Circuit Court for Dorchester County
Case No. C-09-CR-21-000142

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1844

September Term, 2022

STEPHON NATHANIEL BEALE

v.

STATE OF MARYLAND

Leahy,
Albright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: October 12, 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 Rule 1-104(a)(2)(B).

Appellant, Stephon Beale, was convicted in the Circuit Court for Dorchester County of Sexual Abuse of a Minor, Sexual Solicitation of a Minor, and Second-Degree Assault. Appellant presents a single question for our review:

> 1. Did the court commit reversible error by asking an improper compound question regarding jurors "strong feelings" during *Voir Dire*.

Because we find that the argument was not preserved for our review, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Dorchester County of Sexual Abuse of a Minor, Sexual Solicitation of a Minor, and Second-Degree Assault. The jury found appellant guilty on all counts and the court imposed a term of incarceration of twenty-five years on Count One, all but twelve and a half years suspended, a term of incarceration of 7 years on Count Two, and a term of incarceration of 2 years on Count Three, all to be served concurrently, followed by 5 years' probation.

On June 7, 2021, the Cambridge Police Department responded to a call from Christina Jackson, alleging that appellant, Ms. Jackson's live-in boyfriend, had had an inappropriate encounter with her daughter, G.J. G.J. informed authorities—and then testified at trial—that on June 4, Appellant had come into her room after school. She reported that Appellant told her he wanted to show her something and showed her a condom. He then told her he wanted to teach her something, left the room, and returned naked. He put on the condom, asked her to put on gloves, and requested that she pull on his penis. She reported that he then pulled on his own penis until it produced "white goo."

Three days after the incident G.J. persuaded appellant to tell Christina Jackson what had happened, and Christina Jackson called the police. G.J. was interviewed by the police and Child Protective Services. Following the interview, the police filed charges against appellant.

Prior to trial, appellant's trial counsel filed "Defendant's Requested *Voir Dire*," requesting the following question: "Do any of you have strong feelings about the crimes alleged herein?" (the "strong feelings question"). When the case proceeded to trial, during *voir dire*, the court modified the question, asking the venire panel the following question:

> "The State alleges that the defendant committed the crime of sexual abuse of a minor and related offenses. Do any of you have particularly strong views about those crimes that it might make it difficult for you to sit in this case and render a fair and impartial verdict."

Appellant's counsel lodged no objection. Indeed, thirty-nine potential jurors answered the question, and appellant's counsel still raised no objection to the *voir dire* question. A short time later, the court asked counsel if they wanted to approach the bench:

> "THE COURT: So the numbers I've been reading off are my standard *voir dire* but I may have missed something and I will give you the opportunity to tell me if you think there are other questions we haven't gotten to that you think are important. We'll start with the state. We covered all, I think I worked off the State's basic list as well."

There then followed a brief colloquy between the court and the State regarding the need for a question about law enforcement or legal training. The court turned to appellant's counsel and asked if he has anything to raise. Appellant's counsel raised the need for a question about the duration of trial. There was a brief colloquy about some questions, not including the one at issue, that the court found to be duplicative of the jury instructions and

inappropriate for *voir dire*. Appellant's counsel then requested a question on familial ties to law enforcement. Counsel did not raise the issue of the strong feelings question or any concerns about compound questions at any point during the colloquy at the bench. The court asked once again, "All right, is that it?" Appellant's counsel answered "Yes, sir."

The case proceeded to trial. The jury found the appellant guilty on all counts, and he was sentenced as described above.

II.

Before this Court, appellant argues that the strong feelings question, as phrased by the trial court was improper. Appellant argues that the trial court's version of the question was a compound question: first, whether the juror had strong feelings, and second, whether any strong feelings which any juror might feel would make it difficult to be fair and impartial. Appellant maintains that in asking the compound question, the court shifted the burden of determining bias from the court to the juror, and, therefore, did not achieve the goals that the strong feelings question is designed to accomplish. The compound question, appellant argues, prevented the trial court from fulfilling its purpose of ensuring an impartial jury by determining the existence of specific cause for disqualification. This error, according to appellant, was not harmless.

In his reply brief, appellant recognizes that his claim of error is unpreserved, but requests that this Court exercise its discretion to review his unpreserved claim. He argues that the error in the trial court was plain error, and, therefore, subject to review. Appellant argues that his trial counsel never affirmatively waived the issue, instead providing the

correct phrasing of the question to the trial judge and simply failing to object when the judge deviated from the correct phrasing. He argues that the error was clear and obvious in light of this court's past precedent on the subject, that the error deprived him of an impartial jury, and that, by depriving him of the guarantee of an impartial jury, it seriously affected the fairness of the judicial proceedings. Bound up in appellant's claim of plain error is a claim of ineffective assistance of counsel. He recognizes that ineffective assistance of counsel claims are reserved, generally, for post-conviction proceedings, but argues that this Court should entertain the claim on direct appeal as a factor to consider when determining whether or not to exercise the court's discretion to find plain error.

The State maintains that this issue is not preserved for our review because there was no objection below. Because in appellant's opening brief he does not address non-preservation or plain error, the State's argument addresses only failure to preserve the issue for appellate review.[1] The State points out that merely submitting a written question

[1] Appellant does not raise plain error or ineffective assistance of counsel in his initial brief and raises it for the first time in his reply brief. The State argued, at oral argument, that appellant bypassed the chance for plain-error review by failing to raise it in his opening brief.

The State is correct that courts generally do not consider arguments raised for the first time in a reply brief. *See e.g., Gazunis v. Foster*, 400 Md. 541, 554 (2007). Indeed, several Maryland courts have declined to exercise plain error review on grounds that the matter was only raised in a reply brief. *Robinson v. State*, 404 Md. 208, 215 n.3 (2008); *McIntyre v. State*, 168 Md. App. 504, 532 (2006). However, courts around the country, and in Maryland, have addressed plain error arguments on their merits when raised for the first time in a reply brief. *See e.g.*, *Perry v. State*, 229 Md. App. 687, 710 (2016) (Maryland); *Marcus v. Reyes*, 327 Ore. App. 122, 123 (Or. Ct. App. 2023); *Stewart v. State*, 367 So. 3d 985 (2023); *Swicord v. Police Stds. Advisory Council*, 309 Neb. 43, 50 (2021); *People v. Williams*, 193 Ill. 2d 306, 348 (Ill. 2000).

requesting a particularly worded *voir dire* question does not preserve the issue for our review without a later objection, and the trial court gave defense counsel several opportunities to complain about the jury inquiry.

III.

We address first the matter of preservation. Maryland Rule 8-131(a) dictates that appellate courts will not address claims of error which have not been raised or decided in the trial court. *Graham v. State*, 325 Md. 398, 411 (1992). The purpose of this rule is to bring to the trial court's attention the alleged error and to give the court an opportunity to correct it. *Robson v. State*, 257 Md. App. 421, 461 (2023).

With respect to *voir dire* questions, the initial presentation of a proposed list of questions submitted to the trial judge is not sufficient to preserve claims of error for deviations from that list. *Lopez-Villa v. State*, 478 Md. 1, 16 (2022). In *Lopez-Villa*, the Maryland Supreme Court addressed the preservation issue with respect to a *voir dire* question, explaining as follows:

> "Petitioner failed to preserve his claims based on *Kazadi* by failing to object when the trial court informed him that it was not inclined to ask his proposed voir dire questions, and by responding '[no]' when the trial court asked if he had missed anything during voir dire. Petitioner's desired actions were not made known to the court at the time of its decision merely because Petitioner had submitted, at an earlier time, a list of proposed questions to the court. Such an action is insufficient to satisfy either the plain language requirements of Md. Rule 4-323(c) or the Rule's purpose of providing the trial court with the opportunity to correct, and the opposing party the opportunity to respond

We shall assume, for the sake of argument, that appellant could request plain error review for the first time in his reply brief and find on the merits that this issue does not warrant plain error review.

> to, any perceived errors. Neither is it sufficient to preserve Petitioner's claims under Md. Rule 8-131(a)."

Id. at 20. Appellant must object or express disagreement when the court indicates that it will deviate from the proposed list. *Id.* at 13. Otherwise, the court could reasonably perceive that appellant "had abandoned those claims or ultimately agreed with the court's determination that they were unnecessary." *Id.* at 16. Therefore, when a criminal defendant fails to object to a compound *voir dire* question, the claim of error is unpreserved. *Robson*, 257 Md. at 459-61 (declining to review a claim of error stemming from a compound *voir dire* question where the appellant failed to object to the question). This error is unpreserved for our review.

Appellant requests that this court exercise its discretion to engage in plain error review of the unpreserved claim of error. While plain error review of *voir dire* questions is within this court's discretion, it is exceedingly rare. *Jefferson v. State*, 194 Md. App. 190, 200-01 (2010). Plain error review is applicable only when (1) there is an error or defect that has not been intentionally relinquished or abandoned, (2) the legal error is clear and obvious, (3) the error affected appellant's substantial rights, and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Newton v. State*, 455 Md. 341, 364 (2017).

Here, even the first requirement is not met. There is a difference between a right which has been forfeited by mere silence or failure to object, and a right which has been waived by intentional relinquishment. *Carroll v. State*, 202 Md. App. 487, 509 (2011) A right which has been affirmatively waived is not appropriate for plain error review. *Booth*

v. State, 327 Md. 142, 180 (1992) ("Booth's argument . . . does not even require a plain error analysis. This is because there is more than a simple lack of an objection to the instruction given. Here defense counsel affirmatively advised the court that there was no objection to the instruction.").

When a party affirmatively indicates satisfaction with the questions asked on *voir dire* or that there are no further questions that need to be asked, that party affirmatively waives any objections. In *Robson*, for instance, after the *voir dire* was concluded, the trial court asked whether counsel was "satisfied with its questions." Appellant's counsel answered unequivocally, "I'm satisfied with the questions that have been asked, yes." *Robson*, 257 Md. App. at 459. The court found that this was "more than mere silence." In *Brice v. State*, 225 Md. App. 666, 679 (2015), the court held that appellant had waived any objections to the court's *voir dire* questions when, at the conclusion of *voir dire*, counsel for both parties were specifically asked if the court had missed any questions and defense counsel replied "No." A similar fact pattern exists here. The court asked counsel if there were any further questions the court did not address. Appellant's trial counsel affirmatively declined to raise the issue. The matter is waived. We decline to exercise plain error review.

Finally, we decline to address appellant's ineffective assistance of counsel claim on direct appeal. "Generally, absent any 'objective, uncontroverted, or conceded error,' the issue of defense counsel's effectiveness is raised most appropriately in a post-conviction proceeding." *Steward v. State*, 218 Md. App. 550, 570 (2014).

JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER

COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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