Circuit Court for Somerset County
Case No. C-19-CR-22-000036

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1349

September Term, 2022

KEVIN L. PARKER, JR.

v.

STATE OF MARYLAND

Leahy,
Tang,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: August 4, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

A jury sitting in the Circuit Court for Somerset County found Kevin L. Parker, Jr., appellant, guilty of possession of a regulated firearm, after previously having been convicted of a disqualifying offense, and illegal possession of ammunition. The court sentenced appellant to an aggregate term of active incarceration of two and a half years. He then appealed, raising three questions for our review, which we quote:

> 1. Did the State's improper introduction of a prejudicial hearsay statement through direct questioning deny Appellant a fair trial?
>
> 2. Did the Courtroom Clerk's disclosure to the jury of Appellant's prior criminal history in violation of the Parties' stipulation deny Appellant a fair trial?
>
> 3. Did Appellant's trial attorney provide ineffective assistance of counsel by failing to object when the Courtroom Clerk gave the jury information regarding Appellant's prior criminal history in violation of the Parties[']stipulation?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Early in the morning of January 6, 2022, police received a call for a medical emergency at an apartment where appellant resided. The first-responding police officer, Officer Adam Parks, encountered appellant, "on the ground" outside, "bleeding profusely" from a gunshot wound to his "upper left leg."

Shortly thereafter, Officer Kyle Koerner arrived at the scene. Together, the two officers administered first aid to appellant. Officer Parks applied pressure to appellant's leg wound to stanch the bleeding. He then turned that task over to Officer Koerner and began to look for "more gunshot wounds" on appellant, which required that he cut appellant's pants with medical scissors. While doing so, he recovered a loaded KelTec

.380 caliber semi-automatic handgun concealed on appellant's person, "kind of in his upper—lower thigh area." Officer Parks removed the magazine and ammunition. Portions of two body-worn camera videos depicting these events were played for the jury without the audio portion.[1]

Officer Parks entered appellant's home and found blood "all over," on both floors of the two-story apartment. Inside, Officer Parks found appellant's stepson, R.J., also with a gunshot wound. The officers searched outside for shell casings but did not find any.

Appellant, who was prohibited by law from possessing a firearm, pursued the defense of necessity.[2] In support of this defense, appellant testified on his own behalf. He stated that three unknown assailants tried to rob him while he was outside, and one of them shot him during a struggle. He further claimed that his stepson came outside to check on

[1] These body camera videos were admitted into evidence without objection.

[2] The necessity defense "arises when an individual is faced with a choice of two evils, and one is the commission of an illegal act." *State v. Crawford*, 308 Md. 683, 691 (1987). The Supreme Court of Maryland articulated the following elements necessary to establish the necessity defense to the crime of unlawful possession of a handgun:

> (1) the defendant must be in present, imminent, and impending peril of death or serious bodily injury, or reasonably believe himself or others to be in such danger; (2) the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) the defendant must not have any reasonable, legal alternative to possessing the handgun; (4) the handgun must be made available to the defendant without preconceived design, and (5) the defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends.

Id. at 698–99.

him and also "got shot." Appellant did not remember much about the incident because he was "bleeding out" but hypothesized that if the assailant had dropped the gun, he probably grabbed it and placed it in his hip area. He denied owning the handgun recovered from his person and accused police of failing to investigate. On direct examination, appellant detailed this account:

> [DEFENSE COUNSEL]: Okay. Could you tell the ladies and gentlemen of the jury where you were in the -- during that day?
>
> [APPELLANT]: I was outside, and three individuals came, they try to rob me.
>
> [DEFENSE COUNSEL]: Let's back up. What time of the morning might this be?
>
> [APPELLANT]: It was nighttime.
>
> [DEFENSE COUNSEL]: Okay, so dark out?
>
> [APPELLANT]: Yeah, it was dark time.
>
> [DEFENSE COUNSEL]: Okay.
>
> [APPELLANT]: Three individuals came, they tried to rob me, I was fighting with them, and some of them took off, but when they heard the shot, that's when the rest of them took off, and that's basically all I remember, for real, that was it.
>
> [DEFENSE COUNSEL]: Okay. Do you remember why you were outside?
>
> [APPELLANT]: I was outside smoking a cigarette.
>
> [DEFENSE COUNSEL]: Okay. And you said it was nighttime. Was there anybody else outside with you?
>
> [APPELLANT]: Well, not that I remember. But my son came outside to check on me, and he got shot.

[DEFENSE COUNSEL]: So both of you are -- you and your son are both outside?

[APPELLANT]: No, I was outside by myself, and he had came outside to check on me.

[DEFENSE COUNSEL]: Okay. When did he come out to check on you?

[APPELLANT]: I don't remember; I was on the ground.

[DEFENSE COUNSEL]: So you'd already been shot.

[APPELLANT]: Yeah, I guess I was on the ground just bleeding, that's all I remember.

[DEFENSE COUNSEL]: Okay. And how many people did you say?

[APPELLANT]: About three to four people.

[DEFENSE COUNSEL]: Three to four people. And were they in a parking lot or on the sidewalk?

[APPELLANT]: We was in the parking lot.

[DEFENSE COUNSEL]: Okay. So you were --

[APPELLANT]: Yeah, I was -- I was like on my step, and shoot -- it leds [sic] to the parking lot while I was fighting.

[DEFENSE COUNSEL]: Okay. And did you know these people?

[APPELLANT]: No, I didn't know them.

[DEFENSE COUNSEL]: Any idea why they picked you out?

[APPELLANT]: No, couldn't tell you.

[DEFENSE COUNSEL]: Okay. So you didn't intentionally put yourself in that position?

[APPELLANT]: Not at all, I was outside smoking a cigarette.

[DEFENSE COUNSEL]: Okay. And when you were outside, did one of the -- were there multiple shots fired?

[APPELLANT]: All I remember is just one shot, and I was on the ground, and they just started running.

[DEFENSE COUNSEL]: Okay. **Might one of the -- might one of those people have dropped a gun near you?**

[APPELLANT]: **I'm not for sure, I can't remember. I couldn't really remember any -- I just remember probably tussling and fighting with these people.**

[DEFENSE COUNSEL]: So they were close to you?

[APPELLANT]: Yeah, they was close.

[DEFENSE COUNSEL]: All right. **And so if a gun had fallen down, you might have grabbed it so they didn't get it?**

[APPELLANT]: **Probably. Most likely I would have.**

[PROSECUTOR]: Objection. Leading.

THE COURT: Overruled.

[APPELLANT]: **Yeah, most likely.**

[DEFENSE COUNSEL]: Okay. **And if you had grabbed it, where might you have put it?**

[APPELLANT]: **Put it in -- on my hip.**

[DEFENSE COUNSEL]: And to be fair, why is it you don't remember much?

[APPELLANT]: I was shot; I was bleeding out.

[DEFENSE COUNSEL]: Okay. Had you been drinking that evening?

[APPELLANT]: Probably not a lot, but I had probably drank a little bit, but not -- not that much.

[DEFENSE COUNSEL]: Okay.

[APPELLANT]: I got shot in my main artery.

[DEFENSE COUNSEL]: In your upper leg?

[APPELLANT]: Yeah.

[DEFENSE COUNSEL]: And the State has alleged that the handgun that they found in your shorts was yours. Was it yours?

[APPELLANT]: No, it wasn't. All they had to do is -- man, if they had done the investigation they would have found out -- they would have knowed [sic] that wasn't my gun.

[DEFENSE COUNSEL]: Did the [local] Police Department ever --

[APPELLANT]: They didn't do nothing.

[DEFENSE COUNSEL]: Let me finish. Did they ever take your DNA, they ever take your fingerprints?

[APPELLANT]: No.

[DEFENSE COUNSEL]: Hair sample? Do you remember what happened after the officers got to the scene?

[APPELLANT]: I don't remember.

[DEFENSE COUNSEL]: Do you remember telling them several people had shot you?

[APPELLANT]: Yeah, I told them there was people out there.

(Emphasis added.)

During cross-examination, the prosecutor played the body-worn camera video recorded when police responded to the shooting. The prosecutor challenged appellant about his narrative and the police investigation:

[PROSECUTOR]: All right. So where did the gun come from?

[APPELLANT]: I don't know. It had to be them people -- y'all should have investigate[d] it.

* * *

[PROSECUTOR]: Tell me what that is that's coming out there [referring to the video], what's that?

[APPELLANT]: That's the gun. That's a gun.

[PROSECUTOR]: Okay. And where did that come out of?

[APPELLANT]: Out of the pants, out of my pants.

[PROSECUTOR]: The pants that you were -- so this is you? And that gun came out of your pants, that's State's Exhibit 6, which was introduced earlier. So once you were shot where did you go?

[APPELLANT]: To the ground.

[PROSECUTOR]: Okay. How would blood get inside?

[APPELLANT]: I don't know. That's -- they supposed to investigate that, which they didn't.

[PROSECUTOR]: Okay. Who's [R.J.]?

[APPELLANT]: That's my son that got shot.

[PROSECUTOR]: Okay. When did he get shot?

[APPELLANT]: I couldn't tell you; I was on the ground.

[PROSECUTOR]: And when was he outside?

[APPELLANT]: I couldn't tell you, if I'm shot bleeding out on the ground.

[PROSECUTOR]: When did he come outside?

[APPELLANT]: You just asked me that. How do I know? You all should have did --

[PROSECUTOR]: In relat- --

[APPELLANT]: -- an investigation, that's what y'all are supposed to do.

* * *

[PROSECUTOR]: You testified on direct that [R.J.] came outside, was it before or after you got shot?

[APPELLANT]: I don't know.

[DEFENSE COUNSEL]: Objection. Asked and answered.

THE COURT: Overruled.

[PROSECUTOR]: Sorry, what was the response?

[APPELLANT]: I don't know. If I was on the ground shot bleeding in and out.

[PROSECUTOR]: Okay. But it wasn't before you got shot?

[APPELLANT]: No.

[PROSECUTOR]: It wasn't when you were allegedly getting robbed?

[APPELLANT]: No.

[PROSECUTOR]: Okay. And you have one gunshot wound?

[APPELLANT]: Yes.

[PROSECUTOR]: Did you call the police?

[APPELLANT]: No. How I call the police? You know who called the police.

[PROSECUTOR]: Who is Armani Gregory (phonetic)?

[APPELLANT]: That's my oldest son's girlfriend.

[PROSECUTOR]: Would it surprise the -- to know that these people were interviewed?

[APPELLANT]: You said what?

[PROSECUTOR]: **Would it surprise you to know that [R.J.] --**

[DEFENSE COUNSEL]: **Objection.**

[PROSECUTOR]: . . . **was interviewed?**

THE COURT: **Overruled.**

[APPELLANT]: You already knew that. We went to the child advocacy place and everything. So what are you saying? We know that. Y'all ain't do no investigation though. You ain't talking about that.

[PROSECUTOR]: Okay. Were you aware that Officer Parks interviewed [R.J.]?

[APPELLANT]: Yeah, he interviewed everybody.

[PROSECUTOR]: Okay. **Were you aware that [R.J.] stated --**

[DEFENSE COUNSEL]: **Objection.**

THE COURT: **Overruled. Overruled. To the extent if he knows.** Go ahead, Mr. State's Attorney.

[PROSECUTOR]: **Was there a struggle between you and [R.J.] that night?**

[APPELLANT]: **Not at all.**

[PROSECUTOR]: **Why would he tell Officer Parks that?**

[DEFENSE COUNSEL]: **Objection.**

[APPELLANT]: **I don't know, I couldn't tell you that.**

THE COURT: **Overruled**[.]

[APPELLANT]: **You'd have to ask him.**

[PROSECUTOR]: What'd they steal from you?

[APPELLANT]: What'd they steal from me? I don't know.

[PROSECUTOR]: When they went to rob you, what did they ask you for?

[APPELLANT]: I don't remember. . . . I know I didn't have no money in my wallet. Nothing but my Social Security and my ID.

(Emphasis added.)

After deliberating for less than half an hour,[3] the jury found appellant guilty of possession of a regulated firearm, after previously having been convicted of a disqualifying offense, and illegal possession of ammunition.

Additional facts will be included in the discussion as they become relevant.

DISCUSSION

I.

Relying primarily on *Bell v. State*, 114 Md. App. 480 (1997), appellant contends that the trial court erroneously permitted the prosecutor to introduce inadmissible hearsay within hearsay while cross-examining him. Specifically, he maintains that the prosecutor, while cross-examining him, improperly introduced a hearsay statement made by a non-testifying witness (R.J.) to Officer Parks on the night of the incident. Appellant argues the error was not harmless, as it contradicted his testimony, "introduced a theory not previously introduced to the jury," and suggested that appellant "was both violent and a parent that would engage in such a serious fight with his child."

[3] At 3:50 p.m., the jury retired to consider its verdict. At 4:19 p.m., the court informed the parties that the jury had reached a verdict.

The State counters that the court correctly overruled appellant's objection to the prosecutor's question ("Why would [R.J.] tell Officer Parks that [there had been a struggle between him and appellant that night]?") because it was not offered to prove the truth of the matter asserted. Instead, "the reference to the out-of-court statement occurred as part of a line of questioning that was responsive to [appellant]'s repeated refrain that he could not remember any details – other than his claim that three individuals tried to rob him – and that the State had failed to investigate." Any error was harmless because it was an isolated occurrence, the prosecutor did not rely upon it or even refer to it during closing argument, and the evidence against appellant was overwhelming.

A. Analysis

We begin with a summary of *Bell v. State*, *supra*, as it is pertinent to our analysis. In *Bell*, the defendant shot two people, killing one and seriously wounding another. 114 Md. App. at 483. The central issue was whether the defendant had acted in self-defense. *Id*. The defendant testified in his own defense. *Id*. at 486. The prosecutor, while cross-examining the defendant, "repeatedly questioned" the defendant concerning a statement that had been made by the defendant's friend, who did not testify at trial. *Id*. at 488. The prosecutor framed various cross-examination questions as: "Would it surprise you that [the non-testifying witness] said" (or did not say) various things in his written statement? *Id*. at 488–90.

On appeal, the defendant argued that the trial court erred in permitting the State to cross-examine the defendant by referring to a statement made by a non-testifying witness. *See id.* at 483. The State claimed that, even if no hearsay exception applied, the trial court

did not err because the prosecutor merely referred to the statement to suggest that there was evidence contrary to the defendant's account of the incident, and the statement itself was not introduced, nor quoted directly by the prosecution. *Id*. at 495. We rejected the argument, explaining that the prosecutor's testimonial-like questions placed before the jury the apparent content of the non-testifying witness's statement. *Id*.

The State also argued that it properly used the non-testifying witness's statement to impeach the defendant's credibility. *Id*. at 496. We also rejected that argument, reasoning that:

> [s]tatements that are otherwise inadmissible are not salvaged by invoking the mantra of "impeachment." If the State could not properly use the statement under the applicable rules of evidence, we fail to see how it could, instead, read the statement to the jury, apparently line by line, through the questions it posed to the defendant.

Id.

We then turned to the question of whether any error by the trial court was harmless. Although the defendant conceded that he killed one person and wounded another, self-defense was "hotly contested." *Id*. at 503. We recognized that a defendant's state of mind is an "integral part of the defenses of perfect and imperfect self-defense" and can "rarely be proved directly." *Id*. Thus, the defendant's credibility in that case was "a particularly crucial component of his defense." *Id*. at 503–04. Although the evidence was overwhelming that the defendant shot the two individuals, the evidence as to his state of mind was "anything but that." *Id*. at 504. We concluded that the error was not harmless and remanded for a new trial, explaining, *inter alia*, that the State was erroneously "allowed

to impugn [the defendant's] version of the occurrence with a not-so-veiled attempt to put before the jury the out-of-court statement of an absent eyewitness." *Id.*

Applying *Bell* to the instant case, we conclude that the trial court erred in overruling the defense objection to the question, "Why would he tell Officer Parks that?" But we conclude that the error was harmless. We explain.

Hearsay

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). A statement "is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. "If one or more hearsay statements are contained within another hearsay statement, each must fall within an exception to the hearsay rule in order not to be excluded by that rule." Md. Rule 5-805. "Whether evidence qualifies for a hearsay exception presents a question of law," which we review "without deference." *Wise v. State*, 471 Md. 431, 442 (2020) (citation omitted).

The State has not suggested an applicable hearsay exception or other basis for the admissibility of R.J.'s statement, nor could we find one. Despite its assertion to the contrary, the State injected the hearsay statement to refute appellant's denial that there had been a struggle between him and R.J. that night. The testimonial-like question was posed and permitted at least in part to prove the truth of the matter asserted therein—namely, that there was a struggle between appellant and R.J. that night.

Harmless Error

When an appellant establishes error in a criminal case, reversal is mandated unless we, on our own "independent review of the record," can "declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict[.]" *Dorsey v. State*, 276 Md. 638, 659 (1976); *see also State v. Jordan*, 480 Md. 490, 506 (2022) ("Once error is established, the State must convince an appellate court, beyond a reasonable doubt, 'that the error in no way influenced the verdict[.]'") (citation omitted). "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Bellamy v. State*, 403 Md. 308, 332–33 (2008).

In reviewing for harmless error, we look to various factors including, *inter alia*, the nature and effect of the purported error upon the jury, the jury's behavior during deliberations, the length of jury deliberations, and the overall strength of the prosecution's case from the jury's perspective. *See Dionas v. State*, 436 Md. 97, 110–12, 116 (2013). We do not "find facts or weigh evidence," and we must not "encroach upon the jury's judgment." *Id.* at 109, 118.

With respect to the nature and effect of the error on the jury, the prosecutor mentioned R.J.'s statement once during trial. After asking the impermissible question, the prosecutor did not press further. Unlike in *Bell*, the prosecutor here did not "repeatedly" question appellant about R.J.'s statement "line by line." *See Bell*, 114 Md. App. at 496. In addition, the prosecutor never mentioned R.J.'s statement during closing argument.

Instead, he focused on appellant's own account of the incident, arguing to the jury that appellant's version of events was implausible:

> When asked on details, [appellant's] response was I don't know for everything except for yeah, three guys shot me. What were they trying to take from you? I don't know. What did they do? I don't know. When did your son get shot? I don't know. Well, was it before or after? I don't know. I mean, I got shot, I don't know, I don't know.
>
> People who are telling the truth know the answers because the truth stays the same. People remember the truth. He can't remember it because what he's telling you was not the truth. His statement was so self-serving.
>
> * * *
>
> Laying in the parking lot, bleeding, immobile, he would have you believe that these people came up, robbed him, and then said there you go, buddy, just take my gun. And when you're having it out of necessity, you don't put it in your underwear. If you really think they're coming back, it's in your hand. You put it in your underwear when you're hiding something, when you know you're prohibited by law from having a gun. People that hold a gun out of necessity, and this is a necessity defense, don't put it in their underwear. And robbers don't throw guns at their alleged victims in the real world, only in [appellant's] make-believe world where he has everything to gain by lying in this case. He says he doesn't remember every detail. He remembers nothing. I can understand people don't remember every detail, but nothing?
>
> And then here's the other place where his story completely falls apart. How'd his son get shot? How did the son get shot? He said they shot him and they fled. And then I guess they came back—the son came out, they came back, shot the son too, and then slid him the gun so he could hide it in his underwear. This story makes absolutely no sense.

The State did not promote an alternate version of the incident for the jury to consider. At most, the State suggested that appellant "probably" "shot himself, and then came outside," but the State did not tie this insinuation to R.J.'s statement. The jury was left to appraise appellant's necessity defense based on his account of the incident as he presented it.

With respect to the jury's deliberation, the jury deliberated for less than half an hour before reaching its verdict, without presenting any notes to the court. *See Dionas*, 436 Md. at 111–12 (jury notes sent over the course of deliberations and the "length of jury deliberations provide context, albeit not necessarily conclusive, for the evaluation and understanding of the jury's findings, and thus, perspective"). Apparently, the jury did not consider this a close case and had no difficulty assessing, and ultimately rejecting, appellant's necessity defense.

Finally, with respect to the overall strength of the prosecution's case, neither party disputes that the evidence established that appellant possessed the firearm and ammunition or that he was legally prohibited from doing so. The relevance of the error is to appellant's necessity defense. Appellant appears to suggest that, where his credibility was an issue, an error affecting the jury's ability to assess his credibility is not harmless error. In this regard, we revisit *Bell*. As previously mentioned, the defendant's credibility in *Bell* was a crucial component to his defense because his state of mind, which can rarely be proved directly, was an integral part of the defenses of perfect and imperfect self-defense. 114 Md. App. at 503–04. By contrast, the testimony presented by appellant in support of his necessity defense here did not implicate his state of mind. It was premised on his account of the factual circumstances of the case—namely, that his encounter with the robbers placed him in present or immediate danger of life and limb; he did not place himself in that danger; under the circumstances of being shot, he had no legal alternative to grabbing the gun and placing it in his waistband; and police recovered the gun upon their arrival shortly thereafter.

It is apparent from the record, that the single question posed, suggesting that "there was a struggle" between appellant and R.J. on the night in question, without context, was unimportant relative to other evidence that the jury considered in reaching its verdict. Appellant's inability to recall the details of his version of events, which was underscored by the parties during appellant's examination and their respective closing arguments, was thrust to the forefront of the jury's assessment of appellant's necessity defense. Based on this record, we are satisfied that there is no reasonable possibility that the isolated error contributed to the rendition of the guilty verdict, and it therefore was harmless. *See Dorsey*, 276 Md. at 659.

II.

Appellant contends that the courtroom clerk's disclosure to the jury of his prior criminal history, in reading the charges to the jury at the commencement of trial, violated the terms of the parties' stipulation and denied him a fair trial.

Because appellant was charged with possession of a regulated firearm after previously having been convicted of a disqualifying offense, in violation of Public Safety Article ("PS"), § 5-133(b)(2),[4] he was entitled to a stipulation as to his prior, disqualifying conviction, as mandated by the Supreme Court of Maryland[5] in *Carter v. State*, 374 Md.

[4] Maryland Code (2003, 2018 Repl. Vol.), PS § 5-133(b)(2), provides, "Subject to § 5-133.3 of this subtitle [not applicable here], a person may not possess a regulated firearm if the person . . . has been convicted of a violation classified as a common law crime and received a term of imprisonment of more than 2 years[.]"

[5] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the (continued)

693, 720–21 (2003). In *Carter*, the Court promulgated a *per se* rule under which "any defendant charged with the possession of a regulated firearm by a prohibited person is legally entitled to a stipulation that informs the jury that he or she is simply prohibited from possessing a regulated firearm, and disclosing no further detail regarding any prior convictions, if the defendant requests it." *Hemming v. State*, 469 Md. 219, 259 (2020) (citing *Carter*, 374 Md. at 722).

Prior to trial, the parties settled on a stipulation, whereby, in the words of the trial judge, "there's going to be no reference whatsoever . . . as to any prior convictions or crimes that may or may not have been committed by [appellant] in the past, just simply that he's prohibited from possessing a firearm[.]"

After swearing the selected jury and before opening statements, the court clerk read the charges to the jury:

> **It is formally charged** that [appellant], on or about January 6th, 2022, at [appellant's address], Princess Anne, Maryland, Somerset County, Maryland, did possess ammunition, being prohibited from possessing a regulated firearm under PS 5-133(b)/PS 5-133(c). **As to the next count, did knowingly possess a regulated firearm after being convicted of a violation [classified][6] as a common law crime and received a term of imprisonment of more than two years** against the peace, government, and dignity of the State.
>
> Upon this indictment, he had been arraigned, and upon this arraignment, he had pled not guilty, and for his trial, have put himself upon

Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a).

[6] The transcript states, "of class 5[.]" We agree with the State that this appears to be a transcription error.

> the country you are, to that your charge is to inquire whether he be guilty of the matter whereof he stands indicted, or charged or not guilty.

(Emphasis added.) Defense counsel did not object.

A. Analysis

On appeal, appellant argues that he was "substantially prejudiced and denied a fair trial when the [clerk] violated [the] stipulation, and this error overcomes plain error and harmless error review." He then inconsistently claims that the error "is ineligible for plain or harmless error review."[7] As best as we can tell, appellant seems to suggest that we should consider the merits of the purported error, notwithstanding his failure to object to it, because he was substantially prejudiced by the clerk's announcement that he had been convicted of a "common law crime" for which he "received a term of imprisonment of more than two years."

In *Molter v. State*, 201 Md. App. 155 (2011), we encountered a similar strategy, albeit under different circumstances, where the defendant claimed that the prosecutor twice made an improper and prejudicial comment in opening and closing statements. *Id*. at 179. On neither occasion was an objection made, and the contention was not preserved on appeal. *Id*. Acknowledging that the claim was not preserved, the defendant proceeded to argue the merits of the unpreserved contention. *Id*. We observed that the defendant seemed

[7] Harmless error review does not apply to unpreserved claims. *See Rainey v. State*, 246 Md. App. 160, 185 n.16 (2020) ("Under Maryland law, all preserved errors, whether 'of constitutional significance or otherwise,' are subject to the *Chapman* [harmless error] standard") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))); *Wilkins v. State*, 253 Md. App. 528, 542 n.7 (2022) ("[G]enerally, preserved claims of error are reviewed for harmless error, and unpreserved claims of error may be reviewed for plain error.").

to be "operating on the naive assumption that if his contention would be good enough to prevail on the merits if it had been preserved, that becomes *ipso facto* good reason why he should be entitled to the extraordinary plain error exemption from the preservation requirement." *Id*. In declining to overlook the preservation requirement, we explained:

> Many trial advocates seem to suffer the misapprehension that if the instructional error, even in the absence of an objection, is plain and is material to the rights of the accused, the appellate court is thereby divested of its discretion and is required to consider the contention on its merits. The appellate discretion is not so cabined. On the question of overlooking non-preservation, the appellate discretion is plenary.
>
> The fact that an error may have been prejudicial to the accused does not, of course, *ipso facto* guarantee that it will be noticed.

Id. at 180 (quoting *Morris v. State*, 153 Md. App. 480, 512 (2003)).

Here, appellant did not object to the clerk's recitation of the charge, and his contention is therefore not preserved for appellate review. *See* Md. Rule 8-131(a) ("Ordinarily, an appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"). To the extent that appellant invites us to engage in plain error review of the issue, we decline to do so.

We reserve our discretion to exercise plain error review "for those 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)). To grant plain error review, four conditions must be met:

1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.

2. The error must be clear or obvious, and not subject to reasonable dispute.

3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.

4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Winston v. State, 235 Md. App. 540, 567 (2018) (citing *Newton*, 455 Md. at 364). Our analysis "need not proceed sequentially through the four conditions; instead, [we] may begin with any one of the four and may end [our] analysis if [we] conclude[] that that condition has not been met." *Id*. at 568.

As to the second condition, we conclude that the legal error is not "obvious." Whether the clerk's recitation—that appellant had been convicted of a "common law crime" for which he "received a term of imprisonment of more than two years"—amounts to legal error is subject to reasonable dispute. As mentioned, *Carter* held that when a defendant stipulates to the previous conviction for a disqualifying crime, the court should inform the jury that the defendant admits that he has been convicted of a crime for which he is prohibited from possessing a regulated firearm under the law. 374 Md. at 722. It should not describe the previous conviction with any more particularity (such as the name and nature of the conviction) or by using the categories of crimes under the statute (such as "crime of violence" or "felony"). *Id*. at 720–22. Here, although the clerk's recitation of the firearm charge was not completely faithful to the trial judge's directive, *supra*, the name, nature, and category of the disqualifying crime were not disclosed to the jury. Nor did the mention of the term of imprisonment shed light into any of these aspects of the disqualifying crime.

Even assuming *arguendo* that the purported error was obvious, appellant has not demonstrated that it affected the outcome of the proceedings under the third condition. Rather, relying on *Carter*, he claims that it "carried a significant probability of prejudice." In *Carter*, the Court concluded that the trial court erred in permitting the State to introduce documentary evidence that the defendant previously had been convicted of "robbery with a deadly weapon." *Id.* at 721. It reversed the convictions because the admission of such evidence, "unduly prejudiced" the defendant by "possibly luring the jury 'into a sequence of bad character reasoning.'" *Id*.

Here, the clerk's recitation did not rise to the level of prejudice in *Carter*. The clerk's recitation, which apparently went unnoticed by the attorneys and the court, was also likely overlooked by the jury. Neither counsel nor the court drew attention to it at trial. Instead, the court appropriately advised the jury of the *Carter* stipulation—"By agreement of the parties, a stipulation has been reached that [appellant] is prohibited in the state of Maryland from possessing a firearm." At the close of the case, the court instructed the jury to make its decision based on the evidence presented, including any stipulations. It also instructed the jury that the charging document was not evidence and "must not create any inference of guilt." Under the circumstances, the jury likely ignored the clerk's recitation. Accordingly, we decline to exercise plain error review.

III.

Finally, appellant contends that his trial counsel provided ineffective assistance, in violation of his constitutional right to effective assistance of counsel, by failing to object when the clerk provided the jury information regarding appellant's prior criminal history

in reading the charges to the jury, *supra*. The State counters that we should decline to address the claim on direct appeal.

A. Analysis

"Generally, in Maryland, a defendant's attack of a criminal conviction due to ineffective assistance of counsel occurs at post-conviction review." *Crippen v. State*, 207 Md. App. 236, 250 (2012). Postconviction proceedings "are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). "By having counsel testify and describe [the] reasons for acting or failing to act in the manner complained of, the post-conviction court is better able to determine intelligently whether the attorney's actions met the applicable standard of competence." *Addison v. State*, 191 Md. App. 159, 175 (2010) (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)).

Direct review of the claim on appeal is a rare exception that applies only when "the critical facts are undisputed, the record is sufficiently developed, and/or the legal representation is so egregiously ineffective that it is obvious from the trial record that a defendant was denied his Sixth Amendment right to counsel." *Mosley*, 378 Md. at 564.

We are not persuaded that this claim falls under this rare exception for consideration on direct appeal. We can imagine a tactical reason for trial counsel to have refrained from objecting in this case; counsel may well have deemed the purported error relatively minor and not wished to draw the jury's attention to it by objecting. Given this possibility, a

postconviction proceeding is the appropriate forum to test trial counsel's performance and examine whether any deficient performance resulted in prejudice. *See Wallace v. State*, 475 Md. 639, 654 (2021) (to prevail in an ineffective assistance of counsel claim, the defendant must show: (1) that his attorney's performance was deficient; and (2) that the defendant was prejudiced as a result). We therefore decline appellant's request that we address this claim on direct appeal.

JUDGMENTS OF THE CIRCUIT COURT FOR SOMERSET COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.