

Circuit Court for Somerset County
Case No. C-19-CR-18-000158

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 489

September Term, 2019

ROY DAVISON

v.

STATE OF MARYLAND

Arthur,
Beachley,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 4, 2020

*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.

Convicted by a jury in the Circuit Court for Somerset County of attempted armed robbery, use of a firearm in the commission of a felony or crime of violence, and related offenses, Roy Davison, appellant, presents for our review two questions: whether the court committed “plain error in propounding in compound form a voir dire question inquiring into whether the prospective jurors had strong feelings concerning the offenses on trial,” and whether the court abused its discretion “in precluding [him] from testifying regarding his own credibility.” For the reasons that follow, we shall affirm the judgments of the circuit court.

At trial, the State called Cody King, who testified pursuant to a plea agreement that on August 13, 2018, he met with Mr. Davison and Justin Bull in the parking lot of a Food Lion, where they “discussed robbing a pharmacy” so that Mr. King could get “pills to get . . . money.” Mr. King entered Mr. Davison’s vehicle, and the three went “to pick up [Mr. King’s] truck,” because Mr. Davison’s vehicle “wouldn’t go as fast or work properly.” The three then went to Mr. Bull’s home, where they retrieved an “AK-47.” Mr. Davison then drove the three to the pharmacy. Mr. King and Mr. Bull, who was holding the gun, entered the pharmacy, where Mr. King told “everybody to get down” and demanded “Percocets, oxys[,] and Suboxone strips.” Mr. King and Mr. Bull went “behind the counter,” and Mr. Bull went “in the back[] towards the exit.” When Mr. King heard Mr. Bull say, “oh, shit, he has a gun,” Mr. King ran “out the front.” Mr. King and Mr. Bull reunited with Mr. Davison, and the three departed. When asked who “initiated the plan to rob” the pharmacy, Mr. King stated: “I don’t know who did initially, but the person that came to me was Roy Davison.”

Mr. Davison first contends that the court “plainly erred in propounding a compound ‘strong feelings’ voir dire question.” During voir dire, juror number 224 indicated to the court that the juror had previously been “a victim” and “also a defendant.” The court asked the juror: “Do you have any strong feelings about the crimes that are alleged here in this case or the underlying crimes that would render you unable to render a fair and impartial verdict in this case.” Defense counsel did not lodge any objection to the question, and the juror replied: “No.” Later, juror number 163 indicated to the court that the juror had been a “[d]efendant, witness[,] and victim.” The following colloquy then occurred:

THE COURT: Do you – do you believe you could be fair and impartial – do you have such strong feelings about the charge, the alleged charges or the underlying elements of assault or theft, that would affect your ability to be fair and impartial in this case?

THE JUROR: Oh, yes, because everyone is innocent until proven guilty.

THE COURT: So you think you would have a hard time rendering a verdict in this case?

THE JUROR: No.

Defense counsel again did not lodge any objection. Later, the court asked the venire: “Does any member of the jury panel have such strong feelings about the crimes charged that they would be unable to be fair and impartial in this case?” Defense counsel again did not lodge any objection, and no juror responded. Following voir dire, defense counsel stated that he had no exceptions, and following jury selection, stated that he was satisfied with the jury.

Mr. Davison now contends that the court’s “questions were propounded in error.” Recognizing that, “ordinarily, error committed during the voir dire process must be objected to in order to mandate relief on appeal,” Mr. Davison “requests that [we] exercise [our] discretion and recognize plain error.” We decline to do so. We have stated that “an affirmative act of commission[,] as opposed to an act of omission, constitutes a waiver rather than a forfeiture,” and a waived claim “is not subject to plain error review.” *Carroll v. State*, 202 Md. App. 487, 514 (2011) (citation omitted). Here, defense counsel stated on the record at the end of voir dire that he had no exceptions, and then accepted the jury. Mr. Davison thus affirmatively waived his contention, making plain error review unavailable. We further note that the questions were not the type of error that seriously affects the fairness, integrity, or public reputation of judicial proceedings, and that Mr. Davison was permitted to participate fully in the voir dire process, strike jurors for cause, and exercise peremptory strikes. Hence, we shall not exercise our discretion to engage in plain error review.

Mr. Davison next contends that the “court abused its discretion in excluding evidence of [his] truthfulness.” Following the close of the State’s case, Mr. Davison told the court that he would testify. The prosecutor stated: “[F]or the record, there are impeachable offenses.” During direct examination, defense counsel elicited testimony from Mr. Davison that he had previously been incarcerated for committing burglary, rogue and vagabond, possession of marijuana, and first degree assault. Mr. Davison subsequently denied involvement in the offenses and testified as to the efforts he made “to prove [his] innocence.” Defense counsel then asked Mr. Davison: “Now, with regard to your

standards for honesty and truthfulness, have you been continually honest and truthful since your release from incarceration?” The prosecutor objected, and following argument, the court sustained the objection.

At sentencing, defense counsel gave Mr. Davison “the opportunity to address the [c]ourt,” and the following colloquy occurred:

[MR. DAVISON]: Your Honor, I apologize for the things that’s happened, you know. I made a mistake. I did corroborate [sic] to commit an armed robbery. I apologize. I’m sorry for the things that’s happened, you know. I can’t take back what’s happened.

THE COURT: You’re taking responsibility here this morning, Mr. Davison, that it happened?

[MR. DAVISON]: Yes, I am; yes, I am.

THE COURT: Because I know on the stand –

[MR. DAVISON]: I – I – I know I got up there, and I lied.

THE COURT: – you told the [c]ourt that it didn’t happen. Are you telling me today that – that – I mean, I’d rather you be honest with me –

[MR. DAVISON]: I’m being honest.

THE COURT: – and tell me that –

[MR. DAVISON]: I admit I had – I had part in it; yes, I did.

THE COURT: Okay.

[MR. DAVISON]: I had part in it, you know what I mean.

THE COURT: I’m giving you some credit for that this morning. Because, you know, it was clear from the State’s evidence and especially the video at Food Lion that you were with Mr. Bull right before this happened, and that wasn’t just happenstance. And I think the jury – the jury’s verdict was in large part based upon that video that they saw, that you got on the stand and said that you didn’t have anything to do with it and that you hadn’t

been with Mr. Bull that day, and then they saw on the video that you had been.

So you're telling me this morning that – I would rather you be honest with me and tell me that, Your Honor, I'm sorry I lied to you and the jurors on the stand, and I did have something to do with it.

[MR. DAVISON]: I did have something to do, and I do apologize. You know, I seen the videos. I'm very remorseful of what happened. It should have never happened.

THE COURT: Anything else you would like to tell me?

[MR. DAVISON]: I just apologize for wasting the [c]ourt's time, Your Honor. I should have, you know, been honest from the beginning.

The court subsequently imposed upon Mr. Davison a total term of imprisonment of 35 years. The court stated: “Quite frankly, I was prepared to give him 40 years. But based upon the allocution he's made and that he admitted that he lied to the [c]ourt and that he owned up to that, I gave him credit for five years based upon what he told me here this morning.”

Mr. Davison now contends that at trial, the court erred in excluding Mr. Davison's testimony as to whether he had “been continually honest and truthful since [his] release from incarceration,” because “evidence of a defendant's truthfulness is admissible where he is on trial for an offense which would itself give rise to an impeachable offense if it was the subject of a conviction,” and “the State's announcement that it would impeach Mr. Davison's credibility with prior convictions . . . ‘opened the door’ to evidence of [his] truthfulness.” But, the Supreme Court has stated that “[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*.” *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (emphasis in original).

Because Mr. Davison admitted at sentencing that his testimony at trial was false, the court could not have erred in precluding Mr. Davison from supporting that false testimony with testimony that he had, for some period of time, been an honest and truthful person. Hence, the court did not err in excluding such testimony.

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