UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1955

September Term, 2015

SYNEETRA BELL

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Rodowsky, Lawrence F.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: September 7, 2016

A jury in the Circuit Court for Montgomery County convicted Syneetra Bell, Appellant, of one count of theft scheme between $1,000.00 and $10,000.00, two counts of theft less than $1,000.00, and one count of theft between $1,000.00 and $10,000.00. Appellant was sentenced to a total of five years' imprisonment, with all but one year suspended. In this appeal, Appellant presents the following questions for our review:

> 1. Did the circuit court err in conducting a hearing in the absence of Appellant and her counsel?
>
> 2. Did the trial court commit plain error in permitting the State in closing argument to adopt a new theory of guilt unsupported by the trial court's instructions to the jury?
>
> 3. Did the trial court err in refusing to permit the defense to refresh the recollection of a key State's witness?

For reasons to follow, we answer questions 1 and 2 in the negative and question 3 in the affirmative, but hold any error to be harmless. Accordingly, we affirm the judgments of the circuit court.

BACKGROUND

On October 24, 2014, Montgomery County Police Corporal John O'Brien was on duty in the area of the Montgomery Mall when he observed Appellant and another individual, Derrick Bell, acting suspiciously. After witnessing Appellant empty the contents of her purse into the trunk of an automobile, Cpl. O'Brien followed Appellant and Mr. Bell, who was wearing a large overcoat, into the mall and surveilled their movements. Cpl. O'Brien observed the two go into one of the mall's stores, Forever 21, and concluded that the two were involved in shoplifting.

Although Cpl. O'Brien did not actually witness Appellant shoplift, another officer on the scene, John Wigmore, did witness such behavior. Officer Wigmore reported that he observed both Appellant and Mr. Bell inside a different store, Express, where Appellant handed merchandise to Mr. Bell, who took the merchandise into a dressing room and then left the store without leaving any items in the dressing room or paying for the merchandise. Officer Wigmore then followed the two into LensCrafters, where he saw Appellant put merchandise into her purse and exit the store without paying.

A short time later, Appellant and Mr. Bell exited the mall and were stopped by police. Appellant asked Officer Wigmore why she was stopped, and Officer Wigmore responded, "Well, you stole some glasses from the LensCrafters." Appellant responded, "Oh, that's all," and pointed to her purse. A search of Appellant's purse revealed several pieces of stolen merchandise, including a handbag from Forever 21, a bracelet from Express, and several pairs of eyeglasses from LensCrafters. Both Appellant and Mr. Bell were arrested and charged, and a joint trial was held.[1]

A few days before the scheduled trial date, Mr. Bell requested a postponement and the circuit court held a motions hearing. Neither Appellant nor Appellant's counsel were present for the hearing. At the start of the hearing, the court discussed the absence of Appellant and her counsel:

> THE COURT: Okay. We notified [Appellant's counsel] about this hearing. It was very short notice and we hadn't heard back from him. Last . . . evening about 10 o'clock, he sent an email saying, "I'm out of state, not back until

[1] Mr. Bell is not a party to this appeal.

> Friday night. I'm ready for trial on Monday. My client is anxious to get this over." 10 o'clock. So, that's his response and position, and I'm confident that he was not able to contact his client, as well. He may be on vacation. I don't know what the nature of his absence from the state is, but that is the only information that I received and that is what I wanted to let counsel know.

The circuit court ultimately denied Mr. Bell's request for a postponement, and the trial began as scheduled. Although both Appellant and Appellant's counsel had ample opportunity to raise any preliminary issues prior to the start of trial, at no time did either party inform the court that he or she objected to the court's decision to deny Mr. Bell's request for a postponement.

At trial, the State called Katrina Mercer, an employee with LensCrafters, as a witness. Ms. Mercer testified that she was working on the day of the theft and that she observed Appellant and Mr. Bell enter the store. Ms. Mercer also testified that she and Mr. Bell had a conversation in which Mr. Bell indicated that he was looking for glasses for Appellant, whom Mr. Bell identified as his wife. By this time, Appellant had moved to a "blind spot," an area of the store not visible from where Ms. Mercer was standing. A few minutes after Appellant and Mr. Bell left, Officer Wigmore entered the store and asked Ms. Mercer if any items were missing, and Ms. Mercer confirmed that several pairs of glasses were missing from the area of the "blind spot."

On cross-examination, Mr. Bell's counsel questioned Ms. Mercer about a discussion she had with the State, prior to trial, in which Ms. Mercer may have indicated that she was "not quite sure about the content of her conversation with Mr. Bell." Ms.

Mercer responded that she could not recall exactly what she and the State discussed. Mr. Bell's counsel asked the circuit court if he could refresh Ms. Mercer's recollection, and the State objected. A bench conference ensued involving the State and Mr. Bell's counsel:

[DEFENSE]: Your Honor, I intend to . . . refresh her recollection with this email . . . that the State provided . . . in which she says she doesn't remember the content of their conversation on August 10.

THE COURT: This is whose?

[DEFENSE]: This is [the State] –

THE COURT: Writing to you?

[DEFENSE]: Yes[.]

THE COURT: How is that refreshing her recollection?

[DEFENSE]: Well, I'm only saying is I'm allowed to refresh it with anything. I can bring anything to the witness and say, does this help –

THE COURT: No. This is a communication between an attorney from the State's Attorney's Office and yourself, and it's apparently, a recitation of some of the events that took place between the State and this particular witness. But it's, how would that refresh her recollection?

[DEFENSE]: Seeing [the State's] report, I think would refresh her that she did not tell him that she remembered the conversation.

THE COURT: Well, I think you can ask the question. But in terms of, this is not her document, and I don't think, I don't

see how she would adopt that document because she doesn't know what – I mean, I'm assuming she knows nothing about his document.

[STATE]: She doesn't. And it's my recollection of the conversation. I could be wrong.

THE COURT: Right . . . . I'm not going to allow it.

At the close of evidence, the circuit court instructed the jury on the elements of theft:

> Each defendant is charged with the crime of theft. In order to convict a defendant of theft the State must prove that a defendant willfully or knowingly obtained or exerted unauthorized control over property of the owner and that the defendant had the purpose of depriving the owner of the property . . . Deprive means to . . . withhold property of another permanently for a period of time or to dispose of the property or use or deal with the property so as to make it unlikely that the owner will recover it. Exert control means to take, carry away or appropriate to a person's own use or to sell, convey or transfer title to an interest in or possession of property[.]

During his closing argument, Appellant's counsel intimated that the State failed to prove beyond a reasonable doubt that Appellant stole the merchandise, in part because the State had "no proof that anything was taken" and "no proof whatsoever of anybody taking anything, anything at all." During its rebuttal argument, the State responded:

> Now one thing that [Appellant's counsel] harped on was the fact that no one saw exactly when these things were taken. I would say that doesn't matter you have proof that she's in possession of recently stolen goods . . . . [R]emember Officer O'Brien said she dumped out all of the contents of her purse in the trunk? Nothing was in her purse when she walked into the mall. She walks out and all of a sudden there's all this stolen property inside. It's there because she stole it.

DISCUSSION

I.

Appellant first argues that the circuit court erred in conducting a motions hearing in the absence of Appellant and Appellant's counsel. Appellant maintains that she had a right to be present at every stage of her trial, which included the aforementioned hearing, and that the hearing court violated this right by holding the hearing without her. Appellant also maintains that she had a fundamental right to be represented by counsel, which she did not waive, and that the court violated this right by holding the hearing without Appellant's counsel.

Under Md. Rule 4-231(b), "[a] defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a *nolle prosequi* or stet is entered pursuant to Rules 4-247 and 4-248." *Id.* "This right is a common law right preserved by both the Sixth Amendment of the United States Constitution and Article 5 of the Maryland Declaration of Rights." *Pugh v. State,* 103 Md. App. 624, 654 (1995) (citations omitted).

The Maryland Rules also make clear that the right to be present may be waived by a defendant "who, personally or through counsel, agrees to or acquiesces in being absent." Md. Rule 4-231(c)(3). Moreover, "an effective waiver of the defendant's right to be present at every stage of the trial will not always require a personal waiver by the defendant." *Williams v. State,* 292 Md. 201, 219 (1981). "Where the right of confrontation is not implicated, and where there is involved no other right requiring

intelligent and knowing action by the defendant himself for an effective waiver, a defendant will ordinarily be bound by the action or inaction of his attorney." *Id.*

In the present case, Appellant's counsel informed the circuit court that he was aware of the nature of the hearing and that both he and Appellant were prepared for trial to begin as scheduled. At no time did defense counsel indicate that he objected to the hearing, nor did he provide any indication that he or Appellant wished to be present. *See id.* at 219-20 ("[I]f the defendant himself does not affirmatively ask to be present . . . or does not express an objection at the time, and if his attorney consents to his absence or says nothing regarding the matter, the right to be present will be deemed to have been waived."). Additionally, neither Appellant nor Appellant's counsel informed the court that it objected to the court's decision to hold the motions hearing without them, despite adequate opportunity to raise the issue prior to trial. *See Chase v. State,* 309 Md. 224, 236 (1987) (finding that the defendant waived his right to be present, in part because "he made no objection regarding any lack of presence on his part or to any action by his counsel."). Accordingly, we hold that the court did not err in conducting the motions hearing without Appellant, as such right was waived.

We likewise reject Appellant's claim that the circuit court violated her right to counsel. As noted, the record established that Appellant was represented by counsel, who informed the court that he was aware of the hearing and did not object to the court's holding of the hearing in his absence. Appellant's contention that her counsel's absence was akin to a denial of her right to an attorney is factually erroneous. In any event, Appellant's counsel made clear both his and Appellant's positions on the matter; namely,

that he was "ready for trial" and that Appellant was "anxious to get this over." Given that the hearing court ultimately denied Mr. Bell's motion for a postponement, effectively granting Appellant her desired outcome to get this "over," the presence of Appellant's attorney at the hearing would have been unnecessary and superfluous and had no effect on Appellant's right to representation.[2] *Id.* ("There is no war between the Constitution and common sense.") (Quoting *Mapp v. Ohio,* 367 U.S. 643, 657 (1961)).

II.

Appellant next argues that the circuit court "committed plain error in allowing the State in closing argument to adopt a new theory of guilt unsupported by the trial court's instructions to the jury."[3] Appellant maintains that the court instructed the jury only on "the obtaining or exerting control modality" of theft, which required the State to prove that Appellant obtained or exerted unauthorized control over the property of another. Appellant insists, however, that the State's closing argument put forth an alternate theory; namely, "the separate modality of possession of recently stolen goods," which is treated as a distinct offense under the Maryland Criminal Code. Appellant avers that this

[2] Appellant hypothesizes that, had she been present at the hearing, "she may have concluded that because [Mr. Bell] needed a continuance . . . the best way to test the State's case would be to delay matters until that could be arranged." Similarly, Appellant argues that her counsel's presence "could have made a difference" because he "may well have advised his client to side with [Mr. Bell] and seek a postponement." These contentions, however, are unsupported by the record. *See Green v. State*, 23 Md. App. 680, 683 (1974) ("In our consideration of an appeal, we must, of course, stay within the record.").

[3] Appellant concedes that "no objection was made to this aspect of the State's closing."

argument was improper, "because it placed before the jury a new theory for conviction neither covered in the jury's instructions, nor a reasonably foreseeable topic to be covered in the defense closing."

Plain error review is reserved for those issues that are "compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *State v. Hutchinson,* 287 Md. 198, 203 (1980). Even in the face of such an issue, we shall intervene "only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble v. State,* 300 Md. 387, 397 (1984). In short, although this Court has the power to recognize plain error, "it 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[.]" *Chaney v. State,* 397 Md. 460, 468 (2007).

In light of this stringent standard, we decline Appellant's invitation to review the issue for plain error. The State's comments regarding Appellant's possession of recently stolen goods appears to have been a response to defense counsel's suggestion that the State offered "no proof" that Appellant stole the merchandise. At no time did the State suggest that its comments were meant to be considered as an alternate theory of the crime or that the jury should find Appellant guilty solely on the grounds that she was in possession of recently stolen goods. Instead, the State seemed to be suggesting that the jury may infer that Appellant stole the merchandise from the fact that Appellant entered the mall with an empty purse and exited the mall with the same purse filled with recently

stolen items. In light of all of the other evidence presented in this case, the court's failure to intervene during the State's closing was not error, much less the sort of error "so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Trimble,* 300 Md. at 397 (discussing plain error review).

III.

Appellant's final argument is that the circuit court erred in denying Mr. Bell's counsel the opportunity to refresh Ms. Mercer's recollection with an e-mail conversation between Mr. Bell's counsel and the State. Appellant maintains that the court's decision was erroneous because "there is essentially no limit upon the materials which may be used to refresh a witness's present recollection."

According to the State, Appellant's claim was unpreserved because "she did not object or otherwise challenge the trial court's ruling relating to Derrick Bell's counsel's attempt to refresh Mercer's recollection." In support, the State cites this Court's opinion in *Williams v. State,* 216 Md. App. 235 (2014), where we stated that "in cases involving multiple defendants each defendant must lodge his own objection in order to preserve it for appellate review and may not rely, for preservation purposes, on the mere fact that a co-defendant objected." *Id.* at 254. Assuming without deciding that this issue has been preserved, we address the merits of Appellant's argument.

"Present recollection refreshed or revived is the use of a writing or object to refresh a witness' recollection so that person may testify about prior events from present recollection." *Farewell v. State,* 150 Md. App. 540, 576 (2003) (citation omitted). "Whether a party may use a writing or other object to refresh the failing memory of a

witness lies within the sound discretion of the trial court." *Butler v. State,* 107 Md. App. 345, 354 (1995) (citation omitted). "This is to be guided, at least in part, by the relationship between the subject matter of the witness's testimony and the document." *Id.*

Nevertheless, it is important to note the difference between using an item to refresh a witness's memory and admitting the item into evidence as a prior recollection recorded:

> When dealing with an instance of Past Recollection Recorded, the reason for the rigorous standards of admissibility is quite clear . . . . Since the piece of paper itself, in effect, speaks to the jury, the piece of paper must pass muster in terms of its evidentiary competence . . . . By marked contrast to Past Recollection Recorded, no such testimonial competence is demanded of a mere stimulus to present recollection, for the stimulus itself is never evidence.

Baker v. State, 35 Md. App. 593, 598 (1977) (internal footnote omitted).

Because it is the witness's testimony, not the stimulus, that is received into evidence, attorneys are given "a large amount of freedom to refresh a witness's recollection[.]" *Farewell,* 150 Md. App. at 576 (citation omitted). This freedom includes the use of writings to refresh a witness's memory, even when the writings were not authored by or are unfamiliar to the witness:

> [W]hen a writing of some sort is the implement used to stir the embers of cooling memory, the writing . . .need not have been adopted by him, need not have been made contemporaneously with or shortly after the incident in question, and need not even be necessarily accurate . . . . It [may] be a memorandum made by one other than the witness, even if never before read by the witness or vouched for by him. It may be an Associated Press account. It may be a highly selective version of the incident at the hands of

> a Hemingway or Eliot. All that is required is that it ignite the flash of accurate recall – that it accomplish the revival which is sought.

Baker, 35 Md. App. at 601-02.

In *Baker,* for instance, this Court found error in the trial court's denial of defense counsel's request to refresh a police officer's memory with another officer's report. *Id.* at 596-97. In that case, the trial court denied the request on the grounds that the witness did not author the report and because the information contained in the report was not within the witness's personal knowledge. *Id.* at 596. In holding this to be error, we explained that, had counsel sought to offer the report into evidence as a prior recollection recorded, the trial court would have been correct in its ruling; however, because counsel offered the report merely to refresh the witness's memory, the trial court's decision to deny the request was erroneous. *Id.* 598-99. Stated another way, the trial court "erroneously measured the legitimacy of the effort to revive present recollection against the more rigorous standards for the admissibility of a recordation of past memory." *Id.* at 597. We further explained:

> Not only may the writing to be used as a memory aid fall short of the rigorous standards of competence required of a record of past recollection, the memory aid itself need not even be a writing. What may it be? It may be anything. It may be a line from Kipling or the dolorous refrain of "The Tennessee Waltz;" a whiff of hickory smoke; the running of fingers across a swatch of corduroy; the sweet carbonation of chocolate soda; the sight of a faded snapshot in a long-neglected album. All that is required is that it may trigger the Proustian moment. It may be anything which produces the desired testimonial prelude, "It all comes back to me now."

Id. at 602-03 (internal footnotes omitted).

In light of our holding in *Baker* and the almost limitless bounds placed on the types of writings that can be used to refresh a witness's memory, we hold that the circuit court in the instant case erred in refusing to allow Mr. Bell's counsel to refresh Ms. Mercer's memory. The court stated that it would not allow Mr. Bell's counsel to use the e-mail to refresh Ms. Mercer's memory because the document was not hers, because she knew nothing about the document, and because the assertions made in the document could be inaccurate. As noted, however, none of these issues bear on whether the document could be used to refresh Ms. Mercer's memory. Accordingly, the court abused its discretion in basing its decision on these grounds. *See Kelly v. State,* 392 Md. 511, 531 (2006) (An abuse of discretion occurs when a trial court "exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law.") (Internal citations omitted).

Nonetheless, we are convinced beyond a reasonable doubt that the circuit court's error was harmless. In a criminal case, an erroneous evidentiary ruling is harmless when the reviewing court is "satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict." *Dorsey v. State,* 276 Md. 638, 659 (1976) (footnote omitted). "In performing a harmless error analysis, we are not to find facts or weigh evidence." *Bellamy v. State,* 403 Md. 308, 332 (2008). Rather, once error has been assessed, reversal is required unless the trial court's error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Id.* (citation omitted). In other words, "the issue is not what evidence was available to the

jury, but rather what evidence the jury, in fact, used to reach its verdict." *Dionas v. State*, 436 Md. 97, 109 (2013) (citations omitted).

In the present case, the testimony excluded by the circuit court – whether Ms. Mercer told the State prior to trial that she could not remember her conversation with Mr. Bell – almost certainly was unimportant to the jury's decision to convict Appellant of theft. As previously noted, Appellant was observed by police entering the mall with an empty purse, walking into three different stores, and then exiting the mall with stolen merchandise from the three stores she visited. What Mr. Bell may or may not have said to Ms. Mercer had no bearing on whether Appellant willfully or knowingly obtained or exerted unauthorized control over property with the intention of depriving the owner of the property.

Moreover, Appellant was charged with, but acquitted of, conspiracy to engage in a theft scheme, the only charge on which Mr. Bell's comments to Ms. Mercer could have had any conceivable impact. In short, the jury already did not believe beyond a reasonable doubt that Appellant and Mr. Bell were in cahoots during the theft, even without the excluded testimony, which merely would have discounted the perceived relationship between Appellant and Mr. Bell while the two were inside LensCrafters.

In fact, had Mr. Bell's attorney been permitted to refresh Ms. Mercer's memory, and had she admitted to her conversation with the State, this would have, at its most damning, discredited Ms. Mercer as a witness. Her credibility as a witness, however, was of no consequence to Appellant's theft convictions, as Ms. Mercer did not see Appellant take any merchandise from the store. Ms. Mercer's testimony merely reiterated facts

already established by Officer Wigmore, *i.e.*, that Appellant had been in the store just prior to her arrest and that the merchandise found in Appellant's purse belonged to LensCrafters, Accordingly, the circuit court's error in refusing Mr. Bell's counsel's request to refresh Ms. Mercer's memory was harmless.

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