Circuit Court for Baltimore City
Case No. 816337009

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 210

September Term, 2017

STACEY PLATER

v.

STATE OF MARYLAND

Berger,
Friedman,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 22, 2018

Appellant Stacey Plater, a Baltimore City police officer, was found guilty of misconduct in office after tipping off a drug dealer that the dealer was under investigation by the police. In this appeal, Plater challenges the sufficiency of the evidence to support his conviction, arguing that the State failed to prove that he had engaged in wrongful conduct under color of office. We disagree, and affirm the conviction.

BACKGROUND

An FBI Task Force charged with investigating police corruption came to suspect an improper relationship between Ronald "Brutus" Smith, a known drug dealer in Baltimore County, and Stacey Plater, a Baltimore City police officer assigned to the Northwest District. When a wiretap of Smith's telephone revealed conversations between Smith and Plater, the task force sought and obtained a warrant to wiretap Plater's phone, as well. The Task Force then fed Plater false information to see if he would pass it along to Smith. To conduct this sting operation, a member of the FBI Task Force, posing as a Lieutenant from the Prince George's County Police Department, attended a roll call meeting at the Northwest District at the beginning of one of Plater's shifts. The Lieutenant explained that the Prince George's County Police were searching for information about a drug dealer, known to them only as "Brutus." He also circulated a photograph of a group of men, one of whom was Smith. In the photo, Smith was labelled as "Brutus." The Lieutenant asked for help in obtaining Brutus's real name. The Task Force then waited to see if Plater would call Smith to tip him off that he was the subject of the investigation.

They didn't have to wait long. Within an hour, while still on duty, Plater began to contact Smith to warn him that he was the target of an investigation. First, Plater called

Kevin Ackwood, a mutual friend of his and Smith's, and asked Ackwood to arrange a meeting with Smith:

[PLATER]:	Yo do this yo. Get in touch with um Bru right? Tell [him] meet me at [Wannies]. Meet me at Wannies barbershop yo?
[ACKWOOD]:	Oh word. Everything good?
[PLATER]:	Nah not for yo.
[ACKWOOD]:	Who, for Bru?
[PLATER]:	Yeah, he ever, he ever holler at you about, like somebody following him …
[ACKWOOD]:	Yeah, he told me about it.
[PLATER]:	Yeah, well apparently it some shit in PG …
[ACKWOOD]:	In PG?
[PLATER]:	But they got his muther fucking picture. Yeah.
[ACKWOOD]:	In PG County?
[PLATER]:	Yeah, … somebody probably ratted on you, real bad.
[ACKWOOD]:	Alright, I hit you right back.

Less than three minutes later, Plater received a phone call from Smith:

[PLATER]:	Yo, um, holler at me at, at Wannies yo.
[SMITH]:	Alright, I'm on Route 40 I will up be there in a minute.
[PLATER]	Alright.

Plater received a follow-up phone call from Ackwood shortly after:

[ACKERMAN]: Did you, did he talk, did he call you?

[PLATER]: Yeah I wanted you to tell him just, just meet me there … Like I told [you] …

[ACKERMAN]: I did.

[PLATER]: Nah, [he] called me and shit.

[ACKERMAN]: Oh. What time you all meet him?

[PLATER]: I told him to meet me at Wannies … he said, he on his way up, he on Route 40. … Told [him], when he told me, I was like, yo somebody probably ratted on you …

[ACKERMAN]: Yeah but son said he don't be doing shit though. He just, you know what I mean? [He's] probably on some bull shit. It ain't like son be out there doing noth'n. You know what I mean like that?

[PLATER]: They got [his] face, sure enough. … Some muther fucker from PG, it was like umm

[ACKERMAN]: From PD?

[PLATER]: Yeah. It's like a detective from PG.

[ACKERMAN]: PG County?

[PLATER]: PG County, yeah.

About fifteen minutes later, Smith called Plater again:

[PLATER]: Yo

[SMITH]: Yo, where you at?

[PLATER]: Walking down there now.

[SMITH]: Alright

An hour and a half after Plater's last call with Smith, Plater called his then-girlfriend, Tiara Williams, and told her about the situation:

[PLATER]: Talked to Brutus ass and shit.

[WILLIAMS]: (laugh) What he say?

[PLATER]: He, he, he came out the house like weeks before, and we talked and I told him I said, you know, somebody you did probably got pinched and you know they ratted or did something or just, you know, whatever. I said you got to watch that cuz people do that yo.

[WILLIAMS]: Yeah

[PLATER]: But and cause he came up and was like some white boys was following me. I said yeah probably, some boys on you. You know but he ain't been doing nothing since though. I said whoever you jump with probably got pinched and dude … ratted on you and said something like he got it from you. But you don't, but it was funny cause he don't sell down there though. …

Plater was charged with misconduct in office. After a one-day trial, a jury found Plater guilty. He noted this timely appeal.

DISCUSSION

Plater challenges his conviction on two grounds: *first* he argues that the State failed to present sufficient evidence that he engaged in misconduct in office, and *second*, he contends that the circuit court erred in failing to grant a mistrial based on jury deadlock.

Because we conclude that there was sufficient evidence to prove that Plater engaged in wrongful conduct under color of office and that he failed to preserve his argument that the circuit court should have declared a hung jury and granted a mistrial, we affirm his conviction.

I. MISCONDUCT IN OFFICE

Plater argues that the State failed to present sufficient evidence to support a conviction for misconduct in office. We review a sufficiency of the evidence challenge in the light most favorable to the State and determine "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Perry v. State*, 229 Md. App. 687, 696 (2016) (cleaned up).[1] In making this determination, we "do not second-guess the jury's determination where there are competing rational inferences available" based on the facts presented at trial. *Smith v. State*, 415 Md. 174, 183 (2010). Thus, in reviewing Plater's conviction for misconduct in office, we will "defer to the jury's inferences and determine whether they are supported by the evidence." *Id.* at 185.

Misconduct in office is a common law crime in Maryland, generally defined as "corrupt behavior by a public officer in the exercise of the duties of his office or while acting under color of his office." *Duncan v. State*, 282 Md. 385, 387 (1978). Misconduct

[1] "Cleaned up" is a new parenthetical intended to simplify quotations from legal sources. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143 (2017). Use of (cleaned up) signals that to improve readability but without altering the substance of the quotation, the current author has removed extraneous, non-substantive clutter such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization.

in office has three varieties: (1) ***malfeasance***, defined as "the doing of an act which is wrongful in itself;" (2) ***misfeasance***, defined as "the doing of an act otherwise lawful in a wrongful manner;" and (3) ***nonfeasance***, defined as "the omitting to do an act which is required by the duties of the office." *Id.* A public officer who engages in one of these acts "because he is an officer or because of the opportunity afforded by that fact" does so under color of his office, and is guilty of misconduct in office. *Chester v. State*, 32 Md. App. 593, 606 (1976).

Plater was charged with the malfeasance variety of misconduct in office. Thus, the State bore the burden of proving that Plater engaged in an act that was wrongful in itself while acting under color of his office. Plater argues, however, that the State failed to present sufficient evidence to show that his actions were wrongful or that they were done under color of his office. We will review Plater's challenges as to each element in turn.

A. Wrongful Conduct

Plater argues that the State failed to present sufficient evidence at trial as to "what constitutes 'wrongful' conduct," and therefore the jury was not properly equipped to determine whether his conduct constituted malfeasance. *Brief of Appellant* at 11. Specifically, Plater argues that to establish that his conduct was wrongful, the State had to produce evidence that his actions violated some statute, official policy, or police departmental guideline, or present lay opinion or expert testimony regarding his conduct. We disagree.

Our case law defines the malfeasance variety of misconduct in office as engaging in an act that is "wrongful in itself." *Duncan*, 282 Md. at 387. Whether an action is

wrongful in itself is measured by "the nature of the act, and not in the motive by which it is done." *Chester*, 32 Md. App. at 604. The central question is whether the public official did "an act which a person ought not to do at all." *Id.* at 603. While explicitly illegal activities fall into this category, malfeasance is not limited to conduct that violates a written rule or professional standard. *See Francis v. State*, 208 Md. App. 1, 22 (2012). Rather, behavior "that anyone with at least a semblance of common sense would know is contemptuous conduct" constitutes malfeasance. *Leopold v. State*, 216 Md. App. 586, 608 (2014) (quoting *Smith v. Goguen*, 415 U.S. 566, 584 (1974) (White, J., concurring)).

Under the circumstances of this case, we conclude that the jury did not require any additional guidance to determine that Plater's conduct was wrongful in itself. While sworn to enforce the law and protect the community he served, Plater used information he obtained in the scope of his professional duties to tip off a drug dealer to an ongoing investigation. We are persuaded that a person of ordinary intelligence is equipped to determine that this conduct was a willful abuse of authority and that Plater engaged in "an act which a person ought not to do at all." *Chester*, 32 Md. App. at 603; *see also Leopold*, 216 Md. App. at 607. There needn't be a rule, regulation, or statute that says police officers should not tip off drug dealers about ongoing criminal investigations. Thus, we hold that the State presented sufficient evidence for a reasonable jury to conclude that Plater's conduct was wrongful in itself beyond a reasonable doubt.

B. Color of Office

Plater next contends that the evidence produced by the State was insufficient to prove that he was acting under color of office when he informed Smith of the investigation

against him. "[T]he act of one who is an officer, which act is done because he is an officer *or because of the opportunity afforded by that fact*, is under color of his office." *Chester*, 32 Md. App. at 606 (emphasis added). Plater argues, however, that at the time of the alleged misconduct, he acted for personal reasons as a private citizen and not in his official capacity. He further suggests that his actions had nothing to do with the opportunity afforded him by his status as a police officer, because the task force deliberately exposed him to false information. Thus, in Plater's view, because there was no real investigation in Prince George's County regarding Smith, he did not actually reveal any confidential or official police information to Smith.

Based on the evidence presented at trial, however, we conclude that a reasonable jury could certainly have found that Plater took advantage of the opportunity afforded him as an officer when he informed Smith, the drug dealer, that he was under police investigation. *Chester*, 32 Md. App. at 605-06. The jury heard testimony that Plater reported for duty at his precinct, heard an announcement about an "ongoing drug investigation" in Prince George's County, received a photograph of the suspects of this "investigation," and was asked for his help in gathering information for this "investigation." Only one hour later, during that same shift, Plater called Kevin Ackwood, his and Smith's mutual friend, to set up a meeting with Smith. The jury heard Plater tell Ackwood that "somebody probably ratted on [Smith]," and that "a detective from PG" had a photo of Smith. Plater's calls also reveal that, while on duty, he "talked to [Smith]" to relay this same information. Plater only had the opportunity to learn this information because of his status as a police officer. And in turn, he used this opportunity to reveal—

while on duty, no less—the exact information he learned at roll call to Smith, the drug dealer.[2] Based on these facts, we conclude that the State presented sufficient evidence for a jury to find, beyond a reasonable doubt, that Plater's conduct occurred under color of office.[3] *Id.*; *Perry*, 229 Md. App. at 696.

Because we conclude that the State presented sufficient evidence that Plater engaged in wrongful conduct under the color of his office, we affirm the conviction for misconduct in office.

II. MISTRIAL BASED ON JURY DEADLOCK

Finally, Plater contends that the circuit court erred by failing to declare a mistrial based on jury deadlock when, he alleges, it was clear that "the verdict was the result of an impermissible jury compromise." During *voir dire*, the circuit court indicated to the jury panel that it expected to finish the trial in one day. As predicted, the presentation of evidence concluded in the afternoon and the jury was released to deliberate around 4:00 p.m. An hour after beginning deliberations, the jury returned a note to the court stating that

[2] It is immaterial that the information Plater disclosed to the drug dealer, Smith, was fabricated. We are not sure how justice would be better served by the investigators giving him real information to expose. All that matters is that Plater learned the relevant information by virtue of his status as a police officer, and that he took advantage of that status by tipping off Smith.

[3] Plater seems to misunderstand the phrase "color of office" and the purpose behind it. Acting under color of office doesn't have to mean that the officer acted as a requirement of office. Nor does it require that the officer actively held himself out in his official capacity while doing the act. Rather, it only requires that the officer acted because of the advantage afforded to him by the office. *Chester*, 32 Md. App. at 606. If we were to agree with Plater, then no public official could be convicted of misconduct because they could immunize themselves by arguing that they acted for their own personal benefit. That would be an absurd result.

it could not reach a unanimous decision. The circuit court gave the jury the option of continuing with deliberations that evening or returning the next day. The jury opted to stay, but an hour and a half later, it sent a second note stating, again, that it could not reach a unanimous decision. At this point, Plater's counsel informed the court that he would like the jury to continue deliberating. The circuit court agreed and again gave the jury the option to return the following day or to continue deliberating into the night. The jury agreed to continue, and about 50 minutes later it announced that it had reached a verdict finding Plater guilty. At Plater's request, the jury was harkened and each member was individually polled. Plater argues that these facts demonstrate that the jury only reached a verdict to avoid the inconvenience of continued deliberations and that, therefore, the circuit court abused its discretion by failing to declare a mistrial *sua sponte* based on jury deadlock.

Pursuant to Maryland Rule 8-131, "the appellate court will not decide any … issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Here, however, Plater never objected to the circuit court's instructions to the jury to continue deliberating, nor did he request a mistrial based on jury deadlock at any point. Thus, Plater failed to preserve his argument that the circuit court should have declared a mistrial. In an attempt to overcome his lack of preservation, Plater asserts—for the first time—in his reply brief that we should exercise our discretion to review this issue for plain error. We decline to do so.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.