UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1461

September Term, 2014

MICHAEL N. VILLA

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Kehoe, J.

Filed: March 3, 2016

After a jury trial in the Circuit Court for Worcester County, Michael Villa, appellant, was found guilty of indecent exposure and disorderly conduct. He was sentenced to incarceration for a term of three years for indecent exposure. The conviction for disorderly conduct was merged for sentencing purposes. This timely appeal followed.

Villa presents the following questions for our consideration:

> I. Did the circuit court err in permitting the admission of testimony about a prior bad act?
>
> II. Was defense counsel ineffective for directing the jury during closing argument to convict Villa of disorderly conduct?

For the reasons set forth more fully below, we decline to address the claim of ineffective assistance of counsel, and affirm the circuit court's judgment.

FACTUAL BACKGROUND

On July 7, 2013, Joseph Miller went to Ocean City, Maryland for the day with his wife and child. They went to the beach near 28th Street. Sometime in the afternoon, while Miller was by the water with his child, he noticed Villa on the beach "sitting with his hand in his crotch" and "masturbating." According to Miller, Villa occasionally put his hand to his mouth and "appear[ed] to spit into it and then [went] into masturbating again." Villa, who did not have a shirt on, held a piece of clothing in his left hand that he used occasionally to cover himself. Miller, however, could see Villa's penis and see him masturbating when he was not covered.

After observing Villa for one or two minutes, Miller advised his wife of the situation. Miller and his wife sat on the beach about thirty to forty feet behind Villa. Approximately forty-five minutes passed from the time Miller first observed Villa with his hand in his crotch until he finished masturbating. Miller observed Villa leave the beach in the custody of the police. Less than fifteen minutes later, Miller provided the police with a written statement describing what he had observed.

Kelly McGrath, the life guard crew chief for the area from 26th to 33rd Streets in Ocean City, received a complaint about Villa from a female beach patron. McGrath went to the patron's area on the beach and, from about ten yards away, observed Villa masturbating for between five and ten minutes. McGrath did not see Villa's genitals, but she observed him covering himself when people walked by. McGrath called the police.

Ocean City Police Officer Kevin Carroll responded to the call for a man masturbating on the beach. He approached Villa, who was lying on his back and appeared to be asleep. Villa had a shirt "kind of wrapped around" one hand, with both hands in the area of his thigh and abdomen. When Officer Carroll explained why he was there, Villa stated that he was adjusting his privates when the officer approached.

Villa testified on his own behalf. On July 7, 2013, he was at the beach with his girlfriend. He had acquired "a bad itch" or "jock itch" the night before, and had been

scratching it ever since. He did not think anyone was paying attention because he had covered himself with a lime green shirt. Villa explained:

> Well, I was using my t-shirt. I had a lime green t-shirt. I was covering up, you know, I mean, I don't know why she thought it was a towel or whatever, but it was a t-shirt and I was covering myself up just to scratch. I had a Speedo on, I couldn't scratch regularly, you know, I didn't want to – believe me, I wouldn't wear it again. If I could change that day that's one thing I wouldn't have done was wore that Speedo on the family beach there because I felt strangely, but I didn't have another bathing suit at the time so I couldn't change.
>
> And really, nobody was paying attention to me is all I'm saying is it really didn't seem like I was, you know, out of line that much, I was just tending to myself and my private itch. And I covered myself and no one, I mean, if I had noticed or somebody complained or somebody said something surely I wouldn't have kept going with it. And I had a bad case of jock itch and the Speedo did not help anything, I mean, you know, it just made it worse. That's all I was doing, you know.
>
> The lifeguard girl, I mean, her description of what she saw to me matches – she said she was sitting up high and saw me scratch, she saw my hand moving, but it was underneath the towel thing and that's exactly what I was doing, I was just scratching, you know?
>
> I don't know where he got his version of what he saw for that minute or whatever, what he was seeing. And he didn't even see my bathing suit on me so, I mean, how could he see both and not my bathing suit and he didn't even see my bathing suit when I walked away with the police in handcuffs. So evidently he didn't want to see a bathing suit on me, you know, I mean, this guy–
>
> * * *
>
> I had my bathing suit on the whole time. If he didn't see it when I walked away he [m]ight not visualize me even having a bathing suit on, but he did not, it's not what he saw.

We shall include additional facts in our discussion of the questions presented.

DISCUSSION

I.

Villa first contends that the trial court erred in admitting testimony about a prior bad act. Specifically, he directs our attention to the following testimony by McGrath, the life guard crew chief, during direct examination by the State:

> [Prosecutor]: And can you tell us what happened on that day in the afternoon?
>
> [McGrath]: Yeah, I was sitting on 28th Street. We have an unassigned, so I had an afternoon break, so I ran down to check on my guards. The first interaction I had with the Defendant was when I ran by and he was drinking on the beach. So I approached him, made him aware of the ordinance, asked him to take it off the beach and I continued running. I went to 26th Street to talk to my guard there. At that time I was approached by a woman who was a beach patron who complained to me about –
>
> [Defense Counsel]: We would object because that would be what's called hearsay, what somebody told the guard.
>
> [Prosecutor]: Your Honor?
>
> THE COURT: Yes.
>
> [Prosecutor]: Your Honor, it's not being offered for the truth of the matter, it's leading up to why she made contact again with the Defendant.
>
> THE COURT: Okay. The objection is overruled as to her answer where she said she was approached by a beach patron who was complaining. Overruled, ask another question.

Villa argues that McGrath's testimony about his alleged violation of an ordinance prohibiting drinking on the beach constituted inadmissible "other crimes" or "bad-acts evidence" that conveyed to the jury that he "was a troublemaker – he simply couldn't behave himself on the beach." Recognizing that he did not object to McGrath's testimony, Villa asks us to exercise our discretion to grant plain error review. We decline to do so.

Plain error review is a "rare, rare phenomenon," undertaken only when unobjected to error is extraordinary. *Kelly v. State*, 195 Md. App. 403, 432 (2010)(and cases cited therein). In *Kelly*, we recognized that although we have discretion to address an unpreserved issue,

> [i]t is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) 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).

In *Kelly*, we explained:

> Plain error is error which vitally affects a defendant's right to a fair and impartial trial. 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. [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.

195 Md. App. at 431-32 (internal quotations and citations omitted).

Among the factors we consider in determining whether to exercise our discretion to grant plain error review are "'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.'" *Savoy v. State*, 420 Md. 232, 243 (2011) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)).

This is not one of those rare cases that warrants plain error review. Although not referenced in Villa's brief, our review of the record reveals that the issue of drinking on the beach was also raised on two other occasions during trial. On cross-examination, defense counsel questioned McGrath about her first encounter with Villa as follows:

> [Defense Counsel]: As I understand it you were the lifeguard at the beach that day, that Sunday afternoon?
>
> [McGrath]: Yes.
>
> Q. Okay. And there came a time when you saw that the Defendant, what, was drinking a beer on the beach?
>
> A. Uh-huh, yes.
>
> Q. You told him, you've got to take that off the beach?
>
> A. Yeah, just make him aware of the ordinance, ask him to take it off.

> Q. How was he clothed, dressed at that time when you first came upon him, if you can tell us, if you remember?
>
> A. When I first came by I just asked him to take it off and he had the lime green cloth draped across his lap.

Subsequently, Villa himself testified on direct examination about his encounter with McGrath, stating:

> [Defense Counsel]: Do you recall the lifeguard coming up to you about drinking a can of beer?
>
> [Villa]: Yes, yes. She [McGrath] approached me and told me to stop drinking and I stopped drinking. And you know, I had my bathing suit on at the time and we talked and I opened the cooler and everything, so she saw that I had the bathing suit on and everything.

Our review of the entire record reveals that the unpreserved error complained of by Villa is not so compelling, extraordinary, exceptional or fundamental as to warrant our exercise of discretion to grant plain error review. Moreover, the trial testimony demonstrates that Villa not only failed to object to McGrath's testimony on direct examination, but intentionally relinquished or abandoned any objection he might have had with respect to the subject of his drinking on the beach by presenting that evidence to the jury himself. *See Savoy*, 420 Md. at 240 (waiver is the intentional relinquishment or abandonment of a known right)(and cases cited therein). As Villa waived any objection he might have had to testimony concerning his drinking on the beach, we shall not exercise our discretion to engage in plain error review.

II.

Villa next contends that defense counsel was ineffective because, during closing argument, without having conferred with Villa, defense counsel argued:

> I think what we've been witnessing here today is the State's Attorney's tunnel vision on the morality of what they think he was doing to raise you all to a sense of indignation, that you would be offended by what they thought he was doing and therefore he must have committed this crime. And I suggest to you that's not necessarily true if you take what the Court told you the crime was. It's intentionally, willfully exposing yourself. And a man with a bathing suit who's using a towel, as has been described by Mr. Villa, is clearly not guilty of indecent exposure. And I think you could find him not guilty of that charge. I think that would be a fair verdict.
>
> Now, the disorderly conduct count is a little different horse. Disorderly conduct is doing something in public that is disturbing to other people, whether you know they're watching or not. **And I think what you heard here today does meet the legal definition of disorderly conduct, so I'm not going to belittle my credibility with you as a lawyer by trying to argue otherwise.**
>
> **I think a fair verdict in this case is to find Mr. Villa not guilty of indecent exposure because he did not intend in any fashion to bring this about, but that you should return a verdict of guilty of disorderly conduct, and I think if you do that would represent a fair verdict in resolving this case.** Thank you.

(Emphasis added).

Villa argues that defense counsel's assistance fell below an objective standard of reasonableness and prejudiced the outcome of his trial. He maintains that "no defendant sits at the trial table expecting defense counsel to assist the prosecution's case." In addition, he asserts that the "record does not disclose" that he consented to the concession

made by defense counsel and, in fact, reveals that he entered a plea of not guilty. According to Villa, "[d]efense counsel's concession gave away the farm – it instructed the jury to disregard [his] version and judge his behavior as criminal, rather than unfortunate and innocuous as [he] explained."

As a general rule, a claim of ineffective assistance of counsel should be raised in a post-conviction proceeding. *Smith v. State*, 394 Md. 184 (2006). A post-conviction court, "[b]y having counsel testify and describe his or her reasons for acting or failing to act in the manner complained of . . . is better able to determine intelligently whether the attorney's actions met the applicable standard of competence." *Johnson v. State*, 292 Md. 405, 435 (1982), *abrogated in part on other grounds*, *Hoey v. State*, 311 Md. 473, 494-95 (1986). In *Smith*, the Court of Appeals commented on the propriety of examining a trial record on direct appeal, stating:

> [G]enerally, the trial record does not provide adequate detail upon which the reviewing court could base an assessment regarding whether counsel rendered ineffective assistance because the character of counsel's representation is not the focus of the proceedings and there is no discussion of counsel's strategy supporting the conduct at issue.

Id. at 200.

In the instant case, there is no evidence to show whether Villa consented to or objected to the tactical decision to concede guilt on the disorderly conduct charge. Moreover, there is no evidence of counsel's reasoning with regard to the particular

strategy that was employed at trial. Clearly, under the facts of this particular case, by having defense counsel testify and describe his reasons for conceding guilt on the disorderly conduct charge, the post-conviction court will be better able to determine intelligently whether his actions met the applicable standard of competence. As the record before us is not sufficiently developed to permit review of Villa's ineffective assistance of counsel claim on direct appeal, we shall not address that issue.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.