287 Md. 198, 204 (1980)).

C.L. § 7–105 governs the crime of theft of a motor vehicle and subpart (b) provides that, "[a] person may not knowingly and willfully take a motor vehicle out of the owner's lawful custody, control or use without the owner's consent."

In the instant case, the court provided the following instruction to the jury:

> Count 1, and I will read you the elements, which is the theft of the motor vehicle, which is the Lexus. In order for the defendant to be found guilty of the crime of auto theft, the State must prove that the defendant did, and there is [sic] three elements,

> possess a motor vehicle, either alone or with others. Two, he must be knowing, knowing it to be stolen or believing that it was probably stolen, and three, that the defendant had the purpose of depriving the owner of the property. All three of those elements must be proven to you by beyond a reasonable doubt. The elements are like the ingredients of a, say, a cake. They all must exist.

In *In re Landon G*, 214 Md. App. 483 (2013), citing Judge Moylan's summary of the crime of theft of a motor vehicle[4] under the consolidated theft statute, we held that theft of a motor vehicle "proscribes the unauthorized use of a motor vehicle" and that "the State need not prove that appellant was involved in the original taking of the vehicle out of the custody or use of its owner." *Landon*, 214 Md. App. at 509. Accordingly, to obtain a conviction for theft of a motor vehicle, the State is not required to prove that an accused has physically taken the vehicle; *i.e.*, proving unauthorized use beyond a reasonable doubt is sufficient.

Although appellant focuses his plain error argument on the absence of the element of "physical taking" in the instruction to the jury, we note that the jury instruction propounded at appellant's trial mirrors the pattern jury instruction for C.L. § 7–104(c) "Theft—Possession of Stolen Property."[5] In May 2016, the Maryland Bar Association

[4] As cited in *Landon*, 214 Md. App. at 447: JUDGE CHARLES E. MOYLAN, JR., SECTION 342A—UNAUTHORIZED USE OF A MOTOR VEHICLE, IN MARYLAND'S CONSOLIDATED THEFT LAW AND UNAUTHORIZED USE, Ch. 16 (MICPEL 2001).

[5] MPJI-Cr 4:32.2 § 7-104(C) (2nd ed., 2016 supp.). THEFT—POSSESSION OF STOLEN PROPERTY: "The defendant is charged with the crime of theft. In order to convict the defendant of theft, the State must prove: (1) that the defendant possessed stolen property; (2) that the defendant knew that the property was stolen or believed that it probably was stolen; [and] (3) that the defendant [had the purpose of depriving the owner of the property] [willfully or knowingly abandoned, used, or concealed the property in such a manner as to

Standing Committee published a supplement to the second edition of the Maryland Criminal Pattern Jury Instructions, adding section 4:32.4, which created a new instruction for the crime of theft of a motor vehicle.[6] MJPI-Cr 432.4 provides the following:

> The defendant is charged with the crime of theft of a motor vehicle. In order to convict the defendant of motor vehicle theft, the State must prove:
>
> (1) that the defendant knowingly and willfully took a motor vehicle; and
>
> (2) that the defendant took the motor vehicle from the owner's custody, control, or use without the owner's consent.
>
> 'Owner' means a person, other than the defendant, who has a lawful interest in or is in lawful possession of a motor vehicle by consent or chain of consent of the title owner.

In the instant case, despite the absence of the word "use" in the trial court's instruction, it is apparent that the elements of theft of a motor vehicle were covered by the instruction given. Although we are mindful that there is a strong preference among Maryland's appellate courts regarding the use of pattern jury instructions, *Green v. State*, 127 Md. App. 758, 771 (1999), it is not mandatory that they be used verbatim. What is required of the trial court is to fairly and impartially instruct the jurors so that their duty to

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deprive the owner of the property or knew that the abandonment, use, or concealment probably would deprive the owner of the property]; [and] [(4) the value of the property was [over $1,000] [over $10,000] [over $100,000]]; [and] [(5) the defendant did not act under a good faith claim of right to the property or with an honest belief that the defendant had a right to obtain or exert control over the property.]

[6] MSBA., INC., https://msba.inreachce.com/Details?resultsPage=1&sortBy=&q=criminal+patt&searchType=1&groupId=57bdd910-2bc9-4b27-9028-69b851365b40 (last visited Apr. 5, 2017).

return a "true verdict based on the evidence" is not impaired. *Brady*, *supra*. There is no indication that the jury was so impaired. It would be nonsensical to find plain error where the jury was required to find unauthorized use and instructed about "depriving the owner of the property." Patently, unauthorized use of a vehicle deprives the owner of the "use" of his or her property. Furthermore, the other elements required for conviction under C.L. § 7–105, "knowingly and willfully take a motor vehicle," were appropriately covered in the instructions with explicit reference to "knowing and willful" and then an instruction for "possession." Accordingly, we decline to exercise our discretion to review for plain error.

Because our decision does not encompass the State's assertion that plain error review is inappropriate for a lesser included offense that does not affect the outcome of the proceedings, we also decline to engage in that analysis.

CONCLUSION

We hold that the court did not err by not conducting an on-the-record inquiry concerning appellant's waiver of the right to testify, absent any indicia of confusion that would put the court on "clear notice." We also hold that appellant did not preserve the issue of the jury instruction for our review, but that, if preserved, there is no error.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.