Circuit Court for Prince George's County
Case No. CT180830X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1237

September Term, 2021

FILADELFO BENITEZ F.

v.

STATE OF MARYLAND

Wells, C.J.,
Leahy,
Ripken,

JJ.

Opinion by Ripken, J.

Filed: May 13, 2022

A jury in the Circuit Court for Prince George's County convicted Filadelfo Benitez F. ("Appellant") of eleven offenses[1] related to a long-running pattern of sexual abuse that he committed against his minor daughter, P.[2] The circuit court sentenced Appellant to an aggregate of two hundred and ten years' incarceration with ten years suspended, five years' supervised probation, and lifetime sexual offender registration and supervision.

Appellant presents a single issue for our review: "Did the lower [c]ourt err in not declaring a mistrial, *sua sponte*, and instead issuing a curative instruction following a disturbance from one of Appellant's witnesses?" Appellant concedes that this issue is not preserved but asks this Court to exercise plain error review. For the reasons explained below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

At trial, P. testified that Appellant raped her on a near-daily basis from when she was eight years old until she was fifteen years old. P. gave birth to a child conceived by Appellant's abuse. P. eventually disclosed the abuse to a relative, who helped her leave Appellant's home. P.'s younger brother, A., testified that he saw Appellant rape P. but feared that Appellant would harm him if he attempted to intervene. A forensic analyst

[1] Appellant was convicted of one count of continuing course of sexual abuse against a child; four counts of sexual abuse of a minor by a family member; three counts second-degree rape; two counts of third-degree sexual offense; and one count of second-degree assault.

[2] To protect the victim's identity, we refer to her by a randomly selected initial and identify her father using only the first initial in his last name. *See Juan Pablo B. v. State*, 252 Md. App. 624, 629 n.3 (2021).

testified he analyzed samples of Deoxyribonucleic Acid ("DNA") from P., her daughter, and Appellant. The analyst determined that Appellant could not be excluded as being the father of P.'s child and that Appellant was 2.94 billion times more likely to be the father of P.'s child than another person selected at random. A detective testified that Appellant confessed that he was the father of P.'s child and that he had sexually abused her on one occasion. At trial, Appellant's defense theory was that K., one of Appellant's sons, committed the abuse and that Appellant lied to protect him. Appellant called his sister A.F. as a witness. A.F. testified that she had seen K. and P. together. Unprompted, A.F. displayed a photograph that she had brought with her to the witness stand. The State objected.

The circuit court ordered a recess in the trial, and the jury left the courtroom. The State moved to hold A.F. in contempt. The court reviewed the photograph and others A.F. had in her lap, noting as follows:

> [F]or purposes of the record the witness began to hold up a photograph that was directed toward the defendant's table. I personally did not see what [it] was. I saw that she held something up. The back side of the photograph that I saw was white.
>
> I do not know if the jurors saw what was on the photograph. And just for purposes of the record, it appears that the first photograph—because she had one, two, three, four pictures. And the first photograph that the witness gave to the Court is a picture. It appears that there is an individual standing next to I think [P.] at some sort of function. I don't know if the jurors saw it. I don't know if they could have seen it from the distance in which they were from the witness.

The court gave the parties time to discuss among themselves how to proceed with A.F. The court admonished A.F. that her actions could potentially cause a mistrial. After a lunch

break, the State offered a curative instruction. The circuit court stated: "Why don't you take a couple of moments so that the two of you can straighten out your stipulation?" The transcript notes that counsel then conferred off the record. The jury returned to the courtroom. The circuit court said the following:

> All right, ladies and gentlemen, I'm going to read a joint exhibit number one, a stipulation by the parties.
>
> We broke earlier because the witness [A.F.] pulled something out of her bag which is not allowed in Court which created a security concern.
>
> Security in this courtroom is taken very seriously. Apparently the witness was attempting to produce a photograph. All evidence must be admitted through the attorneys of record.
>
> This is the photograph that the witness produced. There is no testimony on the record regarding the authentication, who the parties are in the photograph, or when or where the photograph was taken.
>
> This photograph is not evidence in this case. And you should not consider the photograph when deliberating.
>
> And that will be admitted as Joint Exhibit Number 1. And the photograph is contained in Court's Exhibit Number 1 but not admitted.

Appellant's counsel did not object to the jointly stipulated curative instruction and did not move for a mistrial.

Appellant was convicted of all counts submitted. Appellant timely appealed.

DISCUSSION

On appeal, Appellant argues that he was deprived of an impartial trial by A.F.'s disturbance of the proceedings, the recess, the jury's long absence from the courtroom, and,

particularly, the joint stipulation.[3] Appellant argues that the court should have *sua sponte* declared a mistrial and that the reference in the joint stipulation to a "security concern" could have led the jury to discredit A.F.'s testimony or to find Appellant guilty, or less credible, by association.[4] Appellant acknowledges his claim of error is not preserved under Md. Rule 8-131(a) and asks this Court to exercise plain error review.

The State argues that Appellant affirmatively waived his claim of error relating to the curative instruction by stipulating to the language in that instruction. The State further argues that plain error review is otherwise inappropriate because Appellant has not identified any prejudicial error, let alone "clear error" affecting Appellant's substantial rights, and the case does not present an exceptional circumstance warranting plain error review.

This Court generally does not review issues unless they were raised in or decided by the trial court. *See* Maryland Rule 8-131(a). Claims of error relating to jury instructions are not preserved for appellate review unless a timely, specific objection to the instruction

[3] Appellant's reply brief clarifies that he does not argue that he was prejudiced by A.F.'s display of the photograph.

[4] Appellant argues in his principal brief that the trial disturbance created "manifest necessity" "for the trial judge to declare a mistrial *sua sponte*." The State correctly responds that the doctrine of manifest necessity concerns the prosecution's burden to establish that the retrial of a defendant following a declaration of a mistrial over the defendant's objection would not place the defendant in double jeopardy. And because the circuit court did not declare a mistrial in this case, the doctrine is inapplicable.

Appellant states in his reply brief that his cited cases dealing with manifest necessity may nonetheless be used as "guideposts" for assessing when a juror's impartiality may be called into question. We find those cases to be factually dissimilar, as explained below.

is made at trial. Maryland Rule 4-325(f); *Yates v. State*, 429 Md. 112, 130 (2012); *see Paige v. State*, 222 Md. App. 190, 200–01 (2015) (holding that issue concerning content of curative instruction was not preserved for appellate review where defense counsel failed to object or request further relief after trial court sustained objection and gave curative instruction). Nonetheless, an appellate court "may [] take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object." Maryland Rule 4-325(f). Appellate courts rarely exercise discretionary review of unpreserved errors because fairness and judicial efficiency require that objections be presented to the trial court so that a proper record may be made and so that the trial court, and parties, have an opportunity to respond. *Ray v. State*, 435 Md. 1, 23 (2013).

The exercise of "plain error review" is reserved for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial.'" *Newton v. State*, 455 Md. 341, 364 (2017) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)); *see also Peterson v. State*, 196 Md. App. 563, 589 (2010) ("In the context of erroneous jury instructions, however, the plain error doctrine has been noticed sparingly. The plain error hurdle . . . nowhere looms larger than in the context of alleged instructional errors." (internal quotation marks and citations omitted)). Four conditions must be satisfied before an appellate court can exercise its discretion to find plain error:

> (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 [] proceedings; and

> (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Beckwitt v. State, 477 Md. 398, 464 (2022) (alteration in original) (quoting *Newton*, 455 Md. at 364). The first criterion recognizes that "[f]orfeited rights are reviewable for plain error, while waived rights are not." *State v. Rich*, 415 Md. 567, 580 (2010). "Forfeiture is the failure to make timely assertion of a right, whereas waiver is the intentional relinquishment or abandonment of a known right" *Id.* (internal quotation marks and citation omitted).

This Court has recognized an affirmative waiver under circumstances similar to those here in *Somers v. State*, 156 Md. App. 279, 312 (2004). In that case, Somers was tried for the robbery of a liquor store. *Id.* at 285. The State called as a witness Somers's co-defendant, who had already pleaded guilty. *Id.* at 288. The co-defendant testified that he did not commit the robbery alone. *Id.* at 289. When the State asked the co-defendant to identify his accomplice, he refused and stated that he felt "uncomfortable answering." *Id.* Somers moved for a mistrial on the grounds that the co-defendant's answers implied that Somers was the accomplice but the co-defendant's refusal to directly say so hindered Somers's opportunity for cross-examination. *Id.* at 289–90. The circuit court denied the motion for a mistrial. *Id.* At the close of evidence, Somers submitted a proposed curative instruction stating that the co-defendant's refusal to answer could not be considered evidence of Somers's guilt. *Id.* at 290–91. The trial court read the proposed instruction to the jury. *Id.* at 291. On appeal, Somers argued that the motion for mistrial should have been granted and, for the first time, argued that the content of the curative instruction

exacerbated the prejudice from the co-defendant's refusal to answer. *Id.* at 311–12. We held that Somers waived any issue with the content of the instruction: "Having sought and obtained the precise instruction he requested, Somers cannot now be heard to complain that the language of the instruction was prejudicial." *Id.* at 312.

We conclude that Appellant affirmatively waived any claim of error with respect to the content of the instruction. The record reflects that the curative instruction and exhibit were a joint stipulation. In other words, the language referring to a "security concern," was submitted to the court by joint agreement of the parties. *See* "Stipulation," *Black's Law Dictionary* (11th ed. 2019) ("A voluntary agreement between opposing parties concerning some relevant point[.]"). Appellant contends that "the record is not clear as to who drafted the curative instruction and whether or not counsel for Appellant meant for it to be a joint stipulation[.]" Our review of the record indicates that the instruction was submitted as a joint stipulation by Appellant and the State. Joint Exhibit One, contained in the record, is titled (in all capital letters) "stipulation by the parties (photograph)" and is signed by counsel for Appellant as well as the Assistant State's Attorneys. The court referred to the exhibit as a "stipulation by the parties." Whether or not counsel for Appellant initially crafted the "security concern" language, counsel for Appellant joined in requesting the instruction given. Accordingly, the contents of that instruction may not be challenged on appeal. *See Somers*, 156 Md. App. at 312.

Next, even if an issue with the content of the instruction were not waived, Appellant has failed to show any error, let alone a clear and obvious one affecting his substantial rights. Appellant argues that the circuit court failed to ensure that Appellant received a fair

and impartial trial. None of the actions that Appellant identifies were so fundamental or egregious as to have threatened the jury's impartiality. *See Newton*, 455 Md. at 364–65. It was appropriate for the circuit court to recess to admonish the witness and consider what, if any, action was warranted. Counsel were allowed an appropriate amount of time, including time over the lunch break, to determine how to proceed. The court and parties reasonably decided that showing photographs to the jurors would limit any speculation about the contents of the photographs. Explaining that A.F.'s conduct, which occurred in front of the jury, "created a security concern" was not inaccurate. In any event, that description was unconnected to A.F.'s credibility, to the accuracy of her testimony, or to Appellant's credibility.[5] We also note that, to the extent Appellant argues that the circuit court erred by not declaring a mistrial *sua sponte*, this argument fails. "[T]here is no obligation on a trial judge to [declare a mistrial *sua sponte*]." *Simmons v. State*, 436 Md. 202, 223 (2013).

Appellant primarily relies on a series of cases considering the prejudice to a defendant from improper witness testimony or remarks from counsel. Those cases are inapposite. *See Guesfeird v. State*, 300 Md. 653, 658–59 (1984) (complaining witness's testimony suggested she had passed a lie detector test); *Rainville v. State*, 328 Md. 398, 406–10 (1992) (mother of sexual-abuse victim testified that defendant was incarcerated for

[5] Appellant argues on appeal that A.F. was his "main witness" and that his "entire defense centered around the credibility of the witnesses." The State persuasively points out that A.F. did not offer any specific testimony about events during the time period of the abuse or about K. and P.'s relationship prior to the birth of P.'s daughter. A.F.'s brief testimony was consistent with the testimony of P. and K.

a similar crime against her son); *Carter v. State*, 366 Md. 574, 588–92 (2001) (witnesses referred to defendant's prior arrest and involvement in a narcotics sale); *Kosmas v. State*, 316 Md. 587, 592–598 (1989) (witness testified that defendant refused to take a lie detector test). None of the events Appellant identifies are tantamount to improper evidence of a defendant's prior bad acts or direct credibility-related testimony. Nor is this a case where the defendant's open hostility to the court may have influenced the jury, *see State v. Brady*, 120 N.H. 899, 901–02 (1980), or where suppressed evidence was repeatedly referenced and exposed to the jury, *see Neal v. State*, 272 Md. 323, 323 n.1 (1974). Last, contrary to Appellant's suggestion, the trial events could not have remotely created a risk that Appellant would be found "guilty by association" with A.F. *See United States v. Jarvis*, 792 F.2d 767, 769–71 (9th Cir. 1986) (finding risk of guilt by association to defendant who was central figure in drug distribution case where jurors saw co-defendants heavily shackled under guard of several U.S. Marshals).

Having found that Appellant affirmatively waived any claim of error with the curative instruction and that, even if he had not, the record does not reveal any fundamental error, our plain error analysis need not go further. As explained in footnote three, we have no occasion to consider whether manifest necessity existed for a retrial.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.