UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0746

September Term, 2015

TERRY R. GOINGS

v.

STATE OF MARYLAND

Meredith,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: September 23, 2016

Terry R. Goings, appellant, was convicted by a jury sitting in the Circuit Court for Montgomery County of robbery and conspiracy to commit robbery. He was sentenced to concurrent terms of ten years for each offense.

In his timely appeal, Goings raises three issues, which we have recast:[1]

I. Whether the trial court abused its discretion when, after excluding evidence the State failed to disclose during discovery, did not strike testimony regarding the State's reception of that evidence.

II. Whether the trial court improperly overruled an objection to testimony referencing existing information from "police files."

III. Whether the trial court committed plain error in conducting *voir dire* when it asked a compound question of prospective jurors.

We shall affirm the judgments of the circuit court.

[1] Goings phrased the issues as follows:

I. **Error! Main Document Only.**Whether the lower court abused its discretion when it refused to strike important prosecution testimony that was both hearsay and previously undisclosed to the defense.

II. **Error! Main Document Only.**Whether the lower court erred when it allowed a detective to testify about existing "police files" on Terry Goings that the detective used as a basis of information on Terry Goings during his investigation in the instance [*sic*] case.

III. Whether the lower court committed plain error when, at the end of two separate "strong feelings" *voir dire* questions, the court incorrectly included the phrase, "that would interfere with your ability to render a fair and impartial verdict?" a phrase which left the decision of juror impartiality to prospective jurors in violation of *Pearson*. [*sic*]

BACKGROUND

On August 14, 2014, around 5:30 p.m., Leon Tune was walking from a bus stop toward his home in Takoma Park, Montgomery County. Two men, later identified as Goings and Trevont Kilby-Neal, attacked him from behind and beat him to the ground, kicking and punching him. During the attack, Tune dropped his briefcase. He surrendered his wallet to one of the assailants, and the other picked up the briefcase as the two ran away. The assailants got into a car driven by a third person, which then left the scene. Tune later testified that the car was a gray, late model Cadillac.

Louvina Joseph, Tune's neighbor, witnessed at least part of the attack. She testified that she noticed the car, which she described at trial as a "goldish-toned" Cadillac, because it was parked in a no-parking zone near her house. When she saw the attack on Tune, she noted the car's license plate number as it drove away. She immediately provided the number to Tune, who entered it in a notes application in his smart phone. Later, during discovery, the State did not provide Goings with the contents of the note or with the fact that Tune entered the note into his smart phone.

Tune contacted the police, who dispatched a radio lookout with the description of the car and the license plate number. In addition, a call to police from another citizen in the neighborhood shortly thereafter reported a suspicious vehicle described as a gold Cadillac. In the investigation, police collected Tune's blood-stained shirt for DNA testing, which revealed the blood to be that of Kilby-Neal.

About an hour after the attack, Officer Timothy Bettis saw a car matching the description and license plate number given by witnesses to the police. Bettis followed the car to a 7-Eleven store, where he observed Goings and Kilby-Neal enter, make some purchases, and return to the car. By that time, additional police officers arrived on the scene, and arrested Goings and Kilby-Neal, as well as Goings's sister, Mia, who was in the driver's seat of the car. Corporal Charles Haak and Officer Edward Drew both observed Tune's credit card on the passenger seat of the car. We will provide additional facts where relevant to our discussion.

Goings, Kilby-Neal, and Mia Goings were tried jointly. Goings and Kilby-Neal were convicted as we have noted; Mia Goings was acquitted of all charges.

DISCUSSION

Goings presents three disparate arguments, any one of which, he posits, entitles him to reversal of the convictions.

1. Discovery – the Cell Phone Note

Goings first contends the circuit court abused its discretion when it failed to strike Tune's recitation of the license plate number given to him by his neighbor, Ms. Joseph. He asserts that this testimony resulted in prejudice to him in two ways: (1) it caught the defense by surprise, as the State had not provided the evidence in discovery; and (2) it "lent a veneer of reliability" to Tune's testimony. The State responds that Goings could not have been taken by surprise, because the license plate number itself and the fact that the neighbor

relayed it to Tune were disclosed during discovery and, in any event, would have otherwise come into evidence.

We review a circuit court's decision not to strike testimony for an abuse of discretion. "[W]hen a discovery violation comes to light in the course of a trial, whether any sanction is to be imposed and, if so, what it is to be, is in the first instance committed to the discretion of the trial judge." *Warrick v. State*, 302 Md. 162, 173 (1985). "[T]he exercise of that discretion includes evaluating whether the violation prejudiced the defendant." *Evans v. State*, 304 Md. 487, 500 (1985). An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court – when the ruling is "violative of fact and logic." *North v. North*, 102 Md. App. 1, 13 (1994) (quoting *Young v. Jangula*, 440 N.W.2d 642, 643 (1989)). "[A] ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *Id.* at 14.

Maryland Rule 4-263, which governs discovery in criminal proceedings, gives a trial court authority to strike testimony and prohibit the admission of evidence undisclosed in discovery. Md. Rule 4-263(n). It likewise gives the trial court the discretion to determine an appropriate remedy for a discovery violation. *Id.*

The discovery rules are meant "to give a defendant the necessary time to prepare a full and adequate defense." *Ross v. State*, 78 Md. App. 275, 286 (1989). "The purpose of the discovery rules is to 'assist the defendant in preparing his defense, and to protect him from surprise.'" *Joyner v. State*, 208 Md. App. 500, 528 (2012) (quoting *Hutchins v. State*,

339 Md. 466, 473 (1995)). However, if the undisclosed information is provided to the defendant in a timely manner, or revealed to the defendant in some other manner, the court may determine a lack of prejudice to the defendant. "If a full record demonstrated there was no discoverable information which was not disclosed, there could have been no violation of [the rules]. If a complete record demonstrated that there was a violation but that it was nonprejudicial, it should not be the basis for a reversal of the conviction." *Warrick v. State*, 302 Md. at 173-74. For instance, in *Warrick*, while the State failed to disclose the location of a show-up identification in discovery, the statement of charges included that information, as did the testimony of one of the officers; thus, reversal was not required because the defendant had been apprised of the location through other means. *Id.* at 173.[2] *See also Silver v. State*, 420 Md. 415, 433-34 (2011) (testimony objected to was "but one of many indicia of Silver's ownership" of certain horses, an element defendant was well aware State would try to prove).

The asserted abuse of discretion occurred at the point at which the State asked Leon Tune if he accurately recorded the license plate number in his phone. Tune responded, saying, "...it says WT–." Before Tune could finish repeating the number, defense counsel quickly objected on the ground that the State had not provided, in discovery, that Tune had recorded the license plate number on his cell phone. The court sustained the objection,

[2] *Warrick* was remanded for further fact-finding, as the circuit court had not made any findings on the record as to whether there was a discovery violation and, if so, whether there was any prejudice to the defendant as a result of the violation. 302 Md. at 174-75.

finding the non-disclosure to be a discovery violation. Defense counsel then moved to strike:

> [COUNSEL]: I move to strike the testimony regarding him receiving this license tag number. And he even started to testify giving a partial listing of the license tag. I move to strike all of that testimony regarding him receiving information regarding the license tag number.
>
> THE COURT: Well, I'm not going to strike that. I mean, he did receive some tag number and he recorded some tag number. But I think that's admissible.

We find no abuse of the court's considerable discretion in not granting the motion to strike.

The court determined that the fact that Tune had received the license plate number – if not the actual number – from his neighbor had been disclosed in discovery. There was no basis for the claim of surprise. Further, the court prohibited the State from recalling Tune to read the license plate number from his cell phone after Ms. Joseph testified about telling him to write it down, which was an appropriate response to the discovery violation, and was not clearly untenable, and thus not an abuse of discretion.

Goings's argument that the testimony about receiving the license plate number from his neighbor "lent a veneer of reliability" to Tune's testimony is likewise without merit.

Defense counsel, on cross examination, had ample opportunity to discredit the reliability of Tune's recording of the information given him, as well as Tune's own reliability. Moreover, the State's direct examination of Ms. Joseph revealed that she observed Tune to be shaken up and excited as she gave him the license plate number, and

that she did not double check that he had recorded the license plate accurately in his cell phone. Tune himself testified that he was "a little rattled" and had to have Joseph repeat the number "two or three" times. In addition, counsel elicited testimony from Ms. Joseph that she was not wearing her glasses when she saw the license plate, and that she uses them for reading. Counsel also raised doubt about Joseph's and Tune's description of the car – they each described a different color.

2. Evidence of Prior Criminal Record

The State called Detective Paul Crane who prepared the search warrant application to obtain DNA samples from Goings. When asked how he obtained information about Goings' height and weight for the application, Crane replied "I work off, based off previous work that would be in the police files or that such." That response, Goings posits, was inadmissible other crimes evidence to which his timely, albeit non-specific, objection ought to have been sustained. The objection was overruled and the State continued with its examination of Crane about the DNA test.

The purpose of the 'prior bad acts' evidentiary rule is to keep fact-finders from basing decisions of guilt on a defendant's reputation. *Hoes v. State*, 35 Md. App. 61, 70-71 (1977). "Evidence of other crimes may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *State v. Faulkner*, 314 Md. 630, 633 (1989). Where the evidence, then, does not refer to prior criminal acts, it would not tend to prejudice the minds of the jury against the defendant and there is no concern that evidence was improperly admitted.

Nothing in the record supports a conclusion that the State was soliciting a response from Crane to develop other crimes evidence. Indeed, it was a one-off. The State made no further mention, even obliquely, of the "police files" during re-direct examination of Crane, examination of any other witnesses, or in closing arguments. We find no merit to Goings's argument.

3. *Voir Dire* – Compound Question

In the jury selection process, the court propounded the following question:

> Based on any of your experiences of your own or any member of your immediate family, do you have such strong feelings about these offenses that would interfere with your ability to render a fair and impartial verdict?

Goings argues that the use of a compound question is in violation of *Pearson v. State*, 437 Md. 350 (2014), and that it had the effect of allowing the venire of potential jurors to self-evaluate potential bias. Evaluation of bias, he argues, is a function left to the court. In short, *Pearson* requires that the court ask only if the prospective juror holds "strong feelings" about the offenses charged and, as to those who answer in the affirmative, the court must then enquire whether those strong feelings would affect the juror's ability to weigh the evidence impartially.

Notwithstanding the facially incorrect phrasing of the question, Goings interposed no objection and now asks us to conduct a plain error review.

We will not review for plain error where the defendant affirmatively waived objections to the error. *Brice v. State*, 225 Md. App. 666, 679 (2015). Waiver can be found even in the lack of an objection when given an opportunity to object. *Id.* The State argues

that plain error is not called for, as Goings affirmatively waived his assignment of error when defense counsel responded "No, sir" to the court's inquiry regarding the *voir dire*.

The court interviewed the venire in two separate pools and, and at the conclusion of each, asked of the State and defense counsel, "Anything else?" without further prompts. Goings's counsel responded "No, sir," and "No," respectively, to each inquiry, which, we conclude, constitutes a waiver. That said, we further conclude that a plain error review provides Goings no benefit.

The discretion to review an unobjected-to error is meant to be rarely used and only in extraordinary circumstances. Both this Court and the Court of Appeals have been emphatic in limiting the exercise this discretion. "Appellate courts will exercise their discretion to review an unpreserved error under the plain error doctrine 'only when the unobjected to error is compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Kelly v. State*, 195 Md. App. 403, 432 (2010) (quoting *Turner v. State*, 181 Md. App. 477, 483 (2008)); *see also State v. Hutchinson*, 287 Md. 198, 203 (1980). "[A]ppellate review under the plain error doctrine '1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Hammersla v. State*, 184 Md. App. 295, 306 (2009) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)).

In *Austin*, we declined to review a trial court's instruction on second-degree murder for plain error, even after "clearly not[ing]": "That instruction is wrong." *Austin v. State*, 90 Md. App. 254, 261 (1992). Likewise, here we decline to review for plain error even

though the question at issue was phrased in the manner that *Pearson* dealt with directly and rejected.

Goings argues that the *voir dire* did not serve "its purpose in attempting to ensure a fair and impartial jury," and that "the defense was deprived of the ability to challenge any of the prospective jurors for cause." That assertion is belied by the record. Goings's counsel participated actively in the entirety of the *voir dire* process and did strike several prospective jurors for cause. Goings has made no further argument to demonstrate that the error affected the outcome of the trial.

In sum, we do not find an error in this record that is so compelling, extraordinary, exceptional or fundamental to have deprived Goings of a fair trial.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.