UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1446

September Term, 2014

DONDRELL LAMONT BANKS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: July 9, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Dondrell Lamont Banks was convicted after a bench trial in the Circuit Court for Talbot County of distribution and possession of cocaine. Mr. Banks was also tried and convicted of possession with intent to distribute, but the trial judge acquitted him of this charge *sua sponte* at his sentencing hearing. Mr. Banks raises two questions on appeal: *first*, whether there is a legal inconsistency between the conviction and acquittal, and *second*, whether the testimony of Detective Scheurholz was properly admitted. Unfortunately, he preserved neither of these issues.

I. BACKGROUND

On October 3, 2012, Detective Robert Scheurholz of the Easton Police Department Narcotics Unit saw Mr. Banks selling cocaine to a man in a vehicle on the corner of South Lane and Locust Street. Detective Scheurholz observed a dark Ford F-150 pull up to the curb, where Mr. Banks was standing. Mr. Banks briefly spoke to the driver of the truck, then leaned through the passenger window with a closed fist. Detective Scheurholz never saw what was in Mr. Banks's hand, but based on his observations and experience he concluded that a drug transaction had occurred.

The Ford F-150 pulled away, and Detective Scheurholz pursued the car and initiated a traffic stop. After the cars had stopped the driver attempted to dispose of a bag by throwing it out the passenger window, but Detective Scheurholz found the bag and identified the substance inside it as crack cocaine.

Mr. Banks was later arrested and indicted for distribution of cocaine, possession with the intent to distribute, and possession. After several postponements, Mr. Banks was

tried and convicted of all three charges after a one-day bench trial. At trial, the State relied on the testimony of two witnesses, Detective Scheurholz and the driver of the Ford F-150, Charles Edgar Harrison. The State did not offer Detective Scheurholz as an expert witness, but did elicit testimony that he believed, based on his experience as a member of the narcotics unit, that he had witnessed a drug transaction. Mr. Banks presented two alibi witnesses in his defense, Rolanda Peterson and Valerie Ellis, who both testified that Mr. Banks was working at Ms. Peterson's beauty salon at the time Detective Scheurholz witnessed the transaction. The State did not offer evidence other than witness testimony and the bag of cocaine Mr. Harrison had dropped.

The trial court ultimately found the State's witnesses more credible and reliable than Mr. Banks's. Although the court did not believe that Ms. Peterson and Ms. Ellis were lying, the judge noted the significant time lapse between the incident and the trial and their reliance on routine to substantiate their testimony:

> [THE COURT]: The basic problem I have with their testimony is what it is based on. They repeatedly said, it's based on routine. On habit. This is what we usually do. And unfortunately for Mr. Banks, and them, they don't have anything specific that happened that particular day.
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> * * *
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> [THE COURT]: And that's not really lying. But it's also not persuasive enough for me to believe that they're sure as the sun's going to go down tonight, that he was there on that particular date at three o'clock in the afternoon.

In a surprise twist at the sentencing hearing, though, the court acquitted Mr. Banks *sua sponte* of the possession with intent to distribute charge. The court characterized its

earlier decision to convict on that charge as an "oversight," and confirmed with the State the case had not been tried as an intent to distribute case:

> [THE COURT]: I want to do one thing first, which is correct an oversight. *Both of you tried to tell me that this is not a possession with intent case*.
>
> [COUNSEL FOR THE STATE]: Correct.
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> [THE COURT]: And for reasons mostly that I was not focusing I said, well one distribution is enough. It's not. So Madam Clerk, just make a docket entry that the Court *sua sponte* grants Motion for Judgment on Count number two.

(Emphasis added.) The court then sentenced Mr. Banks to three years, all but one year suspended, with three years of supervised probation on the two remaining charges.[1] Mr. Banks filed a timely notice of appeal.

II. DISCUSSION

In this appeal we are asked to consider two questions: *first*, whether the trial judge's acquittal of the lesser offense of possession with intent to distribute but conviction of the greater offense of distribution created an inconsistent verdict, and *second*, whether Detective Scheurholz's testimony was properly admitted.[2] Neither, however, is before us

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[1] For sentencing, the first count, distribution, merged with the third count, possession.

[2] Mr. Banks phrased the questions in his brief as follows:

> 1) Did the trial court render inconsistent verdicts by acquitting [Mr. Banks] of possession with the intent to distribute but convicting him of distribution?

(continued…)

because Mr. Banks did not preserve them. He encourages us to review these issues for plain error, but "[p]lain error review is reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Yates v. State*, 429 Md. 112, 130 (2012) (quoting *Savoy v. State*, 420 Md. 232, 243 (2011)). This Court considers "the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* at 131 (quoting *Savoy*, 420 Md. at 243). The errors alleged here, if errors at all, fall well short of this very high bar.

A. The Inconsistent Verdict Issue Was Not Preserved.

Mr. Banks argues that the trial court erred in acquitting him of possession with intent to distribute but convicting him for distribution. He contends that these are legally inconsistent verdicts, which renders the verdict reversible under this Court's decision in *Travis v. State*. 218 Md. App. 410, 462 (2014). The State counters that Mr. Banks failed to preserve the issue, and even if the issue was preserved, that the offense of possession with

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(…continued)

> 2) Did the trial court commit plain error by admitting Detective Scheurholz's inadmissible testimony opining that a drug transaction had taken place?

The State offered a different version of each, but the substance is the same:

> 1) If preserved, did the trial court properly acquit [Mr.] Banks of possession of cocaine with intent to distribute?
>
> 2) Did the trial court properly admit Detective Scheurholz's testimony?

intent to distribute cannot be considered a lesser included crime in the greater inclusive crime of distribution because it contains an element not required to prove distribution. Although we recognize the unusual progression of events in this case, we agree with the State that the inconsistency asserted here was not preserved in the trial court, which bars Mr. Banks from raising this issue on appeal, and even if it did not, the argument is meritless because the additional element needed was not proven by the State and the verdicts are reconcilable.

Before we can consider an issue on appeal, the trial court normally must have the opportunity to consider and decide it in the first instance, which in turn normally requires a defendant to lodge a contemporaneous objection. An unexpected verdict isn't necessarily illogical, and a verdict that is inconsistent isn't necessarily improper—a judge or a jury may, for example, render an inconsistent verdict that redounds to the defendant's benefit, perhaps as an act of lenity. Accordingly, "we should not permit the defendant to accept the jury's lenity in the trial court, only to seek a windfall reversal on appeal by arguing that the … verdicts are inconsistent." *Price v. State*, 405 Md. 10, 40 (2008) (Harrell, J., concurring). In the course of adopting this procedural requirement generally in *McNeal v. State*, the Court of Appeals clarified that "[t]he objection must be made prior to the verdict finality … thus preventing the defendant from accepting the inconsistent verdict and seeking thereafter a windfall reversal on appeal." 426 Md. 455, 466 (2012).

The verdict at issue here took its ultimate shape in an admittedly unusual way. At the close of trial, remember, the court convicted Mr. Banks of all three charges—it was not until sentencing, after the court already had denied an earlier motion for judgment, that the

court decided on its own to revisit and reverse the conviction for possession with intent to distribute. Mr. Banks may not have expected this (positive) development, but he did not challenge the results as inconsistent at the time. The colloquy at the sentencing hearing was not lengthy, but if anything reflects that defense counsel agreed with the court's decision:

> [THE COURT]: Both of you tried to tell me that this is not a possession with intent case.
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> * * *
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> [THE COURT]: So Madam Clerk, just make a docket entry that the Court sua sponte grants Motion for Judgment on Count number two.
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> * * *
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> [COUNSEL FOR DEFENDANT]: You're right.

Moreover, it appears that the court decided to acquit on the possession with intent to distribute charge because the court agreed, albeit belatedly, with Mr. Banks's earlier argument, in support of his motion for judgment of acquittal at the conclusion of the State's evidence, that the State had not proven an essential element of that charge:

> [COUNSEL FOR DEFENDANT]: I would argue that even with all the evidence taken in the light most favorable to the State at this time, the State has not provided an essential element which is proving that there was a sufficient quantity to indicate an intent to distribute and I would ask that that count be dismissed.

We disagree with the State that the defense's success on this argument invited an error that precludes appellate review—his victory did not work any sandbaggery in itself. *See Smith v. State*, 218 Md. App. 689, 701-02 (2014). But upon winning, and thus when the inconsistency came into being, Mr. Banks should have raised the inconsistency and

given the circuit court an opportunity to consider and address it. His failure to do so leaves the question unpreserved, and therefore not available for appellate review. *See Tate v. State*, 182 Md. App. 114, 135-36 (2008) ("The defendant may not stand mute and later complain about the verdicts he did nothing to cure at the only time a cure was still possible… A defendant simply may not seek to exploit an alleged inconsistency without taking the necessary step to cure or resolve the inconsistency when it is still possible to do so.").

For what it's worth, the outcome would be the same even if the issue had been preserved. Not all inconsistent verdicts require reversal—only verdicts that are legally inconsistent. *McNeal*, 426 Md. at 472-73. In *Tate*, we defined legally inconsistent verdicts in terms of the respective elements of the crimes that the finder of fact decided inconsistently:

> A legal inconsistency … occurs when the crime for which a defendant is acquitted is, in its entirety, a lesser included offense within the greater inclusive offense for which a defendant is convicted. The commission of the greater crime cannot, as a matter of law, take place without the commission of the lesser crime … The acquittal of the lesser crime precludes the finding of that required element of the greater crime for which the defendant was convicted … It is something that does not involve speculation about possible or probable factual findings.

Tate, 182 Md. App. at 131. To determine if a lesser offense is "lesser included," we apply the "required evidence" test. "All of the elements of the lesser-included offense must be included in the greater offense." *Williams v. State*, 200 Md. App. 73, 87 (2011) (citation omitted).

This inconsistency fails the required elements test. Although possession is a lesser-included offense of distribution, possession with intent to distribute has an additional element that is not shared with either offense. Md. Code (2002, 2012 Repl. Vol.), § 5-602 of the Criminal Law Article ("CL"), describes both distribution and possession with intent. We see this in the language of the two subparts: "Distribution" is defined as "distribut[ing] or dispens[ing] a controlled dangerous substance," whereas "possession" imposes the additional element that the "dangerous substance" must be "in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense." CL § 5-602. To establish distribution, the State must prove that the defendant *actually* distributed the dangerous substance, whereas to establish possession with intent the State must prove that the defendant *had such a large quantity* in his possession that one can reasonably infer his intention was to distribute it, rather than to use it himself.

In addition, the structures of the statutes—they share common elements, but they are described in separate subsections separated by an "or"—indicates that the legislature intended the two offenses to be separate and distinct from each other. It is entirely possible to separate the two offenses, and for an offender to be guilty of one but not guilty of the other. Without being able to separate them, the "or" becomes meaningless. And "[t]he necessary first step [of statutory interpretation] is to look to the 'normal, plain meaning of the language of the statute,' which we read in its entirety to ensure that 'no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.'" *Butler v. State*, 214 Md. App. 635, 669 (2013) (quoting *Doe v. Montgomery Cnty. Bd. Of Elections*, 406 Md. 697, 712 (2008)). *Garner's Dictionary of Legal Usage* defines "or" as

having "an inclusive sense as well as an exclusive sense," but notes that "[t]he meaning of *or* is usually inclusive." *Garner's Dictionary of Legal Usage* 639 (3d ed. 2011) (citation omitted).

It is not obvious that this verdict is inconsistent at all. The facts adduced at trial permitted the trial court to conclude that, on the one hand, the State had met its burden to prove that Mr. Banks *actually* distributed cocaine yet, on the other hand, failed to prove that Mr. Banks possessed enough cocaine to support an inference of distribution separate from the act the Detective observed. To the extent the acquittal on the intent charge created an inconsistency with the conviction on the distribution charge, however, the inconsistency is factual, not legal, and would not require reversal even if it were preserved.

B. We Decline To Review The Admission of Detective Scheurholz's Testimony For Plain Error.

Mr. Banks asserts that Detective Scheurholz's trial testimony contained opinion testimony based on specialized knowledge or training, and was not admissible because he had not been qualified as an expert. *See Ragland v. State*, 385 Md. 706 (2005). The State responds that Mr. Banks did not object to Detective Scheurholz's testimony, and therefore did not preserve this issue for appellate review. The State contends that even if it was preserved, Detective Scheurholz's testimony did not amount to opinion testimony as defined under *Ragland*, and the questioned testimony was entirely based on personal observation.

Mr. Banks concedes, and the record confirms, that he did not object to this testimony at trial, but asks us to undertake plain error review. We decline to do so. This case is similar

to *Cantine v. State*, 160 Md. App. 391 (2004), in which a detective offered opinion testimony based on his experience in narcotics:

> [T]he State asked Detective Jendrek, "Why did you write the wiretap affidavit?," and he responded: "Because I believed that [the codefendants] were involved in selling drugs." Appellants did not object, and therefore they failed to preserve this issue for review.

Id. at 405. It is far from clear that Detective Scheurholz "offered an opinion that was based on his specialized knowledge and experience as a narcotics detective" when he "opin[ed] that he had observed a drug transaction take place"—officers are permitted to testify to what they observe, and the Detective's opinion is not obviously one that required specialized training or expertise to reach. *See, e.g., Matoumba v. State*, 390 Md. 544, 553 (2006) (police officers may "express opinions as to why certain conduct gave them reasonable articulable suspicion," even though not qualified as experts); *Cantine*, 160 Md. App. at 405 (opinion testimony explaining why Detectives decided to obtain a wiretap).[3] But even if we assume it was opinion testimony, Detective Scheurholz offered it as context to explain the events as he witnessed them, and why he pursued the Ford F-150:

> [DETECTIVE SCHEURHOLZ]: At that point after I observed what appeared to be a hand to hand transaction of a drug, I began to focus my attention primarily on the maroon F-150 that had, I guess you could say, purchased the drug.

* * *

[3] We noted too that under Md. Rule 5-704(a), "testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact." *Cantine*, 160 Md. App. at 405.

> [DETECTIVE SCHEURHOLZ]: [M]y purpose for doing so, I was going to perform a traffic stop and contact a K-9 to attempt to locate any drug that may have been purchased by the black male on the corner.

As such, we doubt that the trial court committed any error in allowing the Detective to testify in this manner, and therefore no plain error justifies appellate review on this unpreserved point.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.