Baltimore City Circuit Court
Case No. 115302013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1268

September Term, 2016

MICHAEL A. KIMBLE

v.

STATE OF MARYLAND

Woodward, C.J.,
Meredith,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, C.J.

Filed: April 20, 2018

A jury in the Circuit Court for Baltimore City convicted Michael Kimble, appellant, of possession of a firearm in relation to a drug trafficking crime, wearing and carrying a handgun, possession of a firearm by a disqualified person, possession with intent to distribute a controlled dangerous substance (cocaine), possession of a controlled dangerous substance (cocaine), and possession of ammunition by a disqualified person. Appellant was sentenced to a total of 35 years' imprisonment. In this appeal, appellant presents the following questions for our review, which have we rephrased:[1]

1. Did the trial court abuse its discretion when, during appellant's direct testimony, it sustained multiple objections to several "leading" questions?

2. Did the trial court's alleged application of the rule against leading questions impermissibly inhibit appellant's constitutional right to present a defense?

3. Was the trial court's failure to instruct the jury on the charge of firearm possession in relation to a drug trafficking crime "fundamental" error warranting automatic reversal?

[1] Appellant phrased the questions as:

1. Did the trial court abuse its discretion in sustaining multiple objections to Mr. Kimble's examination, and precluding much of his relevant testimony, because defense counsel's questions were posed in the form of leading questions?

2. Did the trial court's application of the rule against leading questions unconstitutionally prevent Mr. Kimble from presenting his defense under *Rock v. Arkansas*, 483 U.S. 44 (1987)?

3. Was the trial court's failure to instruct the jury on the charge of firearm possession in relation to a drug trafficking crime fundamental error?

For reasons that follow, we answer appellant's questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

In the early morning hours of October 8, 2015, Baltimore City Police Officer Melvin Jones was in his marked patrol car when he received a report of a robbery at the 1600 block of Pratt Street in Baltimore. After receiving a description of the suspect, Officer Jones responded to that area and observed a group of individuals, including appellant, crowded around one another next to the exterior wall of a nearby building. According to Officer Jones, the individuals appeared to be involved in a dice game.

Believing appellant to be the robbery suspect, Officer Jones exited his vehicle and approached the group on foot. The group dispersed, and Officer Jones followed appellant, who was "walking much faster" and making "a head motion over his shoulder" as if to look for the officer's whereabouts. After a short while, appellant started running, and Officer Jones gave chase. At one point during the chase, appellant removed a handgun from his waistband and pointed it at the officer, who drew his weapon and told appellant to "drop the gun and get on the ground." Appellant dropped the gun, which was later recovered by the police, and then continued to run. Appellant was quickly stopped by police after he collided with a police vehicle driven by Officer Freddie Baker, who was assisting in the pursuit. After appellant was arrested, Officer Jones conducted a search of appellant's person and discovered 19 bags of cocaine in the right pocket of appellant's pants.

At trial, appellant testified that, on the night of his arrest, he had gone to the area to meet a friend when he saw Officer Jones drive by in his patrol car. Appellant claimed that he had not been involved in any dice game and that he was simply walking in the same direction as the other individuals. According to appellant, everyone just "started running," so he ran in the opposite direction, at which time he was hit by Officer Baker's vehicle and apprehended.

At this point in appellant's direct testimony, defense counsel tried to ask appellant several questions about the night of his arrest, but was thwarted by objections from the State:

[DEFENSE COUNSEL]:	**Okay. Did you have a gun?**
[APPELLANT]:	**No, ma'am.**
[STATE]:	**Objection.**
THE COURT:	**Sustained.**
[STATE]:	Move to strike.
THE COURT:	The jury will disregard the last comments of the witness.
[DEFENSE COUNSEL]:	**Did you have anything on your person –**
[STATE]:	**Objection.**
THE COURT:	**Don't answer. Sustained.**
[DEFENSE COUNSEL]:	**You said you were hit by Sergeant Baker's car?**
[APPELLANT]:	**Yes, ma'am.**

[STATE]:	**Objection.**
THE COURT:	**Sustained. Don't answer. The jury will disregard the response of the witness, the last response of the witness.**
[DEFENSE COUNSEL]:	What happened at that point?
[APPELLANT]:	At that point after the other officers came and he asked me did I want medical treatment.
[DEFENSE COUNSEL]:	Who is he?
[APPELLANT]:	Well, the officer asked me did I need medical treatment. I think he – he had a regular badge, it was like the rest of the officer's badge. He came over there, it was a dark-skinned guy, he had glasses. **He asked me did I need medical treatment and I told him yes.**
[STATE]:	**Objection.**
THE COURT:	**Sustained.**
[STATE]:	**Move to strike.**
THE COURT:	**The jury will disregard the last comments of the witness. Sir, don't talk about what you said.**
[DEFENSE COUNSEL]:	Now, you've been convicted before; is that correct?
[APPELLANT]:	Yes, ma'am.
[DEFENSE COUNSEL]:	You've been convicted for possession with the intent to distribute?

[APPELLANT]:	Yes, ma'am.
[DEFENSE COUNSEL]:	**What happened to your phone?**
[STATE]:	**Objection.**
THE COURT:	**Sustained. Do not answer.**
[DEFENSE COUNSEL]:	**When you were – you were handcuffed?**
[STATE]:	**Objection.**
THE COURT:	**Sustained. Do not answer.**
[DEFENSE COUNSEL]:	**Did you see Officer Jones?**
[STATE]:	**Objection.**
THE COURT:	**Sustained. Do not answer.**
[DEFENSE COUNSEL]:	What happened after you were apprehended?
[APPELLANT]:	After I was apprehended, I was took [sic] to the station.
[DEFENSE COUNSEL]:	After you were – were you handcuffed?
[APPELLANT]:	Yes.
[DEFENSE]:	And immediately after you were handcuffed, what happened to you?
[APPELLANT]:	After I was handcuffed, the officers wiped my face after I didn't get [in] the ambulance and he took me to the station. And after they took me to the station, I was brought to Central Booking.
[DEFENSE COUNSEL]:	Who handcuffed you, if you know?

[APPELLANT]:	I can't remember.
[DEFENSE COUNSEL]:	**And after you were handcuffed, did anything physically happen to your person?**
[STATE]:	**Objection.**
THE COURT:	**Sustained. Do not answer.**
[DEFENSE COUNSEL]:	Do you know who took you to the station?
[APPELLANT]:	It was another dark-skinned guy.
[DEFENSE COUNSEL]:	**After you were handcuffed, did you see Officer Jones again?**
[STATE]:	**Objection.**
THE COURT:	**Sustained. Do not answer.**
[DEFENSE COUNSEL]:	I have nothing further.

(Emphasis added).

Following appellant's testimony, the court reviewed with the jury the charges, which included: second-degree assault; use of a handgun in a crime of violence; wearing and carrying a handgun; possession of a regulated firearm; possession of ammunition by a prohibited person; participating in a dice game; possession of cocaine; possession with intent to distribute cocaine; and, possession of a firearm during a drug trafficking crime. The court then instructed the jury on the elements of each of the above charges, except the

charge of possession of a firearm during a drug trafficking crime.[2] Neither appellant nor defense counsel objected to the trial court's omission.

Following closing arguments, but before the jury retired for deliberations, one of the alternate jurors approached the bench, at which time the following colloquy ensued:

A JUROR:	I'm curious about some of the objections and why they were sustained, is that [an] inappropriate question?
THE COURT:	No.
A JUROR:	Why wasn't he allowed to say, for example, you didn't (inaudible)?
THE COURT:	Because they're only self-serving answers and the reliability of them are severely questionable.
A JUROR:	Oh, all right. (Inaudible).
THE COURT:	And they were leading questions. Leading more so than anything else. On direct exam, you cannot lead the witness. Okay? Did you have a gun, that's leading. If she had said, well, what if anything…did you have on your person and he said nothing, fine. But to say – it's like saying, did you have the key to the safe? You know, you can't do that. You're leading them and telling them what to say.
A JUROR:	Thank you.
THE COURT:	All right. You're welcome.

[2] The court, during its initial instructions to the jury, also omitted an instruction on the elements of the charge of participating in a dice game; however, the court later rectified this mistake by issuing an instruction on this charge during jury deliberations.

Appellant was ultimately convicted, as previously noted. This timely appeal followed.

DISCUSSION

I. and II.

Appellant first argues that the trial court abused its discretion when, during appellant's direct examination, it sustained multiple objections "because defense counsel's questions were in the form of leading questions."[3] Appellant maintains that the court's strict adherence to the rule against leading questions was inappropriate because not all of the questions were leading and because it unfairly prevented appellant from presenting his defense.

Before we discuss the merits of appellant's arguments, we must first explore some of the factual assertions made by appellant, as our review and interpretation of the record differs markedly from his. During the relevant portions of appellant's direct testimony quoted above, the State lodged nine objections, all of which were sustained by the trial court. Appellant insists that eight of those objections were sustained because defense counsel's questions were leading. That assumption, however, cannot be made, because neither the State nor the court provided any grounds for the objections or the rulings.

[3] The State contends that appellant's argument is unpreserved because he did not make a formal proffer at trial as to the nature of the evidence that he sought to have admitted. We disagree, as a formal proffer was unnecessary given that the nature of the excluded evidence was apparent from the context of the questions asked. *See* Md. Rule 5-103(a) ("Error may not be predicated upon a ruling that admits or excludes evidence unless…the substance of the evidence was made known to the court by offer on the record *or was apparent from the context within which the evidence was offered*.") (Emphasis added).

Appellant, having apparently recognized such deficiency in the record, instead points to the trial court's subsequent colloquy with one of the jurors, during which the juror asked the court why some of the objections were sustained, and the court responded the answers were "self-serving" and the questions were "leading."

Unfortunately for appellant, that colloquy does not support his assertion that *all* of the objections at issue were sustained on the grounds that the questions were leading, because neither the juror nor the trial judge identified exactly which objections they were referring to when they made their respective comments. Although the trial judge did, in explaining her rulings to the juror, refer to a specific question, namely, defense counsel's question as to whether appellant had a gun, as an example of a leading question, that reference provides, at best, a basis for the trial court's ruling on that particular objection only. It does not necessarily mean, or even imply, that any other rulings by the court, including those mentioned by appellant here, were made because defense counsel's questions were leading.

Moreover, the trial court, in explaining its rulings to the juror, also indicated that it sustained the State's objections because the answers would be self-serving and unreliable. Thus, although the court *may* have sustained all of the objections on the grounds that the questions were leading, it is equally plausible that the court sustained the objections for other reasons. In fact, the record makes plain that at least one of the nine objections, which came on the heels of appellant's testimony as to what he told one of the officers, was likely

sustained, not because the question was leading but because the evidence was hearsay.[4] Accordingly, we cannot say that the trial court erred in excluding testimony elicited by "leading" questions, because we cannot say with any certainty that the court made any such ruling. To hold otherwise would be speculative and without sufficient support in the record.

Assuming, *arguendo*, that the trial court did sustain any or all of the objections on the grounds that the questions were leading, we are persuaded that those rulings were not erroneous. Pursuant to Md. Rule 5-611(c), the decision to "allow leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony." And, "'no error will be recognized unless there is a clear abuse of such discretion.'" *Tetso v. State*, 205 Md. App. 334, 401 (quoting *Oken v. State*, 327 Md. 628 (1992), *cert. denied*, 428 Md. 545 (2012)).

Here, the trial court explained that its decision to sustain certain objections was based on the fact that the questions were leading and the answers would be self-serving and unreliable. The court then explained, in greater detail, why leading questions are generally prohibited and why it chose to preclude them at certain instances during trial. It is clear, therefore, that the trial court recognized the law and applied it in a conscientious manner to the questions posed at trial. Accordingly, we perceive no abuse of discretion.

[4] Although the trial court did not expressly state that the objection was sustained on hearsay grounds, the court did admonish appellant not to "talk about what you said."

For the same reasons, appellant's reliance on *Rock v. Arkansas*, 483 U.S. 44 (1987) is misplaced. There, the defendant, Vickie Lorene Rock, was charged with manslaughter following the shooting death of her husband. *Id.* at 45-46. Prior to trial, Rock, who could not remember the precise details of the shooting, underwent hypnosis to improve her memory. *Id.* at 46. Upon learning of the hypnosis sessions, the prosecution filed a motion to exclude Rock's testimony, and the trial court issued an order limiting Rock's testimony to "matters remembered and stated . . . prior to being placed under hypnosis." *Id.* at 47. Rock was convicted, and she appealed that conviction to the Supreme Court of Arkansas, which ultimately affirmed Rock's conviction and "decided to follow the approach of States that have held hypnotically refreshed testimony of witnesses inadmissible *per se*." *Id.* at 48-49.

The Supreme Court of the United States eventually granted certiorari "to consider the constitutionality of Arkansas' *per se* rule excluding a criminal defendant's hypnotically refreshed testimony." *Id.* at 49. The Court ultimately held that "Arkansas' *per se* rule . . . infringes impermissibly on the right of a defendant to testify on his own behalf." *Id.* at 62. The Court explained:

> The Arkansas rule enunciated by the state courts does not allow a trial court to consider whether posthypnosis testimony may be admissible in a particular case; it is a *per se* rule prohibiting the admission at trial of any defendant's hypnotically refreshed testimony on the ground that such testimony is always unreliable. Thus, in Arkansas, an accused's testimony is limited to matters that he or she can prove were remembered *before* hypnosis. This rule operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information produced.

* * *

> We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool[.]… The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.

Id. at 56, 61 (alterations in original) (footnotes omitted).

Comparing the facts presented in *Arkansas* with the facts in the instant case, it is clear that the two cases are inapposite. Here, we are not faced with a trial court that prevented a defendant from presenting his version of events by way of blind application of a *per se* evidentiary rule. As previously discussed, the record is ambiguous as to whether the court, in the instant case, was even applying the rule against leading questions when it sustained the State's objections. Moreover, even if the trial court was applying that rule, the record shows that the court did so in a discretionary fashion and in light of the manner in which the evidence was being elicited. In short, unlike the situation in *Arkansas*, the trial court's implementation of the evidentiary rule in the instant case was not automatic, nor was the court stripped of the power to make a discretionary decision as to whether that rule should apply. To the contrary, the trial court did just that. That the trial court's rulings happened to limit appellant's testimony in some way does not mean that appellant's right to a fair trial or his ability to present a defense was compromised.

III.

Appellant's final argument is that the trial court erred in failing to provide the jury with an instruction on the elements of one of the charged crimes, namely, possession of a firearm in relation to a drug trafficking crime. Appellant concedes that the issue was not properly preserved because defense counsel failed to object at trial.[5] Appellant maintains, however, that "the failure to instruct, altogether, on a charged crime should constitute fundamental error, to which the concepts of waiver and preservation do not apply." Appellant also maintains that, even if waiver and preservation do apply in the instant case, this Court should review the issue for plain error.

To begin with, we disagree with appellant that the trial court's failure to instruct on a charged crime constituted fundamental error, as that argument was expressly rejected by this Court in *Martin v. State*, 165 Md. App. 189 (2005). There, the defendant, Karim Azim Razzaq, was arrested and charged with various crimes, including first-degree murder, conspiracy to commit first-degree murder, robbery, and conspiracy to commit robbery. *Id.* at 192-93. At trial, during jury instructions, the trial court failed to instruct the jury on the two conspiracy charges. *Id.* at 194. Neither Razzaq nor his counsel lodged an objection, and Razzaq was ultimately convicted. *Id.*

After noting an appeal, Razzaq argued in this Court that the trial court's failure to instruct the jury on the two conspiracy charges constituted fundamental error and warranted

[5] Maryland Rule 4-325(e) provides, in pertinent part, that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury[.]"

automatic reversal. *Id.* at 195, 201. This Court disagreed, noting that the Court of Appeals, in *Reynolds v. State*, 219 Md. 319 (1959), had previously declined to review an unpreserved claim that the trial court in that case had failed to fully instruct the jury on a charged crime. *Martin*, 165 Md. App. at 198, 204; *See also Reynolds*, 219 Md. at 324. After comparing cases in which courts from other jurisdictions held that the failure to instruct on a charged crime constituted fundamental error with cases in which courts from other jurisdictions held that such a failure was not fundamental error, this Court agreed with the rationale of the latter cases and held that "the total failure to instruct on a charged offense is not structural or fundamental error mandating reversal." *Id.* at 201-05.

Given the clear mandate of this Court in *Martin*, we are persuaded that the trial court's failure to instruct in the instant case did not constitute fundamental error, and we see no reason to depart from our previous holding. *See Wallace v. State*, 452 Md. 558, 582 (2017) ("Under *stare decisis*, absent extremely narrow exceptions, an appellate court does not overrule its precedent.") (citations and quotations marks omitted). Accordingly, we reject appellant's argument and affirm on those grounds.

We likewise reject appellant's invitation to review the issue for plain error. Plain error review is reserved for those issues that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980). Even in the face of such an issue, we shall intervene "only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble v. State*, 300 Md. 387, 397 (1984), *cert. denied*, 469 U.S. 1230 (1985). Moreover, "[i]t is a discretion that appellate courts

should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Chaney v. State*, 397 Md. 460, 468 (2007). In fact, "the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation." *Morris v. State*, 153 Md. App. 480, 507 (2003).

To be guilty of possession of a firearm in relation to a drug trafficking crime, a defendant must have "possessed a firearm under sufficient circumstances to constitute a nexus to [a] drug trafficking crime." *Johnson v. State*, 154 Md. App. 286, 305 (2003), *cert. denied*, 380 Md. 618 (2004). Possession of a firearm is considered to have a "nexus" to a drug trafficking crime if: 1) a defendant possesses the drugs with intent to distribute; and 2) the firearm is discovered in close proximity to the drugs. *Id.* at 309. Here, appellant was convicted of possession of a firearm after Officer Jones testified that he saw appellant remove a handgun from his waistband just prior to his arrest. When appellant was arrested a few moments later, 19 individually-wrapped bags of cocaine were found in the front pocket of his pants, which led to his being convicted of a drug trafficking crime, namely, possession with intent to distribute a controlled dangerous substance. *See* Md. Code, (2002, 2012 Repl. Vol.), § 5-621(a)(2) of the Criminal Law Article. Based on those facts, the jury found appellant guilty of possession of a firearm in relation to a drug trafficking crime, and possession with intent to distribute a controlled dangerous substance. It is reasonable to conclude, therefore, that had the jury been instructed on the elements of possession of a firearm in relation to a drug trafficking crime, it would have returned a

guilty verdict on that charge. In light of those facts, we are unpersuaded that plain error review is warranted.

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