Circuit Court for Baltimore County
Case No. 03-K-16-005181

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1722

September Term, 2017

ALPHONSO D. OWENS

v.

STATE OF MARYLAND

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*Woodward,
Shaw Geter,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: July 22, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Appellant, Alphonso Owens, was convicted by a jury sitting in the Circuit Court for Baltimore County of first-degree rape, first-degree sexual offense, and first-degree burglary. Appellant was sentenced to life imprisonment for first-degree rape and first-degree sexual offense and twenty-five years' imprisonment for first-degree burglary, all to be served consecutively. On appeal, appellant presents the following two questions for our review:

> 1. Did the lower court err in permitting the state to introduce numerous prior acts concerning an alleged peeping tom wholly unrelated to [appellant] or the charges he faced?
>
> 2. Did the lower court err, when asking several *voir dire* questions, in such a way that impermissibly shifted the burden of determining bias to the juror?

For the reasons set forth below, we answer both questions in the negative and, accordingly, affirm the judgments of the circuit court.

BACKGROUND

On March 26, 2015, A.F.[1] was leaving her apartment at 2:00 in the morning to go to work. Upon opening the door to her apartment, she saw a figure standing in her doorway and immediately shut the door. She later told police that the individual was an African-American man wearing blue overalls and a mask over his face. He told A.F. that he would kill her if she told anyone about him, and then took her to the bedroom, undressed her, and proceeded to have sexual and digital intercourse with her. He covered her face with a

[1] It is the policy of this Court to conceal the victim's name to protect her privacy.

sweatshirt belonging to A.F. that he had taken. Before leaving, he apologized to A.F. and threw the sweatshirt back to her.

A.F. called her boss to explain what had happened, and he offered to call the police. A.F. was examined at the hospital. Upon further testing, an external genital swab from A.F.'s examination was discovered to be a DNA match for appellant.

The State introduced evidence of multiple 'peeping tom' incidents in A.F.'s apartment complex, and in the surrounding area. Corporal Mohammed Goff testified that, prior to the attack, the Baltimore County Police received "so many complaints in the area" about peeping toms that they created a "selective enforcement detail" to patrol the neighborhood.

A.F. also testified as to an incident occurring in October of 2014. She testified that at the time she was living with a boyfriend and that, around 3:00 in the morning, she heard their dog acting agitated. When she went to check on the dog, she saw her bathroom window being opened by a person whom she could only identify as being African-American. After this incident, A.F. had the apartment's maintenance worker, Richard Ramsey, install screens and slats to secure her windows.

Ramsey also testified as to two other incidents. First, he testified that sometime between the time of the incident described by A.F. in her testimony and the time of the alleged attack on A.F., he noticed the top half of a loveseat leaned up against the wall underneath A.F.'s bedroom window, seemingly positioned to allow someone to stand on it and peer into the window. Second, Ramsey testified that one night, around the same time

period, he observed an African-American male looking as if he was "attempting to get into" A.F.'s bathroom window. Ramsey asked the man to leave, and he did.

Another witness, C.H.,[2] testified about an incident that occurred in January of 2015 at her apartment, which is located across the street from A.F.'s apartment. After the incident, she called the police and participated in the making of a composite sketch of her assailant, which had "an extraordinary likeness to [appellant]" and was admitted into evidence at appellant's trial.

Richard Harper, who lived in another nearby apartment complex, testified that, in March of 2015, he came home from work early one morning to find a man dressed as a maintenance worker looking into his apartment window, inside of which were his children and their mother. Harper further testified that he followed the man into the building and asked what he was doing there, to which the man responded that he was "the maintenance dude." Suspecting this to be untrue, Harper asked the man to leave. While investigating the sexual assault of A.F., the police spoke to Harper and showed him the composite sketch of C.H.'s assailant. Harper told the police that he was a "hundred percent" positive that the man in the sketch was the same man whom he had seen looking into his apartment. At trial Harper identified appellant as the man whom he saw looking into his apartment.

Finally, Sheila and John Eisele lived in an apartment complex about one-half mile away from A.F. Sheila testified that, in the early morning of March 11, 2015, she saw an African-American male wearing dark clothing standing against the wall of a nearby

[2] We also have concealed the name of this witness, because she was the victim of a sexual assault, the details of which the parties agreed not to reveal at trial.

apartment and that the man was still standing there an hour later. She called the police, but did not give a detailed description of the man. John testified that he saw someone looking in the window of a nearby apartment; however, he said that he would not be able to recognize the individual, nor could he give the race of the person.

After a four-day trial, on June 30, 2017, appellant was convicted of first-degree rape, first-degree sexual offense, and first-degree burglary. On September 27, 2017, appellant was sentenced to life imprisonment for first-degree rape and first-degree sexual offense and twenty-five years' imprisonment for first-degree burglary, all to be served consecutively. On October 11, 2017, appellant noted a timely appeal to this Court.

DISCUSSION

I. Prior Bad Acts

At the outset, the State contends that appellant failed to preserve for appellate review the issue of whether the evidence of prior bad acts was properly admitted. The State asserts that, even where a motion in limine has been made and denied, a party must make an objection at the time of the admission of the evidence to preserve the issue for appeal. The State points out that defense counsel failed to renew his objection during the testimony of either the Eiseles or Harper.

The State is correct that, generally, "an objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 4-323(a); *see also Fone v. State*, 233 Md. App. 88, 112-13 (2017) ("It is well-established that a party opposing the admission of evidence shall object at the time the evidence is offered or as soon thereafter

as the grounds for objection become apparent. If not, the objection is waived and the issue is not preserved for review.") (internal quotation marks and citation omitted). Maryland courts, however, have held that there is an exception to this general rule.

In *Watson v. State*, 311 Md. 370 (1988), the defendant asked the trial court to rule on whether his prior convictions were admissible to impeach his testimony. *Id.* at 371-72. The court ruled that the convictions were admissible. *Id.* at 372. The defendant's trial counsel later failed to object when the State declared its intention to use the convictions to cross-examine the defendant and subsequently did so. *Id.* Without deciding the issue, this Court treated the issue as preserved. *Watson v. State*, 68 Md. App. 168, 171, n. 3, *rev'd on other grounds*, 311 Md. 370, (1986). On appeal, the Court of Appeals expressly held that the issue had been preserved. 311 Md. at 372, n. 1. The Court reasoned that "requiring [the defendant] to make yet another objection only a short time after the court's ruling…would be to exalt form over substance." *Id.*

In the instant case, after ruling on appellant's motion in limine to exclude evidence of prior bad acts, the trial court stated that "you guys have made your record of the situation here for sure, and as far as I'm concerned, *you preserved your argument* as well." (emphasis added). In addition, when the State attempted to introduce the composite sketch of C.H.'s assailant, defense counsel approached the bench and stated: "I just wanted to make sure we would preserve our continuing objection….that we would again continue our objection to this evidence coming in under our Motion in Limine." The trial judge responded by saying that "I will give you a continuing objection to questions relating to *these other incidents*." (emphasis added). The trial judge thus made it clear, twice, to the

parties that he considered the actions of defense counsel to be sufficient to preserve the issue of the admissibility of the prior bad acts evidence for appellate review. To hold otherwise "would be to exalt form over substance." We therefore conclude that the issue has been preserved for our review.

A. *Clear and Convincing Evidence*

Maryland Rule 5-404(b) provides that, "[e]vidence of other crimes, wrongs, or other acts…is not admissible to prove the character of a person in order to show action in conformity therewith." The rule does, however, allow that such evidence of prior bad acts "may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident[.]" Before such evidence can be admitted, however, the trial court must engage in a three-step analysis. First, the court must determine that the evidence speaks to one of the permissible purposes specified in Rule 5-404(b). *Hurst v. State*, 400 Md. 397, 408 (2007). Second, the court must determine that the accused's involvement in the prior bad act was established by clear and convincing evidence. *Id.* Third, the court must balance the probative value of the evidence against any undue prejudice that would result from its admission. *Id.* At trial, appellant conceded that the evidence of prior bad acts in the instant case was being introduced to speak to "planning," and made no argument below nor in his brief to this Court that the first prong of the *Hurst* test was not satisfied. Therefore, we need not address it in this opinion.

In reviewing a trial court's determination that a defendant's involvement in prior bad acts was proven by clear and convincing evidence, an appellate court must ascertain

whether there was sufficient evidence to support that finding. *State v. Faulkner*, 314 Md. 630, 635 (1989). We will look "only at the legal question of whether there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue." *Emory v. State*, 101 Md. App. 585, 622 (1994), *cert. denied*, 337 Md. 90 (1995).

Here, the trial judge found that, viewing all of the prior bad acts together, the State had established appellant's involvement by clear and convincing evidence. Specifically, the court concluded:

> When considering this evidence as a whole, as opposed to considering the incidents or episodes that happened individually, the Court is persuaded that there is clear and convincing evidence, or that there is clear and convincing evidence of the accused's involvement in other crimes, sufficient to allow this evidence to be used in the prosecution of this case.

On appeal, appellant contends that the trial court erred in making the above finding. Specifically, appellant points to inadequacies in some of the individual witnesses' testimonies, focusing on the lack of details in their identifications of the persons involved in the incidents that they witnessed. As to A.F., appellant notes that the incident in which she observed someone attempting to enter her bathroom window occurred "an entire year" before the assault in the instant case[3] and that she could not identify whether the person was a man or woman. As to Ramsey, appellant notes that his testimony regarding the loveseat "proved nothing," and that his identification of the man whom he saw was too

[3] In fact, this incident occurred in October of 2014, about five months before the attack on A.F.

vague to provide clear and convincing evidence. Finally, as to the Eiseles, appellant similarly notes that they were unable to provide a description of the person whom they observed.

The State counters by emphasizing that C.H. gave a detailed description of her assailant to the police, who were able to create a composite sketch, which not only bore a strong resemblance to appellant, but was identified by Harper as the man whom he observed attempting to peer into his apartment. The State additionally rejects the "witness-by-witness" approach suggested by appellant's argument, stressing that appellant's objection below was in the form of "an all-or-nothing pretrial motion in limine." The State concludes by arguing that there was significant evidence that someone in the area was looking into apartment windows, and that someone was appellant. We agree with the State.

Appellant's suggestion that each individual witness should be assessed separately is inconsistent with how Maryland courts generally approach this issue. In *Faulkner*, the defendant was charged with robbing a Safeway grocery store. 314 Md. at 632. Several witnesses testified as to the defendant's involvement in previous robberies of the same store. *Id.* at 635-37. The Court of Appeals held that the defendant's involvement in the prior robberies had been established by clear and convincing evidence. *Id.* at 640. Notably, the Court did not address the witnesses and prior robberies in a piecemeal fashion, as appellant asks us to do here, but rather considered all the evidence together in reaching its conclusion. *Id.* We will therefore consider the evidence as a whole in assessing the trial court's conclusion.

Taken together, the evidence provides more than a sufficient basis to support the trial judge's conclusion. C.H. provided the police with a sufficiently detailed description of her assailant to allow them to create a composite sketch. Harper was able to identify the man whom he saw peering into his apartment as the same man shown in the composite sketch. There also is a striking resemblance between the composite sketch and appellant. Although A.F., Ramsey, and the Eiseles were all unable to provide detailed physical descriptions of the person whom they saw, they all described conduct by this person that was strikingly similar to the conduct described by Harper in his testimony; a person skulking around area apartments attempting to peer into the windows. What physical descriptions that they were able to give were in no way inconsistent with the composite sketch of C.H.'s assailant.

Finally, all of the conduct in question occurred in a small area within a short period of time. About five months passed between the October 2014 incident described by A.F. and the attack that she suffered on March 26, 2015. All of the remaining incidents in question occurred during the time period between those two events. There is thus a significant amount of evidence for three propositions: 1) an individual in the area around A.F.'s apartment was engaged in peeping tom activities in the time leading up to the attack on her; 2) this same person committed a sexual assault on C.H.; and (3) appellant was this individual. There is no need for this Court to independently weigh the evidence, as "[t]he questions of whether and of the degree to which legally sufficient evidence actually persuades is idiosyncratic with the fact finder." *Emory*, 101 Md. App. at 622. We need only decide "whether there was some competent evidence which, if believed, could

persuade the fact finder as to the existence of the fact in issue." *Id.* Because such evidence exists, we conclude that the trial court did not err in finding that appellant's involvement in the prior bad acts was proven by clear and convincing evidence.

B. *Balancing Test*

Even if evidence of prior bad acts is offered for a permissible purpose and the accused's involvement has been proven by clear and convincing evidence, the trial judge must still weigh the probative value of the evidence against any undue prejudice it would cause the accused. *Hurst*, 400 Md. at 408. We review the trial court's determination on this question for abuse of discretion. *Faulkner*, 314 Md. at 641. It is important to note that a court conducting this balancing test should not be weighing "prejudice generally, but only *unfair* prejudice." *Oesby v. State*, 142 Md. App. 144, 165, *cert. denied*, 369 Md. 181 (2002). Unfair prejudice is not that which tends "to prove the identity of the defendant as the perpetrator the crimes[,]" but rather that which tends to show only "that the defendant was a 'bad man.'" *Id.* at 166. Our review here is "highly deferential" and we will only reverse those "rare and bizarre exercises of discretion that are…not only wrong but flagrantly and outrageously so." *Id.* at 167-68.

Appellant contends that the trial court "failed to even conduct a balancing test." Appellant further argues that "the prejudice completely outweighs any probative value." The State counters by stressing that the evidence in question was significantly probative to identifying appellant as the assailant and to showing his preparation for the assault.

We will first address appellant's argument that the trial judge failed to conduct the necessary balancing test. We note that, in announcing his ruling on appellant's motion in

limine, the trial judge stated: "The Court also must weigh and balance the issue of whether or not the probative value of this evidence outweighs any prejudice likely to result from its admission." The trial judge, however, did not articulate any specific findings on the balancing test. Such failure does not mean that an abuse of discretion has occurred, as "a trial judge is not required to spell out in words every thought and step of logic taken to reach a conclusion." *Dickens v. State*, 175 Md. App. 231, 241 (2007) (internal quotation marks omitted). Because the trial judge said that he would conduct the balancing test, we conclude that the trial judge did conduct such test, and determined from the test that any undue prejudice from the evidence did not outweigh its probative value.[4]

We cannot conclude that the trial judge's determination here was "flagrantly and outrageously" wrong. The evidence in question tended to show that appellant had been peering into the victim's apartment not long before the attack, and that he may have committed a similar attack in the same area only two months earlier. Such evidence was no doubt damaging to appellant's defense, but it went far beyond merely showing that appellant was a "bad man." For that reason, we hold that the trial judge did not abuse his discretion in determining that the probative value of the evidence outweighed any undue prejudice.

[4] We further note that, even if appellant is correct that the trial judge did not conduct the balancing test, there would be no reversible error. As this Court has previously explained, "if the trial court fails to provide such an explanation, the appeals court will do the balancing itself." *Snyder v. State*, 210 Md. App. 370, 393, *cert. denied*, 432 Md. 470 (2013).

II. Compound Voir Dire Questions

During *voir dire*, the trial judge asked the prospective jurors, among other questions, the following:

> 1. Is there any member of this jury panel who has such strong feelings about the crime of first degree rape that he or she would be unable to listen to the evidence, to follow this Court's instructions as to the law of the State of Maryland that will bind the jury, and render a fair and impartial jury verdict?
>
> 2. Is there anyone who has such strong feelings about the subject matters of prostitution or pimping, as it used to be called, I guess, that he or she questions whether or not he or she can be a fair, neutral and impartial juror in this case?

Appellant acknowledges that defense counsel failed to object to these questions. He nonetheless raises before this Court the argument that these questions constituted 'compound questions' that are forbidden by the Court of Appeals's decisions in *Dingle v. State*, 361 Md. 1 (2000) and *Pearson v. State*, 437 Md. 350 (2014). Appellant presents two avenues for this Court to consider this argument. First, appellant argues that we can consider it as a claim of ineffective assistance of counsel. While such claim ordinarily must be raised in a post-conviction proceeding, appellant points to an exception to this general rule "where the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim[.]" *In re Parris W.*, 363 Md. 717, 726 (2001). As an alternative, appellant suggests that we address this argument by exercising our authority to engage in plain error review under Maryland Rule 8-131. For the reasons explained below, we decline both of appellant's invitations and, accordingly, will not address this issue.

A. *Ineffective Assistance of Counsel*

As discussed above, a claim of ineffective assistance of counsel ordinarily must be brought in a post-conviction proceeding rather than on direct appeal. Maryland courts have fashioned an exception to this general rule where the ineffectiveness can be shown to be "blatant and egregious by the record alone." *Washington v. State*, 191 Md. App. 48, 71 (internal quotation marks omitted), *cert. denied*, 415 Md. 43 (2010). In *In re Parris W.*, an ineffective assistance of counsel claim was allowed on direct appeal where a juvenile defendant's counsel mistakenly subpoenaed witnesses for the wrong date, resulting in the witnesses not being present. 363 Md. at 721. The attorney admitted his mistake on the record. *Id.* at 727; *see also Smith v. Smith*, 394 Md. 184 (2006) (allowing a claim of ineffective assistance of counsel on direct appeal where the record clearly showed that trial counsel disclosed attorney-client communications).

We cannot say that the ineffective assistance of counsel alleged by appellant here was "blatant and egregious by the record." In making an ineffective assistance of counsel claim, a defendant must show that the conduct in question was "not the result of trial strategy." *Coleman v. State*, 434 Md. 320, 338 (2013). We cannot conclude, based on the record alone, that defense counsel's failure to object to the compound questions was not a trial strategy. Defense counsel, for instance, may have been comfortable with the venire and ultimately with the jurors selected to serve. Moreover, the mere fact that trial counsel failed to object to something objectionable does not make the instant case comparable to those cases in which an ineffective assistance claim has been allowed on direct appeal. Unlike *In re Parris W.*, defense counsel here did not admit on the record that he made an

error. Unlike trial counsel's disclosure of privileged communications in *Smith*, it is conceivable that failing to object to certain *voir dire* questions may be part of an attorney's trial strategy.

Appellant also appears to assume that his counsel's failure to object to the improperly phrased questions was a result of ignorance of the law. Defense counsel's proposed *voir dire*, however, shows the contrary. In it, counsel requested properly phrased 'strong feelings' questions regarding prostitution but did not request a 'strong feelings' question about rape.[5] Thus it is not clear that defense counsel was ignorant of the law, and an additional fact finding inquiry would be necessary to determine whether defense counsel's performance was deficient. We therefore conclude that it is inappropriate to address appellant's ineffective assistance of counsel claim in the instant appeal.

B. *Plain Error Review*

Traditionally, plain error review has been "fully committed to the discretion of the appellate court." *Winston v. State*, 235 Md. App. 540, 579 (Meredith, J., concurring), *cert. denied*, 458 Md. 593, 461 Md. 509 (2018). In *Yates v. State*, 429 Md. 112, 130-31 (2012), the Court of Appeals stated:

> Plain error review is reserved for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy* [*v. State*], 420 Md. [232, 243], 22 A.3d 845 (2011) (quoting *State v. Hutchinson*, 287 Md. 198, 203, 411 A.2d 1035 (1980)). Among the factors the Court considers are "the materiality

[5] Specifically, counsel proposed the following two questions:

> 5. Is there anyone here who has strong feelings regarding pimps?
> 6. Is there anyone here who has strong feelings regarding prostitution?

> 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.* This exercise of discretion to engage in plain error review is "rare." *Id.* at 255, 22 A.3d 845.

As discussed above, we cannot conclude, from the record before us, that defense counsel's failure to object to the compound questions was not "the product of conscious design or trial tactics[.]" *See id.* We therefore exercise our discretion and decline to conduct plain error review here.

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