UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0169

September Term, 2015

SHELDON TERRELL COOK

v.

STATE OF MARYLAND

Wright,
Kehoe,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: February 23, 2016

Following a jury trial in the Circuit Court for Montgomery County, appellant, Sheldon Terrell Cook, was convicted of one count of distribution of crack cocaine. The court sentenced him to forty years without the possibility of parole. He presents four issues on appeal, which we have reworded:

> 1. Did the trial court improperly influence appellant's choice to waive his right to testify at trial?
>
> 2. Did the trial court commit plain error when it permitted Detective Richard Grapes to provide expert testimony on the ultimate issue of whether appellant distributed crack cocaine?
>
> 3. Did the trial court err in allowing Corporal Charles Haak to provide rebuttal testimony regarding his observations of Cheryl Frene's sobriety on the evening of appellant's arrest?
>
> 4. Did the trial court abuse its discretion in granting the State's request for a continuance for appellant's sentencing hearing?

We will affirm the judgment of the trial court.

Analysis

Because appellant does not challenge the sufficiency of the evidence against him, a detailed rendition of the facts giving rise to appellant's arrest and conviction is unnecessary. *See, e.g., Joyner v. State*, 208 Md. App. 500, 503 n. 1 (2012).

By way of an overview, on May 21, 2014 a member of the Montgomery County Police Department was conducting surveillance in the parking area of a shopping center in Silver Spring. He noticed what looked like a drug transaction between appellant, apparently the seller, and Cheryl Frene, apparently the purchaser. Both appellant and Ms. Frene were

arrested and their automobiles searched. The police recovered a small amount of cocaine from Ms. Frene, but no money. They recovered a significant amount of money, $317, but no drugs, from appellant or his vehicle. On the night of her arrest, Ms. Frene implicated appellant and identified him as the individual who had sold her cocaine earlier in the evening. She recanted these statements at trial and testified that appellant was not involved. The State's case against appellant consisted largely of testimony by police officers, evidence regarding Ms. Frene's statements made on the night of her arrest, and physical evidence. We will discuss any pertinent facts within the analysis.

I. Appellant's Right to Remain Silent

Appellant's first contention stems from his decision at trial to waive his right to testify on his own behalf. He contends that the trial judge committed reversible error when he "advised [] appellant of the trial philosophy [he] utilized while in private practice with respect to whether a defendant should or should not testify in his/her own defense." Appellant's argument is based on the following colloquy that occurred at trial:

> [THE STATE]: Can we just make it clear on the record that the defendant has been advised of his right to testify or not to testify and that he's chosen to not testify?
>
> THE COURT: Nope. That's a matter between the defendant and his attorney. That's a tactical matter and I know some judges feel differently, but I'm sure counsel . . . you've spoken to your client?
>
> [APPELLANT'S COUNSEL]: Yes, Your Honor.

THE COURT: And he's well aware of his right to testify, and he's standing right here at the bench, right, sir?

[THE STATE]: That's all I ask.

. . . .

I just want the record clear that the defendant has affirmatively.

THE COURT: He is nodding his head and said yes. I saw force.

[APPELLANT]: Yes.

THE COURT: I saw force.

[THE STATE]: Thank you.

THE COURT: ***So, and he chooses not to testify. That's a tactical decision. I don't know that I need to say this for the record, but your opinion of the Law Firm of Dugan & McGann from their old defense days, my rule of thumb was never ever, ever, ever, ever, ever put your client on the stand***, unless your—

[APPELLANT'S COUNSEL] And you're both judges. I think you guys did the right thing.

THE COURT: Unless you know you're going down in flames, and then you let the torpedoes fly and land where they may.

[APPELLANT'S COUNSEL]: And then post-conviction—

THE COURT: So tactically we're in agreement.

"'The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution guarantee the accused in a criminal case the right to testify on his own behalf.'" *Gregory v. State*, 189 Md. App. 20, 32 (2009) (quoting *Tilghman v. State*, 117 Md. App. 542, 553

(1997)). "Because the right to testify is essential to due process in a fair adversary system, it may only be waived knowingly and intelligently[.]" *Id.*

When a defendant is represented by counsel and declines to testify, a rebuttable presumption arises that counsel has fully advised her client of his right to testify or remain silent. *Id.* at 33 (citing *Thanos v. State*, 330 Md. 77, 91-92 (1993)). "[T]he trial court is entitled to assume that counsel has properly advised the defendant about [the right to testify] and the correlative right to remain silent and, if the defendant does not testify, that he has effectively waived his right to do so." *Tilghman*, 117 Md. App. at 555. Thus, absent an indication that the defendant misunderstood or was misinformed about his right to testify, the court may assume that the defendant's choice to waive that right is knowing and intelligent. *Gregory*, 189 Md. App. at 35–36.

Once a defendant has affirmatively waived his right, subsequent advice or statements made by either defense counsel or the court regarding that waiver are not presumed to have influenced the defendant's decision absent evidence contrary thereto. *Id.* at 38. "Detrimental reliance on the erroneous advice is a necessary element in determining that the defendant did not knowingly and voluntarily waive his constitutional right to remain silent." *Id.*; *see also Savoy v. State*, 218 Md. App. 130, 155 (2014). Appellant bears the burden of establishing that he detrimentally relied on the subsequent advice; it is not the State's burden to prove that he did not. *Savoy*, 218 Md. at 155.

In the present case, appellant failed to meet his burden of establishing detrimental reliance on the court's statements. The record shows that the court did not opine on whether appellant should waive his right to testify until after (1) defense counsel represented to the court that his client did not wish to testify; and (2) appellant indicated his agreement by nodding as his lawyer discussed the matter with the judge and the prosecutor. Only after these events transpired did the court comment on appellant's decision. Appellant gave no indication that he had second thoughts about his decision. Thus, even assuming the trial court erred in commenting on appellant's waiver of his right to testify, there is no causal link between the court's comments and appellant's waiver. As such, the trial court did not commit reversible error.

II. Detective Grapes's Testimony

Appellant's second contention pertains to the testimony of Detective Grapes. At trial, Detective Grapes testified as an expert for the State in the area of narcotics investigations and enforcement. During his testimony, he opined to the following:

> [THE STATE]: So based on your training and experience, your examination of the case file and the testimony you have heard, do you have an opinion as to what occurred in this situation, in this case?
>
> [DETECTIVE GRAPES]: Yes, I do.
>
> [THE STATE]: What is that opinion?
>
> [DETECTIVE GRAPES]: I believe the Defendant distributed crack cocaine to the witness, Ms. Frene.

Appellant acknowledges that, generally speaking, the opinions of experts are admissible even when the opinion goes to the ultimate issue of fact. However, he contends an expert may not opine on the ultimate issue of fact when that testimony directly conflicts with another witness's testimony because to do so would "depriv[e] the jury of their essential fact-finding function, that being, weighing the credibility of [the witness]." Appellant acknowledges that his counsel did not object to the State's question, and thus that the issue is not preserved for our review.[1] Nonetheless, he asks us to exercise review pursuant to the plain error doctrine. We decline to do so.

"Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which 'vitally affect[ ] a defendant's right to a fair and impartial trial.'" *Malaska v. State*, 216 Md.

[1]The issue is not preserved because Rule 2-517(a) requires contemporaneous objections to the admission of evidence (emphasis added):

> ***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 .*** The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

App. 492, 524, *cert. denied*, 439 Md. 696 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009) (quotation marks and citation omitted)). This discretion should be rarely exercised because considerations of fairness and judiciary efficiency call for assertions of error to be raised at trial so that "a proper record can be made with respect to the challenge, [and] the other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Chaney v. State*, 397 Md. 460, 468 (2007). We should engage in plain error review only when we are confronted with an outcome-affecting error of such magnitude that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (quotation marks and citation omitted).

Appellant acknowledges that Rule 5-704[2] allows expert witnesses to testify on ultimate issues of fact, but contends that the court's admission of Detective Grapes's testimony was improper because his testimony conflicted with Ms. Frene's testimony, thus depriving the jury of the opportunity to judge her credibility. Appellant does not explain

[2]Rule 5-704 states:

> **(a) In General.** Except as provided in section (b) of this Rule, 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.
>
> **(b) Opinion on Mental State or Condition.** An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged. That issue is for the trier of fact alone. This exception does not apply to an ultimate issue of criminal responsibility.

how Detective Grapes's testimony would have had such an effect on the jury. Perhaps more to the point, we do not see how the trial court's failure to interject itself *sua sponte* into the prosecutor's questioning of a witness seriously affected "the fairness, integrity or public reputation" of either appellant's trial or judicial proceedings generally. *See Kelly v. State*, 392 Md. 511, 543 (2006) ("The responsibility of the trial court to control the proceedings before it does not extend to the right to take over a party's case.").

We decline to exercise plain error review.

III. Corporal Haak's Rebuttal Testimony

Appellant next contends that the trial court erred in permitting Corporal Haak to provide rebuttal testimony on the matter of whether Ms. Frene displayed behaviors associated with crack cocaine intoxication on the evening of appellant's arrest. In order to provide context for appellant's argument, we set out the colloquy pertaining to Corporal Haak's rebuttal testimony:

> [THE STATE]: Now, in your experience as an officer, have you had an opportunity to view individuals who were under the influence of crack cocaine?
>
> [CORPORAL HAAK]: Yes, ma'am.
>
> [THE STATE]: Did you observe any of those signs on Ms. Frene in your—
>
> [APPELLANT'S COUNSEL]: Objection, Your Honor.
>
> THE COURT: Basis?

[APPELLANT'S COUNSEL]: He's not been identified as an expert on the effects of narcotics, particularly, crack cocaine.

THE COURT: All right. Sustained.

[THE STATE]: Thank you.

THE COURT: Unless you want to lay a foundation.

[THE STATE]: Thank you.

[The State proceeded to ask Corporal Haak a series of questions regarding his training and experience with observing individuals under the influence of crack cocaine and the typical behaviors he has historically observed exhibited by those under the influence.]

[APPELLANT'S COUNSEL]: Your Honor, we would object. We requested discovery many months ago. Corporal Haak was never identified as an expert witness as to what the State is trying to lay a foundation for. It's wholly improper. They've only identified one expert witness as Corporal Grapes, who, I believe—

THE COURT: Well, this is rebuttal now. Isn't it?

[APPELLANT'S COUNSEL]: It's still expert testimony.

THE COURT: So? How would they know they would need somebody in rebuttal based on what their witness said?

[APPELLANT'S COUNSEL]: Trial prep.

THE COURT: Okay. On that basis, if that's your basis, the objection's overruled.

[APPELLANT'S COUNSEL]: And Your Honor, I would object furthermore on Corporal Haak's expertise. There's not been any indication that he has been identified as an expert in determining whether he's received any medical or professional training in determining whether a person that may be under the

influence of any drugs, particularly crack, what their behaviors would be, what the medical basis for that behavior would be. Just he's going by anecdotal evidence, which would be improper for expert testimony, Your Honor.

THE COURT: All right. Ms. Tomazic?

[THE STATE]: Thank you, Your Honor. I'm not asking him to explain the actual effects of crack cocaine with respect to how it deals with your mental, your brain activity. I'm just asking him to explain observations that he has made in seeing individuals who have been under the influence of crack cocaine, and whether or not those are consistent with what Ms. Frene evidenced.

THE COURT: All right. Well, I think he's had sufficient, it's training and experience. It can be practical experience. I think he has sufficient background and training from his time on the street that he can indicate what he didn't see.

I don't think he can opine as to whether or not she was under the influence of crack cocaine at the time, but there's indicia that he's seen before, if he did see them or he didn't see them. I think he can describe to the jury what he did or didn't see with respect to her appearance and demeanor and so on.

[THE STATE]: Thank you, Your Honor.

THE COURT: So I'll let him do that, but I'm not going to let him opine as to whether or not she was under the influence of crack.

[THE STATE]: I wasn't going there, Your Honor.

[THE STATE]: Corporal Haak, what, if any, behaviors did Ms. Frene elicit that were consistent with behaviors you have seen of individuals under the influence of crack cocaine, if any?

[CORPORAL HAAK]: Other than general nervousness at the traffic stop, none.

[THE STATE]: Is it uncommon for any individual to be nervous on a traffic stop?

[CORPORAL HAAK]: No. Some more than others, for obvious reasons.

[THE STATE]: Did she exhibit any of that hyper-excitement that you indicated?

[CORPORAL HAAK]: No.

[THE STATE]: Okay. And were you able to have a coherent conversation with her?

[CORPORAL HAAK]: Yes.

[THE STATE]: Did she appear, in any way, to be, you know, dazed or looking off, or not able to maintain focus?

[CORPORAL HAAK]: No.

[THE STATE]: Okay. Was there any concern to you at that time that she was under the influence of any substance?

[CORPORAL HAAK]: No.

Appellant first argues that the court improperly admitted Corporal Haak's testimony as lay opinion when the testimony fell within the realm of expert testimony. Second, he asserts that, even if the court admitted the testimony as expert opinion, the court erred in doing so because the State's failure to disclose Corporal Haak as an expert constituted a discovery violation. We will address each argument in turn.

A. Admissibility of Corporal Haak's Testimony as a Lay Witness

Appellant contends that the trial court improperly admitted Corporal Haak's testimony as a lay witness because critical portions of his testimony in actuality lay within the realm of expert opinion. Before addressing the merits of appellant's argument, we must decide whether the argument is preserved for our review.

Rule 2-517(a)[3] lays out the requirements for objections to evidence. Pertinent to the issue before us, the rule states: "The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." "Thus, a party basing an appeal on a 'general' objection to admission of certain evidence, may argue any ground against its inadmissibility." *DeLeon v. State*, 407 Md. 16, 24–25 (2008). However, "[a]n objection loses its status as a 'general' one 'where a rule requires the ground to be stated, where the trial court requests that the ground be stated, and where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence [.]'" *Id.* at 25 (emphasis removed) (quoting *Boyd v. State*, 399 Md. 457, 475–76 (2007)).

In the present case, appellant's counsel objected to the admission of Corporal Haak's rebuttal testimony three times on the following grounds: (1) that Corporal Haak was not identified as an expert on the effects of crack cocaine, (2) that the State failed to previously disclose Corporal Haak as an expert, and (3) that Corporal Haak was not qualified to provide

[3]The text of Rule 2-517(a) is laid out in footnote 1.

expert testimony in the area of the effects of crack cocaine. None of these grounds pertain to the admissibility of Corporal Haak's testimony as a lay witness. Thus, the specific contention now raised by appellant is not preserved for our review.

Furthermore, and looking past preservation, the record reflects that Corporal Haak was admitted as an expert witness. During the entirety of the colloquy discussing Corporal Haak's admissibility as a witness, the State, the defense, and the court all focused on whether Corporal Haak could be admitted to provide expert testimony. When appellant's counsel lodged his final objection—on the ground that Corporal Haak was not qualified to provide expert testimony—the court stated:

> Well, I think he's had sufficient, it's training and experience. It can be practical experience. I think he has sufficient background and training from his time on the street that he can indicate what he didn't see.

Although the court did not explicitly state that it was overruling appellant's objection, it implied that it found that Corporal Haak had sufficient practical experience and training to qualify him as an expert in the area of behaviors associated with crack cocaine intoxication. As such, the court permitted Corporal Haak to provide testimony on his observations of Ms. Frene's behavior based on that knowledge; at no point did the court indicate that it had changed course and was now admitting Corporal Haak's testimony as lay opinion. Under these circumstances, we conclude that the testimony was admitted as expert testimony.

B. Admissibility of Corporal Haak's Testimony as an Expert Witness

Appellant also asserts that, even if the trial court admitted Corporal Haak's testimony as expert opinion, it erred in doing so because the State failed to disclose Corporal Haak as a witness during discovery, in violation of Rule 4-263(d), which requires the State to disclose:

> *Reports or Statements of Experts*. As to each expert consulted by the State's Attorney in connection with the action:
>
> > (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;
> >
> > (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and
> >
> > (C) the substance of any oral report and conclusion by the expert;

Notably, Rule 4-263(d) only requires the State to disclose information on those experts which it has "consulted." In *Hoey v. State*, 311 Md. 473, 489 (1988), the Court of Appeals examined the meaning of the term "consulted" in the context of Rule 4-263(d). In that case, the Court considered whether the State violated Rule 4-263(d)(8) when it called forth the defendant's psychiatrist to rebut the defendant's testimony that he was not criminally liable for his actions. *Id.* at 479, 488. The Court noted that the psychiatrist "did not conduct any tests on Hoey at the request of the State's Attorney. Rather, all tests

conducted by [the psychiatrist] were made as part of his duties as Hoey's treating psychiatrist." *Id.* at 489. Thus, the Court concluded that the State's Attorney never "consulted" the defendant's psychiatrist and thus did not violate Rule 4-263(d)(8) by failing to disclose the psychiatrist as an expert. *Id.*

We believe the same is true in the present case. Appellant never articulated to the trial court, nor to this Court, how the State consulted with Corporal Haak as an expert prior to trial. It appears from the record that the State did not consider, prior to Ms. Frene's testimony, that there would be any need to consult an expert on behaviors associated with crack cocaine intoxication. As such, we do not believe that the State violated Rule 4-263(d)(8) by failing to disclose Corporal Haak as an expert witness, and the court did not err by permitting him to testify.

IV. The Motion for Continuance of the Sentencing Hearing

Appellant's final contention pertains to his sentencing hearing. Upon appellant's conviction, a pre-sentence investigation report was ordered and a sentencing hearing was scheduled. During the sentencing hearing, the State presented evidence that appellant had three previous convictions of distributing controlled dangerous substances in Virginia and asked for him to be sentenced as a fourth time offender pursuant to Criminal Law Article ("CL") § 5-608(d)[4], for a mandatory minimum sentence of 40-years. Appellant does not

[4]CL § 5-608(d) states:

(continued...)

dispute that the State provided timely notice to the court and defense of the possibility of a mandatory sentence, as required by Rule 4-245(c).[5] However, the trial court also noted during the hearing that it was unclear from the records before it whether the time served for

[4](...continued)

Fourth time offender

(d)(1) Except as provided in § 5-609.1 of this subtitle, a person who is convicted under subsection (a) of this section or of conspiracy to commit a crime included in subsection (a) of this section shall be sentenced to imprisonment for not less than 40 years and is subject to a fine not exceeding $100,000 if the person previously has served three or more separate terms of confinement as a result of three or more separate convictions:

(i) under subsection (a) of this section or § 5-609 of this subtitle;
(ii) of conspiracy to commit a crime included in subsection (a) of this section or § 5-609 of this subtitle;
(iii) of a crime under the laws of another state or the United States that would be a crime included in subsection (a) of this section or § 5-609 of this subtitle if committed in this State; or
(iv) of any combination of these crimes.

(2) The court may not suspend any part of the mandatory minimum sentence of 40 years.

(3) Except as provided in § 4-305 of the Correctional Services Article, the person is not eligible for parole during the mandatory minimum sentence.

[5]Rule 4-245(c) states:

Required Notice of Mandatory Penalties. When the law prescribes a mandatory sentence because of a specified previous conviction, the State's Attorney shall serve a notice of the alleged prior conviction on the defendant or counsel at least 15 days before sentencing in circuit court or five days before sentencing in District Court. If the State's Attorney fails to give timely notice, the court shall postpone sentencing at least 15 days unless the defendant waives the notice requirement.

two of the prior convictions were separate terms of confinement—as is required by CL § 5-608(d) for the convictions to be treated as separate offenses.

As such, the trial court presented the State with two options: the State could request a continuance in order to afford it more time to clarify whether appellant served separate terms of confinement for the two convictions, or it could continue with the hearing and seek a sentence pursuant to the mandatory minimum for a third time offender. The State requested a continuance, and appellant's counsel objected. Appellant argued, as he does now, that since the State timely provided notice of the mandatory sentence pursuant to Rule 4-245(c), there was no basis for the court to grant a continuance.

"The decision whether to grant a request for continuance is committed to the sound discretion of the court." *Abeokuto v. State*, 391 Md. 289, 329 (2006). "An abuse of discretion occurs 'where no reasonable person would take the view adopted by the court' or if the court acts 'without reference to any guiding rules or principles.'" *Serio v. Baystate Properties, LLC*, 209 Md. App. 545, 554 (2013) (quoting *North v. North*, 102 Md.App. 1, 13 (1994)). Appellant asserts that the court abused its discretion in granting the continuance because it provided the State with an "unwarranted opportunity to further seek a draconian sentence for an offense involving less than one gram of cocaine." We disagree.

The court had before it a set of records that clearly showed that appellant had three prior convictions for distribution of controlled dangerous substances. The only ambiguity

was whether appellant had served separate terms of confinement for each conviction, which is one of the factual predicates required by CL § 5-608(d). To be sure, the court could have sentenced appellant as a three time offender. Doing so, however, would frustrate the purpose of the statute if appellant was actually a four time offender because, as the trial court noted, CL § 5-608(d) provides for mandatory, not discretionary, sentencing. The court's decision that the purpose of CL § 5-608(d) would be best served by having accurate information before it when issuing a sentence was far from an abuse of discretion.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.