

Circuit Court for Anne Arundel County
Case No. C-02-CR-16-000695

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 233

September Term, 2017

JOHN JENNINGS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: April 6, 2018

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

A jury in the Circuit Court for Anne Arundel County convicted John Jennings, the appellant, of armed robbery, robbery, second-degree assault, reckless endangerment, and theft of property with a value of less than \$1,000. The court imposed a mandatory minimum ten-year sentence for the armed robbery offense and merged the remaining offenses for sentencing. Jennings noted a timely appeal, presenting three questions, which we have combined and rephrased:

1. Did the trial court commit plain error by admitting the victim-witness's out-of-court statements, and/or by allowing the State to reference those statements during closing argument?
2. Did the trial court err by admitting evidence that Jennings possessed cocaine on the night of the armed robbery?

We shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

The following facts were adduced at trial.

In the early morning hours of March 27, 2016, Ryon Gregory and a few of his friends were patronizing the Acme Bar and Grill in Annapolis. The group of friends had been to two other bars before arriving at Acme. Throughout the night, Gregory had consumed “six to seven beers.”

At around 1:45 a.m., Gregory went to use the bathroom on Acme's second floor. He brought his beer with him. He encountered Jennings, a stranger, on his way to the bathroom. As the two men were entering the bathroom, Jennings asked Gregory if he wanted to purchase cocaine for forty dollars. Gregory declined, but Jennings persisted, asking him the same question an additional “five to ten times” while he was using the

bathroom. After Gregory finished using the bathroom, he turned around to leave. Jennings again asked him if he wanted to buy cocaine. Gregory again said, “no.” Jennings blocked the bathroom door and asked what Gregory had in his wallet. Gregory responded that he was “not really trying to do that[,]” but Jennings said he “r[a]n this place” and that he had “family waiting outside.” Jennings again asked Gregory what he had in his wallet. Gregory replied “not a whole lot[.]”

At that point, Jennings turned off the bathroom lights for about three seconds. When he turned them back on, he was brandishing a “dark grey to black switchblade-style knife.” Gregory took out his wallet and gave Jennings the two five-dollar bills that were inside. Jennings told him to leave and held the bathroom door open for him. As Gregory was leaving, Jennings asked for his beer, which Gregory gave him.

Gregory immediately went downstairs and told one of his friends what had happened. The friend told some bouncers about the incident, and they told Gregory to call 911. Gregory did so and told the dispatcher that he had been robbed and that the robber was still in Acme. While Gregory was speaking to the dispatcher, the bouncers found Jennings and escorted him outside.

Officers from the Annapolis Police Department arrived on the scene soon thereafter. They apprehended Jennings and recovered a “black folding knife [that] fell from his pant leg.” They also recovered from his person a five and two one-dollar bills, as well as a folded lottery ticket that contained cocaine residue. Gregory identified Jennings to the officers as the man who had robbed him. He provided Officer Brian Criss

oral and written statements describing the robbery. At about 3:00 a.m., nearly an hour after Jennings was arrested, Gregory went to the police station for an interview. The interview was video-recorded. In the interview, Gregory again described the robbery.

We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Gregory's Out-Of-Court Statements

In opening statement, defense counsel said that he did not think that Gregory's testimony would be truthful, remarking that Gregory may be "confused based upon the amount of alcohol that he drank" on the night in question, or he may be "flat-out lying." According to defense counsel, "Gregory's story doesn't match with what he originally tells the police[.]" Defense counsel further stated:

[Y]ou're going to realize once you hear Officer Criss testify and once you hear []Gregory testify that []Gregory's story isn't consistent. . . . And the reason why there's inconsistencies is because there was no robbery. It's as simple as that.

The State called Gregory as a witness. Gregory made an in-court identification of Jennings and testified that Jennings had robbed him at knifepoint in the Acme bathroom after attempting to sell him cocaine. During Gregory's testimony, the State played a recording of his telephone call to 911, in which Gregory said he had been robbed in the Acme bar by a man wielding a knife. Jennings did not object to the recording being played. The State also asked Gregory whether he had given the police a written statement and proceeded to question him about specific things he had said in the written

statement to Officer Criss. Jennings objected on the ground that the written statement “speaks for itself.” The court sustained the objection. The State moved to admit the written statement into evidence. Jennings did not object, and the statement was admitted.

The State also called Detective Shomar Johnson, the officer who interviewed Gregory at the police station. Through Detective Johnson, the State sought to play and admit portions of Gregory’s video-recorded interview. Defense counsel did not object, stating instead that “the jury should be entitled to see the interview in its entirety.”¹ The State agreed. The entire interview was played for the jury and was admitted into evidence. In the 20-minute video, Gregory gave a detailed account of the robbery that was consistent with his trial testimony.

In closing argument, the State asserted that Gregory’s rendition of the events to the 911 dispatcher, Officer Criss, Detective Johnson, and at trial were substantially the same, and that any differences were attributable to the fact that the interview was a more detailed recapitulation of the events. The State explained that “the salient and major facts of what occurred to him, armed robbery by [Jennings] in the bathroom, they’ve always been there.” The State also rebutted the assertions made by defense counsel in opening statement, that Gregory either was confused or lying:

¹ In fact, when the court suggested that the State should just admit the video and allow the jurors to watch the interview on their own in the deliberation room, defense counsel said that it would be best to “err on the side of caution” and play the video in open court to ensure that the jurors would watch it.

He's not confused and he's not lying. How do you know he's not lying? Well, because it's the same information every time he's relaying it. Why? Because it's the truth. It's easy to repeat the truth. It's hard to repeat a lie multiple times and keep it straight.

So, we know he's not lying. How do we know he's not confused? Well, again, same reason. He gives details. He knows what's going on.

On appeal, Jennings contends Gregory's written statement to the police and the video-recorded interview were inadmissible hearsay that should not have been accepted in evidence. He also asserts that it was improper for the State to reference his out-of-court statements in closing argument. Jennings acknowledges that these issues are not preserved for review but asks that we review them for plain error.

Under Rule 8-131(a), an appellate court ordinarily will not decide a non-jurisdictional issue that was not "raised in or decided by the trial court[.]" We only will engage in plain error review of an unpreserved issue when "the unobjected to error can be characterized as 'compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial'" *Abeokuto v. State*, 391 Md. 289, 327 (2006) (quoting *Richmond v. State*, 330 Md. 223, 236 (1993)); Md. Rule 8-131(a).

Plain error review is rare:

The frequency with which we are called upon to throw the life preserver of plain error to sinking (and eminently sinkable) contentions is almost a litigational scandal. It is as if appellate preservation had become an anachronistic embarrassment. We know, of course, that the possibility of plain error is out there, and on a rare and extraordinary occasion we might even be willing to go there. One must remember, however, that a consideration of plain error is like a trip to Angkor Wat or Easter Island. It is not a casual stroll down the block to the drugstore or the 7-11.

Garner v. State, 183 Md. App. 122, 152 (2008).

Before an appellate court will engage in plain error review:

(1) 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; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) 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 [circuit] court proceedings; and (4) the error must seriously affect[] the fairness, integrity or public reputation of judicial proceedings.

Newton v. State, 455 Md. 341, 364 (2017) (internal quotations omitted); *See also* *Puckett v. United States*, 556 U.S. 129, 135 (2009). The first three steps must be satisfied as a matter of law before the appellate court can exercise its discretion to notice plain error. The fourth step involves an examination of factors that the court may consider when deciding whether to exercise that discretion. *State v. Rich*, 415 Md. 567, 578 (2010) (“[I]f the above three [steps] are satisfied, the court . . . has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” (quoting *Puckett*, 556 U.S. at 135)) (some quotations omitted). In this case, Jennings fails at the first step.

From the beginning of trial and throughout, defense counsel made clear that he wanted Gregory’s out-of-court statements admitted into evidence to show that Gregory was intoxicated when he gave them and that his story was inconsistent and likely a fabrication. In opening statement, defense counsel told the jury that “Gregory’s story doesn’t match up with what he originally tells the police[,]” and that “the video [interview] is not consistent with what Mr. Gregory says.” When the State sought to play a portion of Gregory’s video interview, defense counsel not only did not object, he asked

that the video be played in its entirety and that it be played in open court to ensure that the jury would watch it. In closing argument, defense counsel pointed out that Gregory testified that he first encountered Jennings in the hallway leading to the bathroom, but in his video interview he said he first saw Jennings on the way up the stairs leading to the bathroom. Defense counsel also argued that Gregory was “under the influence of alcohol” and could not “even get through the interview with the police a couple hours later without saying, hey, I was at the bar, I’ve got to use the bathroom.” In addition, he suggested that Gregory was not credible because he had lied about being afraid after the robbery: “you have the ability to . . . listen to [Gregory] and judge his credibility. And you have the ability to listen to him on the 911 [call] and you have the ability to listen to him when he’s giving that video statement as well as today. At no time did he appear scared.”

In short, Gregory’s out-of-court statements were admitted because defense counsel made a strategic decision that that was preferable, not because defense counsel failed to object. Thus, Jennings intentionally relinquished the right to assert that they were erroneously admitted. In *Rich*, the Court of Appeals distinguished between forfeiting and waiving a right: “Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right. Forfeited rights are reviewable for plain error, while waived rights are not.” 415 Md. at 580 (quoting *United States v. Perez*, 116 F.3d 840, 845 (1997)) (emphasis omitted) (citations omitted). The *Rich* Court explained that in deciding whether a party forfeited or waived

the right to challenge an error, the appellate court should examine the record for evidence of intent. When a party decides not to challenge an error in trial court proceedings as a matter of trial tactics, we infer that the party waived that right intentionally. *See Givens v. State*, 449 Md. 433, 481 (2016) (“[U]nder *Rich*, plain error review is unavailable where a defendant fails to object as a matter of trial tactics.”). That policy makes sense because “‘plain error’ review requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel[.]” *Nelson v. State*, 137 Md. App. 402, 423 n.5 (2001).

Next, we turn to Jennings contention that the court committed plain error by allowing the State to reference Gregory’s out-of-court statements in closing argument to show that Gregory’s story was consistent and that he was telling the truth. He asserts that, while it may have been proper to use Gregory’s prior statements for purposes of rehabilitation, “the State used the statements to improperly bolster [his] credibility.” In support, Jennings relies on *Thomas v. State*, 429 Md. 85 (2012).

Thomas concerned whether a prior inconsistent statement was admissible, not whether counsel for a party may comment in closing on a prior consistent statement that was admitted in evidence. The *Thomas* Court explained that a prior consistent statement that is offered to prove the truth of the matter asserted is hearsay but may be admitted under Rule 5-802.1(b) as substantive evidence to rebut an express or implied charge of

fabrication or improper motive, if it was made before the motive to fabricate arose.² *Id.* at 101–03. Alternatively, a prior consistent statement that is not offered to prove the truth of the matter asserted, but instead is offered to rehabilitate a witness who has been impeached is not hearsay and may be admitted under Rule 5-616(c)(2).³ The “statement must, under the circumstances in which it was given, detract[] from the impeachment, or rebut logically the impeachment.” *Id.* at 108 (quotations and citations omitted).

The defendant in *Thomas* was charged with distribution of a controlled substance. Police saw him engage in a hand-to-hand exchange with a man, who they followed and stopped. A search revealed that he was in possession of crack cocaine. The man told the police he had purchased the crack cocaine from the defendant and testified to the same at trial. The defendant argued that he had not *sold* drugs to the man but had attempted to

² Rule 5-802.1 provides:

The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule: . . .

(b) A statement that is consistent with the declarant’s testimony, if the statement is offered to rebut an express or implied charge against the declarant of fabrication, or improper influence or motive[.]

³ Rule 5-616(c)(2) provides:

Rehabilitation. A witness whose credibility has been attacked may be rehabilitated by: . . .

Except as provided by statute, evidence of the witness’s prior statements that are consistent with the witness’s present testimony, when their having been made detracts from the impeachment[.]

buy drugs from him (changing his mind at the last second). Over objection, the court allowed a police officer to testify that the man had told him he had just purchased drugs from the defendant. The Court of Appeals held that it was error to admit that testimony. It reasoned that the man's statement to the police officer was not admissible under Rule 5-802.1(b), because he made it after he was stopped by the police and therefore after he would have had a motive to fabricate. Furthermore, the statement was not admissible for rehabilitative purposes. The court explained that the defense only impeached the man by calling him a liar and that his prior statement to the police did not detract from that impeachment. The Court concluded that the man's prior statement was being used for its truth to bolster his testimony, not to rehabilitate him as a witness.

The case at hand is easily distinguishable from *Thomas* because it does not concern the admissibility of prior consistent statements. Those statements were admitted, appropriately or not, because the defense waived any objection to them. In closing argument, the prosecutor discussed the prior statements to rebut defense counsel's accusations that Gregory was confused, that his story was inconsistent, and that he was lying. This was a fair use of Gregory's statements, which were in evidence. The trial court did not err in allowing the State to do so.

II.

Cocaine

Jennings contends the trial court erred by allowing the State to introduce evidence that he was in possession of cocaine at the time of his arrest.

When the State asked Officer Criss whether he recovered anything from Jennings, defense counsel objected, which led to the following exchange:

[Defense Counsel]: I think this is leading to the testimony that the police officer will say he recovered what he believed to be a controlled dangerous substance from Mr. Jennings. And I would object to that line of questioning. Mr. Jennings is not charged with any sort of possession of a controlled dangerous substance. For that reason, I think it is more prejudicial than probative. I don't see the relevance, either.

...

THE COURT: Why isn't that relevant today? I mean, the victim said that he offered him—or, he asked him if wanted to buy some cocaine.

[Defense Counsel]: He never said that he saw it on him or anything of that nature. It sounds sort of—

THE COURT: Well, don't you think it's relevant that he had cocaine on him? I think there's relevance to it not for the purpose of looking at charges. He's not charged with possession of cocaine. But if there's evidence that he had cocaine that's relevant. Overruled.

Officer Criss went on to testify that he recovered a “lottery ticket that was folded and [contained] a white powdery substance[,]” which he submitted for laboratory analysis.

The State then called Raquel Avelar, a forensic chemist for the Anne Arundel County Police Department Crime Lab who tested the white powder found on Jennings. She testified that the white powder was cocaine. Jennings did not object to this testimony.

Jennings argues on appeal that evidence that he was in possession of cocaine when arrested was not relevant because it did not tend to show that he was guilty of armed robbery. Furthermore, even if the evidence was relevant, it was “substantially more

prejudicial than probative.” The State responds that Jennings did not preserve this issue for appeal because he did not object every time there was testimony about his cocaine possession, and that the issue lacks merit.

“Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection.” *DeLeon v. State*, 407 Md. 16, 31 (2008) (citing *Peisner v. State*, 236 Md. 137, 145–46 (1964)). *See also Yates v. State*, 429 Md. 112, 120–21 (2012) (“Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received.” (quoting *Jones v. State*, 310 Md. 569, 588–89 (1987))).

When the State first asked Officer Criss what he recovered from Jennings, defense counsel objected, stating that evidence that Jennings was in possession of white powder at the time of his arrest was irrelevant and unfairly prejudicial. Defense counsel did not object to Avelar’s testimony that the white powder was cocaine, however. We do not see Avelar’s testimony as being on the same point. Any objection regarding Jennings’s cocaine possession was therefore waived, and the issue is not preserved for our review.

In any event, there is no merit in this contention. Jennings maintains that the evidence was irrelevant because it was evidence of a “crime[] other than the crime for which he” was charged and therefore was inadmissible prior bad acts evidence. *See* Md. Rule 5-404(b). He asserts that such evidence only is admissible when the charged crime and other crime are so connected that one cannot be fully proven without proving the

other. He argues that because the robbery could have been proven without introducing evidence of cocaine possession, the evidence should not have been admitted.

Rule 5-404(b) states,

Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. *Such evidence, however may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.*

(Emphasis added.) Rule 5-404(b) generally prohibits the admission of other crime or bad act evidence to show propensity but permits the evidence to be admitted when it is specially relevant to other issues (not for propensity). *See Smith v. State*, 218 Md. App. 689, 710 (2014). In addition, “the prohibition against ‘other crimes’ evidence does not apply to evidence of wrongs that arise during the same transaction and are intrinsic to the charged crime[.]” *Smith v. State*, 232 Md. App. 583, 600 (2017) (quotations omitted).⁴

In this case, Gregory testified that the man who robbed him offered to sell him cocaine. Evidence of Jennings’s possession of cocaine at that time was not evidence of an “other crime” because it was part and parcel of the robbery. And, even if it was an “other crime,” it was specially relevant to the issue of Jennings’s identity as the robber.

⁴ There is a three-part test for determining whether evidence of other crimes is admissible: 1) Does the evidence fit within one or more of the enumerated exceptions set forth in Md. Rule 5-404(b) or other exceptions not here relevant?; 2) Was the defendant’s involvement with the other crime established by clear and convincing evidence?; 3) Was the probative value of the evidence weighed against the potential undue prejudice? *Jackson v. State*, 230 Md. App. 450, 458–59 (2016) (quoting *Snyder v. State*, 361 Md. 580, 603–04 (2000)).

The trial court did not abuse its discretion in determining that the evidence of Jennings’s cocaine possession was not unduly prejudicial. Relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” Md. Rule 5-403. Balancing the probative value of evidence against the unfair prejudice its admission may cause “is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion.” *Malik v. State*, 152 Md. App. 305, 324 (2003) (citing *Martin v. State*, 364 Md. 692, 705 (2001)). The abuse of discretion standard is “highly-deferential[;]” and “[r]eversal should be reserved for those rare and bizarre exercises of discretion that are . . . not only wrong but flagrantly and outrageously so.” *Oesby v. State*, 142 Md. App. 144, 167–68 (2002). We find no reason to conclude that the trial court wandered outside of its wide range of discretion in this case.

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