

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0129

September Term, 2014

DEANDRE WILSON

v.

STATE OF MARYLAND

Wright,
Hotten,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: May 21, 2015

*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.

Following a trial in the Circuit Court for Harford County, a jury convicted appellant, Deandre Wilson, of first-degree burglary and two counts of first-degree rape. The trial court sentenced him to life in prison, suspending all but 50 years.¹ Thereafter, appellant timely noted this appeal in which he presents the following question for our consideration:

Was it error to allow into evidence laboratory reports by missing witnesses and opinions based upon their work?

For the reasons that follow, we shall affirm the judgments of the trial court.

FACTUAL and PROCEDURAL BACKGROUND

In the early morning hours of July 14, 2004, Kelly G.² fell asleep on her living room couch while waiting for her boyfriend to return home from his late shift at work; because she was expecting her boyfriend, she had left the front door to her house unlocked. Ms. G. was awakened at approximately 2:00 a.m. to find a tall black man she did not know on top of her. She screamed, “hey, what are you doing?” The man apologized, stating that he had gone to the wrong house. Nonetheless, he then covered her mouth and nose so that she could not breathe and pulled her underwear down. Although Ms. G. fought him, the man was able to penetrate her vagina with his penis. When he finished, he left the house, telling Ms. G. that if she alerted the police, he would kill her.

¹The life sentence was imposed on one of the rape charges. The other convictions were merged therein for sentencing purposes.

²Because Ms. G. was the victim of a sexual assault, we will not identify her by surname, to protect her privacy.

After the incident, Ms. G. called her boyfriend, who accompanied her to the Sheriff's Office and then to the hospital, where nurse Phyllis Harden performed a "SAFE," a sexual assault forensic examination. The examination included the taking of vaginal swabs from Ms. G., which were provided to the Maryland State Police.

Damon Burman of the Maryland State Police performed an analysis of the bodily fluids on Ms. G.'s vaginal swabs. He wrote a report, which indicated a positive finding for semen on the vaginal swabs.³

Thereafter, Mr. Burman packed the swabs according to State Police policies and outsourced them to Bode Laboratory for DNA analysis.⁴ In 2004 or 2005, Bode Laboratory analyzed the swabs and created a written report providing the DNA profiles of Ms. G.'s known standard and the unknown DNA from the semen obtained from Ms. G.'s vaginal swabs.

In 2010, Detective Brian Potts, a member of the Harford County Sheriff's Office, developed appellant as a suspect in Ms. G.'s 2004 rape. He obtained a search and seizure

³DNA samples taken from Ms. G.'s boyfriend excluded him as a contributor of the semen.

⁴The Maryland State Police Crime Lab receives federal grant money to outsource cases for DNA analysis to Bode Laboratory, an accredited lab, to assist the Crime Lab when it experiences a backlog.

warrant for appellant's DNA, which was obtained in New York, where appellant resided at the time.⁵

Maryland State Police forensic scientist Amy Kelly, accepted by the trial court as an expert in forensic biology, testified that in 2012 she was tasked with creating a DNA profile from the sample obtained from appellant. By that time, she said, Damon Burman no longer worked for the State Police, having left in good standing after receiving his law degree and gone to Afghanistan to perform DNA analyses there. In Mr. Burman's absence, Ms. Kelly reviewed his notes and report, which indicated a positive finding for semen on the vaginal swabs obtained from Ms. G. in 2004. She also reviewed the Bode Laboratory DNA analysis report. Through Ms. Kelly, Mr. Burman's written report was admitted into evidence as State's Exhibit 9, and the Bode Laboratory report was admitted into evidence as State's Exhibit 10, with no objection from the defense.

After creating a DNA profile from appellant's sample, Ms. Kelly compared appellant's profile to the unknown DNA profile developed by Bode Laboratory in 2004 or 2005. She concluded, to a reasonable degree of scientific certainty, that the previously unknown DNA profile from the semen on Ms. G.'s vaginal swabs was consistent with that

⁵During an interview with Potts, appellant stated that in 2004 he had lived in the neighborhood in which Ms. G. had been raped and that he had had consensual sexual relations with several women in the area. He denied knowing Ms. G. and said he had no memory of having had sex with her, although he did recall a consensual sexual encounter with a woman that took place on a couch.

of appellant.⁶ Ms. Kelly's written report was admitted into evidence as State's Exhibit 12 with no objection.

Appellant did not present any evidence.

Additional relevant facts will be set forth as necessary.

DISCUSSION

As his only assignment of error, appellant contends that the trial court erred when it admitted into evidence Mr. Burman's written report and the Bode Laboratory written report in the absence of testimony by Mr. Burman and a Bode Laboratory witness who would have been subject to cross-examination. In addition, he contends that Ms. Kelly's written report and verbal opinion indicating her conclusions were erroneously admitted because they were based upon the inadmissible Burman and Bode reports. Conceding that he failed to object to the admission of any of the aforementioned evidence, he nonetheless asks this Court to review the matter for plain error.

The State first asserts that plain error review is not warranted because appellant waived any claim of error by indicating affirmatively that he had no objection to the

⁶Ms. Kelly stated that the probability that the DNA profile obtained from Ms. G.'s vaginal swabs was "approximately 6.3 trillion times more likely if it originated from Kelly G[.] and Deandre Wilson than from Kelly G[.] and an unknown individual in the African-American population" and "7.3 trillion time more likely[] if it originated from Kelly G[.] and Deandre Wilson than if it originated from Kelly G[.] and an unknown individual in the Caucasian po[p]ulation." She added that the current population of the world is approximately seven billion.

admission of the contested evidence. Should we undertake a plain error review of the issue appellant presents, the State goes on to argue that the case relied upon by appellant, *Norton v. State*, 217 Md. App. 388, *cert. granted*, 440 Md. 114 (2014), was decided after the trial in this matter and therefore cannot support a finding of plain error under the law as it existed at the time of trial. And, the State concludes, the Court of Appeals rejected a claim similar to appellant's in another case decided shortly before the trial in this matter, *Cooper v. State*, 434 Md. 209 (2013), *cert. denied*, 134 S.Ct. 2723 (2014).

We conclude that appellant has waived his right to plain error review on the issue presented. We explain.

Appellant contends that the trial court committed plain error in admitting into evidence the reports by Mr. Burman and Bode Laboratory because the written reports should not have been admitted in the absence of the authors' testimony, which would have been subject to cross-examination. Not only did defense counsel fail to object to the admission of the contested evidence, however, he affirmatively stated that he had no objection to the admission of that evidence, even after the trial court mused, "I mean, Mr. Burman is the one that did all of this and he is not here. I would certainly be sitting here wondering where the heck Mr. Burman is." Counsel similarly stated he had no objection to the admission of Ms.

Kelly's written report, which relied, in part, upon the conclusions reached in Mr. Burman's and the Bode Laboratory reports.⁷

Maryland Rule 4-323(a) governs objections to rulings related to evidence and reads, in pertinent part:

(a) **Objections to evidence.** 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. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly.

Md. Rule 8-131(a), detailing the scope of appellate review, states:

(a) **Generally.** The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Rules 4-323(a) and 8-131(a) together make clear that a failure to object to the admission of evidence at trial ordinarily constitutes a forfeiture of an appellate claim that the

⁷Appellant also complains that the trial court erred in admitting Ms. Kelly's oral testimony regarding her conclusions. Appellant's counsel did not affirmatively state that he had no objection to that testimony, but neither did he object. In light of our conclusions that appellant waived his right to belatedly take issue with the admission into evidence of Ms. Kelly's written report, we decline to exercise our discretion to undertake plain error review concerning whether Ms. Kelly's oral opinion evidence should have been excluded. After all, the opinion in her report and testimony on the witness stand, insofar as they were based on the reports of Mr. Burman and the Bode lab, were substantially the same.

admission of the evidence was in error. *Sutton v. State*, 139 Md. App. 412, 424 (2001). Of course, in the absence of an objection to the admission of evidence, this Court nonetheless retains discretion to review the matter for plain error. *Id.* at 440.

In this matter, however, appellant did not just fail to object to the admission of the evidence that he now asserts was erroneously admitted. In each instance in which the State sought to admit the complained-of evidence, defense counsel affirmatively stated, “No objection, Your Honor.” As such, he has waived his right to plain error review.

The Court of Appeals has explained the difference between a waiver and a forfeiture: “Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the ‘intentional relinquishment or abandonment of a known right.’” *State v. Rich*, 415 Md. 567, 580 (2010) (quoting *U.S. v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)(further citations omitted)). Forfeited rights are reviewable for plain error, while waived rights are not. *Id.* See also *Booth v. State*, 327 Md. 142, 180 (1992) (plain error analysis not required when defense counsel affirmatively advised the court he had no objection to an instruction given to the jury); *Choate v. State*, 214 Md. App. 118, 130, *cert. denied*, 436 Md. 328 (2013) (“We 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”); *Joyner v. State*, 208 Md. App. 500, 512 (2012) (“In the usual case, a forfeited objection could still be the

subject of plain error review, while an issue that had been waived results in procedural default in every instance.”).

As a result of appellant’s affirmative waiver, we need not and do not undertake an analysis of whether the extraordinary remedy of plain error review is warranted, especially in light of the evidentiary nature of the issue raised. As an appellate court reviewing a cold record, we can never know whether counsel’s agreement to the admission of the evidence was inadvertent or the result of a strategic decision.⁸ In the absence of such knowledge, and in the presence of appellant’s affirmative acceptances of the admission of the disputed evidence, it would be patently unfair to the State to review the issue raised. *See Robinson v. State*, 410 Md. 91, 104 (2009).

**JUDGMENTS OF THE CIRCUIT COURT
FOR HARFORD COUNTY AFFIRMED;
COSTS TO BE PAID BY APPELLANT.**

⁸Defense counsel may have had a strategic reason for not objecting. For instance, he could have reasonably concluded that the jury would find the DNA evidence less persuasive if the State did not call a witness concerning how the laboratory tests were preformed. Moreover, although the record is not clear in this regard, it is possible that defense counsel told the prosecution before trial that he would not object. If that happened, the prosecution would not have had any incentive to obtain the testimony of Mr. Burman or an agent of the Bode Lab.