Circuit Court for Wicomico County
Case No. C-22-CR-17-477

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 704

September Term, 2018

RICHARD D. MOISE

v.

STATE OF MARYLAND

Berger,
Nazarian,
Wells,

JJ.

Opinion by Wells, J.

Filed: August 23, 2019

After a two-day trial, a jury empaneled in the Circuit Court of Wicomico County convicted Appellant, Richard Moise, of sixteen counts related to the armed robbery of the Bank of Delmarva located in Salisbury. The court sentenced Moise to a total of seventy (70) years in prison.

Moise filed a timely appeal and poses two questions for our review:

(1) Whether the circuit court conducted voir dire improperly?

(2) Whether trying Moise under a superseding indictment was error?

As neither issue was preserved below, and the issues presented do not merit plain error review, we affirm the circuit court.

Factual And Procedural Background

At about 5:45 p.m. on Friday, December 9, 2016, five employees of the Salisbury branch of the Bank of Delmarva, John Aukward, Crystal Chatham, Janice Hearn, Debra Vickers, and Melissa Russo, were wrapping up the day's work when five masked men entered. Two of the men were armed. Russo handed the robbers a large amount of cash before they restrained her with zip ties. Aukward triggered a silent alarm before the robbers held him at gunpoint. One of robbers realized that Aukward had engaged the silent alarm and told the others that they had "30 seconds" before the police arrived. The robbers quickly fled the bank with the money. One of the bank employees then called 911. None of the bank employees were able to identify the robbers because they wore masks.

Some of the money taken during the robbery was "bait money," a bundle of $20 bills made to look like $2,000.00 that contains a tracking device. In this case, the tracking device led the police to 919 Spring Avenue in Salisbury. When police arrived at that

location, they spoke with an individual who told officers that there was a suspicious-looking blue duffle bag under a 2005 Toyota Scion that was parked on the street. The officers recovered the bag and inside it was $11,776.00 in cash and nine black and two white zip ties.

A subsequent police investigation led to the arrest of Tairell Copper. Copper pled guilty to participating in the bank robbery and agreed to cooperate with the State. Ultimately, Copper testified against Moise at trial.

At trial, Copper testified he knew Moise from high school. Copper said that he became involved in the robbery through Moise and Moise's friend, Hakeem Wrightout. Copper testified that the robbery was Moise's idea, but the three planned the robbery together. After some research, they decided to rob the Bank of Delmarva and recruited two others to help them.

According to Copper, Moise's role was to take all the money from the heist and place it in a duffle bag. During Copper's testimony at trial, the State played video from bank security cameras which Copper identified Moise as one of the individuals in the bank wearing camouflage and carrying a blue duffle bag. Later in the trial, the State offered testimony from Julie Kempton, an employee of the Forensic Science Division of the Maryland State Police, who testified that Moise's DNA was found on the duffle bag.

After leaving the bank, Copper testified that the men returned to their cars. The men discovered that they had misplaced their keys and were locked out of their cars, so they went to a nearby apartment complex. Later, when they met, Moise told the others that he

had lost the money. Copper testified that Moise claimed to have placed the bag of money under a car, but the bag was not there when Moise and Copper went to retrieve it.

The police testified that they apprehended Moise using GPS locator information from the bank employees' cell phones that were taken during the robbery. Apparently one of the robbers, Calvin Holley, used a bank employee's cell phone. The police obtained the phone's location using GPS, which led them to Holley. In Holley's car, the police found Hearn's cell phone. The next day, the police, with search warrant in hand, searched Holley's house where they found cell phones, a tablet belonging to the bank tellers, and the handgun used in the robbery.

During this time, Moise was arrested on unrelated charges. During a police interview in the unrelated case, Moise admitted he had left his work boots at his friend David Jacquet's house. At trial, Jacquet testified that, on the afternoon of the day of the robbery Moise came to his house breathing heavily, as if he had just been running. Moise asked Jacquet if he could leave his work boots with him and borrow Jacquet's flip-flops. While Jacquet did not find this situation unusual, the police did and seized the boots.

Later, after additional investigation, the police arrested Moise at Jacquet's house and charged him with participating in the bank robbery. The police subsequently searched his car and found black gloves, zip ties, and a tag from Realtree, a brand of camouflage clothing. Moise claimed these items were used for crafting projects.

When the police examined Moise's cell phone, they found searches on the internet related to bank robberies, such as, "how much time it takes police to respond to a bank

robbery," "how to conduct a bank robbery," and the operating hours for the Bank of Delmarva. Additional evidence revealed that co-defendant Wrightout called Moise on the day of the robbery. As noted, Moise's DNA was found on the blue duffle bag stuffed with money that the police found beneath the Toyota. The police also identified Moise on Walmart security camera footage that showed him purchasing zip ties. Detective Caputo of the Salisbury Police Department testified that when the police searched Moise's residence in Salisbury, they found the same kind of zip ties in his apartment.

At the conclusion of the trial, a jury convicted Moise of one count of theft less than $100,000.00, five counts of armed robbery, conspiracy to commit armed robbery, robbery, conspiracy to commit robbery, first-degree assault, conspiracy to commit first degree assault, second-degree assault, conspiracy to commit second-degree assault, reckless endangerment, false imprisonment, and use of a firearm during the commission of a felony or violent crime.

The judge sentenced Moise to ten (10) years on each of the armed robbery counts, with each sentence to run consecutively to the other, and to a consecutive twenty (20) years for use of a firearm in the commission of a felony, with the first five years to be served without parole. All other counts merged into the armed robbery counts at sentencing. Moise's total sentence was seventy (70) years with 543 days credit for time served. Moise subsequently noted a timely appeal.

Discussion

I. *Voir Dire*

Prior to trial, Moise requested the trial judge pose the following questions to the prospective jurors:

> 11. Do any of you have strong feelings about the amount of crime in our community, or about our criminal justice system, that would make it difficult for you to give the defendant or the State a fair trial?
>
> 18. The alleged offenses in this case involve the armed robbery of a bank. Would the nature of the offenses cause you not to be a fair and impartial juror in this case?
>
> 19. The alleged offenses in this case involve the use of a firearm. Would the nature of these offenses cause you not to be a fair and impartial juror?

During voir dire, the trial judge read the following questions to the venire:

> The Defendant is charged with armed robbery, use of a firearm in commission of a felony, among other offenses. Do you feel that the nature of this case is such that it would be difficult for you to render a fair and impartial verdict? If so, please stand.

And,

> Do you have any strong feelings about the amount of crime in our community or about the criminal justice system that would prevent you from being a fair or impartial juror in this case? If so, please stand.

None of the prospective jurors responded to either of these questions.

Against this backdrop, Moise alleges the trial court committed reversible error. Moise claims that the two questions the court asked violated the Court of Appeals' prohibition against the use of "compound" questions as defined in *Dingle v. State*, 361 Md. 1 (2000), *Pearson v. State*, 437 Md. 350 (2014), and most recently in *Collins v. State*, 463 Md. 372 (2019). A "compound" question is one in which the trial court, during voir dire,

asks prospective jurors whether they have "strong feelings" about the offense with which the defendant is charged but leaves it to the prospective juror to determine whether their "strong feelings" would disqualify them from sitting on the jury. Moise argues that in asking these questions the trial court denied him a fair trial in violation of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. "In essence each prospective juror was to decide for him-or-herself whether he or she would be able to sit in judgment of Mr. Moise fairly and impartially in light of the 'nature of th[e] case' and despite 'strong feelings' on crime." Moise acknowledges that a juror's impartiality and fairness are issues upon which a prospective juror may inform the court, but insists they are "for the trial court to find." Because, as he claims, the trial judge relinquished this responsibility to the individual venire members, Moise demands reversal and a new trial.

The State's reply is that even if the questions are improper, Moise got what he wanted. Moise asked the trial court to pose three compound questions to the venire. The judge asked two compound questions, both of which captured the issues that concerned Moise. In the State's view, Moise waived any appellate challenge to either question on four different grounds. First, Moise explicitly requested the trial court ask the venire compound questions. Second, Moise did not object to either question that the court asked. Third, Moise took no exception to the voir dire process. Finally, Moise accepted without objection the jury that was seated. Additionally, the State urges us to consider whether

Moise invited error by posing the questions in the first place. We decline to consider the last issue of invited error to focus on the other challenges the State poses in this appeal.

The standard of review for alleged error during voir dire is abuse of discretion. *Collins*, 463 Md. at 391. We must look at the whole record to determine "whether the questions posed, and the procedures employed have created a reasonable assurance that prejudice would be discovered if present" and if the trial court abused its discretion by improperly conducting voir dire to prevent the discovery of prejudice in the jury panel. *Id.* There is an abuse of discretion when "no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules of principles" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (citations omitted). Rulings of law made by the trial court are reviewed de novo. *Wilson-X v. Dep't of Human Res.*, 403 Md. 667, 675-676 (2008); *Ehrlich v. Perez*, 394 Md. 691, 708 (2006).

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U. S. Const. amend VI. The Fourteenth Amendment to the United States Constitution secures this right the individual States. Article 21 of the Maryland Declaration of Rights likewise guarantees, "[t]hat in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty." Md. Decl. of Rts. Art. 21.

It is well-established that voir dire "is critical to" ensuring the right to an impartial jury. *Pearson*, 437 Md. at 356 (quoting *Washington v. State*, 425 Md. 306, 312 (2012)). "[I]n Maryland, the sole purpose of voir dire is to ensure a fair and impartial jury by determining the existence of specific cause for disqualification." *Id.* at 356, (cleaned up). To that end, "[o]n request, a trial court must ask a voir dire question if and only if the voir dire question is reasonably likely to reveal specific cause for disqualification." *Id*. at 357 (cleaned up). "There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a collateral matter is reasonably liable to have undue influence over a prospective juror." *Id*. at 357 (cleaned up). "The latter category is comprised of biases [that are] directly related to the crime, the witnesses, or the defendant." *Id*. at 357 (cleaned up).

A. *Preservation – Moise's Failure to Object*

At trial, Moise did not object to either of the compound questions the trial court asked. Indeed, Moise himself requested three compound questions of the type disfavored in *Dingle* and *Pearson*. Absent an objection to either of the questions the trial court posed, pursuant to Rule 8-131(a), Moise's objection is not preserved for review. Rule 8-131(a) states:

> Generally, . . . 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.

Md. Rule 8-131(a). Further, Moise cites no authority to consider his claim, including plain error. On this basis, Moise's appeal based on the conduct of voir dire may be dismissed. *See Assateague Coastkeeper v. Md. Dep't of the Env't*, 200 Md. App. 665, 670 n. 4 (2011) (declining to address an issue where appellant failed to adequately brief it), *cert. denied*, 424 Md. 291 (2012); *Conrad v. Gamble*, 183 Md. App. 539, 569 (2008) (declining to address issue because argument was "completely devoid of legal authority"); *Anderson v. Litzenberg*, 115 Md. App. 549, 578 (1996) (failure to provide legal authority to support contention waived contention).

Appellate courts may exercise discretion to consider unpreserved issues if in so doing neither party would be prejudiced and "the exercise of discretion promotes the orderly administration of justice." *Jones v State*, 379 Md. 704, 714-15 (2004). We exercise that discretion to examine whether waiver or plain error is applicable in Moise's case.

B. *Waiver*

The State argues that Moise's claim of error is waived as he did not object to either of the questions that the court posed, and he accepted the empaneled jury without reservation. We now examine whether Moise waived appellate review of either of the questions of which he now complains when he accepted the jury without reservation.

State v. Stringfellow, 425 Md. 461 (2012) offers us guidance. In *Stringfellow*, the Court of Appeals held that where a criminal defendant objected to a voir dire question but accepted without objection the jury that was selected, any objection that he made during voir dire related to the composition of the jury panel was waived. *Id*. at 473. During vior

dire, Stringfellow objected to the State's "CSI effect" question. The trial judge read a modified version of the State's CSI question over Stringfellow's objection. *Id*. at 466. No one in the venire responded. *Id*. Stringfellow ultimately accepted the jury that was seated. *Id*. at 467.

After examining Stringfellow's claim of error, the Court of Appeals concluded that Stringfellow's objection to the CSI question went to the heart of selecting a fair jury. *Id*. at 471. In other words, Stringfellow's argument was that once the venire heard the CSI question, the prospective jurors were so biased or "poisoned" by the implication that Stringfelow was guilty that it could not render a fair verdict. *Id*.

In its discussion of waiver, the Court, citing *Gilchrist v. State*, 340 Md. 606, 618 (1995), observed that,

> [o]bjections related to the inclusion/exclusion of prospective jurors are treated differently for preservation purposes because accepting the empaneled jury, without qualification or reservation, "is directly inconsistent with [the] earlier complaint [about the jury]," which "the party is clearly waiving or abandoning."

Stringfellow, 425 Md. at 470. The Court noted that when the courtroom clerk asked Stringfellow if he was satisfied with the jury selected, he did not object and ask for a new venire but, instead, accepted the panel. *Id*. at 473.

In reaching its decision in *Gilchrist*, the Court relied on the holdings in *Neusbaum v. State*, 156 Md. 149, (1928) and *Glover v. State*, 273 Md 448, 451-52 (1975). In *Nuesbaum*, the prosecutor called the defendant a "hit-and-run driver" in front of the venire. *Id*. at 153. Nuesbaum asked the court to replace the entire venire because the remark, in

Nuesbaum's opinion, was extremely prejudicial. *Id*. The court declined to do so. *Id*. Later, Nuesbaum accepted the jury without objection. *Id*. The Court of Appeals held that Nuesbaum's objection was waived when he did not object to the jury that was seated. *Id*. 162-63.

In *Glover*, the trial judge asked the sheriff to gather additional venire-persons from around the courthouse because of an insufficient jury pool. 273 Md. at 449. Glover objected, arguing that the additional venire-persons were not randomly selected from the registered-voter rolls. *Id*. at 451. The trial judge overruled Glover's objection and seated a jury. *Id*. Glover did not object to the jury selected. *Id*. The Court of Appeals, citing *Nuesbaum*, held that Glover waived any objection to the venire once he accepted the jury. *Id*. at 453.

The Court of Appeals reasoned that Stringfellow's objection was like those in *Nuesbaum* and *Glover*. *Stringfellow*, 425 Md. at 471. In each case, the defense claimed the venire was tainted and the jury selected was biased, but each defendant accepted the jury that was ultimately seated. *Id*. Accordingly, the Court held that Stringfellow's erstwhile objection to the CSI question was not preserved for appellate review when he accepted the empaneled jury.

Like the objections in *Neusbaum* and *Glover*, Stringfellow's objection asserted that the venire members, if the relevant question was posed, would be unfit to sit as jurors in his trial; therefore, his objection went to the inclusion of prospective jurors on the jury selected ultimately. Objections of this nature are waived if not preserved appropriately at

the time the trial court empanels the jury. Here, Stringfellow accepted, without reservation or qualification, the jury. Consequently, Stringfellow failed to preserve his voir dire objection for future consideration on appeal. *Stringfellow*, 425 Md. at 471.

Like the appellants in *Stringfellow*, *Nuesbaum*, and *Glover*, Moise claims that the jury was tainted because the venirepersons, rather than the judge, decided whether they might not be fair based on (1) the nature of the offenses charged, or (2) because of generalized concerns about crime in the community. Moise asserts that he was denied the opportunity to examine the jurors to probe for biases. We understand the prohibition against the trial court's use of compound questions of the type discussed in *Dingle*, *Pearson*, and *Collins*. We realize that the two questions that the trial court posed here fall within that category. Nevertheless, we observe that a critical difference in this case, distinct from the others discussed, is that Moise himself asked for similar, if not identical questions, the court read the questions, and Moise did not object. Had he believed the venire to be tainted, as he now claims, Moise could have asked the judge to rephrase the questions or for a new venire. He undertook neither of these remedies. Not only did he not object to the questions asked, he accepted the jury that he helped seat. We conclude, based on the precedent established in *Stringfellow*, *Glover*, and *Nuesbaum*, that Moise waived any objection he had to the questions the trial court posed based on his inaction below.

C. *Plain error*

We now turn to consider whether the questions under examination were so egregious that we should recognize plain error. The State urges us not to do so, chiefly

because Moise declined to ask for plain error review. Indeed, Moise has not asserted plain error. Additionally, the State argues we should not review for plain error because it is simply inapplicable under the circumstances presented in this appeal.

It is well-settled that the elements of plain error are: (1) a deviation from a legal rule that has not been intentionally relinquished, abandoned or otherwise affirmatively waived by the appellant, (2) the legal error must be clear and obvious and not subject to reasonable dispute, (3) the error must have affected the appellant's substantive rights, meaning that the appellant must demonstrate that the error affected the outcome of the proceedings, and (4) if the other three elements are present, we may then remedy the error. *Newton v. State*, 455 Md. 341, 364 (2017) (citing *State v. Rich*, 415 Md. 567, 578 (2010)); *McCree v. State*, 214 Md. App. 238, 272 (2013) (citing *Puckett v. United States*, 566 U.S. 129, 135 (2009)). Our discretion, however, ought to be exercised only if the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *McCree*, 455 Md. at 364. Meeting all four prongs is, and should be, difficult. *Id*. An appellate court's exercise of discretion to find plain error, "will not be exercised as a matter of course, even when the error complained of is clear." *Sine v. State*, 40 Md. App. 628, 632 (1978). An appellate court may find plain error only if it is extraordinary. "It is the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative." *Williams v. State*, 34 Md. App. 206, 211 (1976); *Austin v. State*, 90 Md. App. 254, 268 (1992). "It is 'rare' for an appellate court to find plan error." *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Yates v. State*, 429 Md. 112, 131 (2012)). We exercise our discretion to consider

the applicability of plain error in this instance owing to the unique circumstances of this appeal.

Our first task is to determine if the trial court committed legal error in asking the two voir dire questions now at issue. Additionally, we must find that Moise did not waive an objection to either question. As discussed, Moise failed to object when the trial court asked disfavored compound questions. Moise later accepted the jury without reservation. For the reasons discussed, we concluded that Moise waived any objection to either question when he did not object and he accepted the jury. Consequently, we must conclude that Moise cannot meet the first prong of the four-part plain error test.

For the sake of completeness, we shall undertake an analysis of the other three prongs of the test. The second inquiry is to determine if the error is "clear and obvious." *McCree*, 214 Md. App. at 272. If either of the voir dire questions at issue were considered, we would readily conclude that the both are compound questions. We acknowledge that the Court of Appeals has prohibited trial judges from asking compound "strong feelings" voir dire questions. We are faced, however, with a unique circumstance where, at trial, an appellant lodged no objection to voir dire questions he now challenges on appeal, and, in fact, requested similar, if not identical questions himself. Additionally, we note that Moise did not argue in his brief, nor did he assert at oral argument, the applicability of plain error. Moise has not claimed that either question the trial court posed was "clear and obvious" error and not one "subject to reasonable dispute."

The State claims that neither question posed was "clear[ly] and obvious[ly]" erroneous. This is so, the State agues, because more than a year after this case was tried the Court of Appeals in *Collins* had to state, for the second time, that trial judges are to refrain from asking compound questions at voir dire. The State's argument is that if the prohibition against compound questions was obvious, trial judges would have refrained from asking them after *Pearson* was decided in 2014.

We observe that, arguably, the prohibition against compound questions has been confusing. *Dingle*'s holding, discouraging the use of compound questions, was obscured by *State v. Shim*, 418 Md. 37 (2011), which permitted the use of a compound "strong feelings" inquiries. "When requested by a defendant, and regardless of the crime, the [trial] court should ask the general question, 'Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts.'" *Id.* at 54 (Brackets in the original).

Pearson specifically abrogated the use of compound questions permitted in *Shim*, holding that such an inquiry contradicted the prohibition against such questions established in *Dingle* eleven years before.

Just like the phrasing of the voir dire questions in *Dingle*, the phrasing of the "strong feelings" voir dire question in *Shim* "shifts from the trial [court] to the [prospective jurors] responsibility to decide [prospective] juror bias." In other words, as with the voir dire questions' phrasings in *Dingle*, the phrasing of the "strong feelings" voir dire question in *Shim* required each prospective juror to evaluate his or her own potential bias. Specifically,

under *Shim* each prospective juror decides whether his or her "strong feelings" (if any) about the crime with which the defendant is charged "would [make it] difficult for [the prospective juror] to fairly and impartially weigh the facts." That decision belongs to the trial court, not the prospective juror. *Pearson*, 437 Md. at 360 (cleaned up). We conclude that while the Court of Appeals' mandate after *Pearson* was clear, it seems not to have yet filtered to the trial courts or the trial bar. After all, it was Moise's trial counsel that proposed three compound voir dire questions and failed to object to the two compound questions the trial judge asked. One may conclude that trial court judges and the trial bar do not yet realize that compound questions are to be avoided.

In any case, reviewing a trial court's use of a compound question should not be done in a vacuum. In *Arnez Collins*, another case that concerned the conduct of voir dire, with regard to compound questions, the Court of Appeals noted,

> . . . as we have recognized in the past, a voir dire process that involves compound questions is not automatically invalid. 'A review of the trial court's rulings should be undertaken only on the record of the voir dire examination as a whole.' In White, the trial judge initially asked the venire compound questions, but she followed that with an exhaustive, two-day long, individual voir dire process, which this Court found to be procedurally sufficient. *Id*. at 248.

452 Md. 614, 625, FN 5 (2017) (citations omitted). In this case, the judge conducted voir dire from the morning until the afternoon of the first day of trial. The process was recorded over 85 transcript pages. The record shows that Moise's counsel actively participated, asking questions of the prospective jurors as well as the judge to discern potential juror bias. The judge excused fifteen potential jurors for cause. As has been noted, at the end

of the process, a jury acceptable to Moise and the State was selected without objection. From this we conclude that while the compound "strong feelings" questions used in this case should have been avoided, their use did not deny Moise a reasonable, fair, and comprehensive voir dire process.

Third, we consider whether the error affected the outcome of the proceedings. Moise's argument is clear: the compound questions used here bred uncertainty that the jurors selected were unbiased. At oral argument, Moise contended that it was no more than speculation that the jurors empaneled rendered a fair and impartial verdict given the method of voir dire.

The State, on the other hand, contends that the outcome of the proceedings was not affected. Moise never objected to the voir dire. He accepted the jury without qualification. His protests are now too little too late.

We have already concluded that Moise waived any objection to the jury when he accepted it without reservation. We also observe that the voir dire process was not perfunctory; Moise had an opportunity to exercise preemptory challenges and strikes for cause. We understand that Moise's argument that he may have been better able to exercise strikes for cause had any member of the venire stood for either of the questions asked. However, we have concluded that the process permitted Moise to fully participate.

Additionally, we observe that the evidence the State marshalled against Moise was substantial and clearly pointed to his guilt. Specifically, we speak of his co-conspirator Copper's testimony, the video evidence from Walmart and the bank, as well as the forensic

evidence from Moise's phone and from the duffle bag that contained the stolen money and had on it Moise's DNA. We conclude that the testimony was more than credible and the weight of the evidence sufficient to establish Moise's guilt beyond a reasonable doubt. While we agree that the two questions at issue should have been rephrased, we cannot conclude that the compound questions used here, when arrayed against the overall fairness of the voir dire process and the weight of the evidence, denied Moise a fair trial. Had the evidence been less definitive or the process of voir dire less comprehensive, we would draw a different conclusion.

Finally, we consider whether the error is so prejudicial that we must reverse Moise's conviction. While the use of the two compound questions in this case was regrettable, for the reasons already articulated in this opinion, we do not conclude that their inclusion was so egregious that Moise was denied a fair trial. Consequently, we shall decline to recognize plain error.

II. *Nolle Prosequi of Prior Charges and the Issuance of a Superseding Indictment*

Moise's second claim of error is that it is a violation of the Fifth Amendment prohibition against double jeopardy for the State to have dismissed the original charges and filed a superseding indictment against him. The State filed a new indictment, adding additional charges, months before the trial. In his brief, appellate counsel informed us that Moise specifically requested inclusion of this claim of error.

The State argues that it did nothing improper in filing an amended set of charges in this case. If it did anything prohibited when it filed the new indictment, the State asserts that the issue is now waived. According to the State, Moise did not comply with Rule 8-504, which mandates that in appellate briefs, each party is obligated to provide a short statement of the applicable standard of review and a presentation of that party's position with appropriate legal authority supporting their position.

We agree with the State. Rule 8-504(a)(5) and (6), states that a brief must contain "a concise statement of the applicable standard of review for each issue" and "argument in support of the party's position on each issue." The failure to cite an applicable standard of review or arguments in favor of an issue constitutes the issue's waiver on appeal. *Pack Shack, Inc. v. Howard County*, 377 Md. 55, 88 n.14 (2003). Moise has neither set forth the applicable standard of review nor cited any legal authority for his position that the State's use of a superseding indictment constitutes double jeopardy. Moise's second claim of error is, therefore, waived.

Even had we considered Moise's claim on the merits, we would still find no error. The use of a superseding indictment does not necessarily place a defendant in double jeopardy because the State has broad discretion to file a new indictment at any time before jeopardy attaches. *See*, generally, *State v. Ferguson*, 218 Md. App. 670 (2014). "In order for jeopardy to attach, a defendant must risk a determination of guilt." *Odem v. State*, 175 Md. App. 684, 700 (2007). In this case, jeopardy would not have attached until the jury was seated and sworn. "It is generally held that, with respect to a jury trial, a defendant is

placed in jeopardy when the jury is selected and sworn." *Blondes v. State*, 273 Md. 435, 444 (1975) (citing *Illinois v. Somerville*, 410 U.S. 458, 467 (1973)). We conclude that the State had the broad discretion to file a superseding indictment at any time prior to the jury being sworn. Finally, for the same reasons articulated in section I, namely that the use of a superseding indictment is not improper, we conclude that Moise's second claim does not merit plain error review.

THE JUDGEMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.