UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1962

September Term, 2014

EDWARD THOMPSON,
A/K/A EDWARD EUGENE SHANE

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: March 8, 2016

Appellant, Edward Thompson,[1] was convicted by a jury in the Circuit Court for Prince George's County of one count each of first degree burglary, third degree burglary, attempted burglary, and theft.[2] The court sentenced appellant to serve twenty years of incarceration, all but fifteen years suspended, on the charge of first degree burglary and merged appellant's remaining convictions for the purposes of sentencing.

In his timely filed appeal, appellant raises three questions for our consideration:

> 1. Did the trial court abuse its discretion by allowing the State to cross-examine [appellant] about prior convictions without making the proper determinations about their admissibility?
>
> 2. Did the trial court commit plain error by failing to instruct jurors that [appellant's] convictions could only be used for impeachment purposes?
>
> 3. Did the prosecutor make improper closing arguments about [appellant's] prior convictions, which constituted plain error?

Because appellant has failed to properly preserve these questions for appellate review and discerning no plain error, we shall affirm the judgment of the circuit court.

BACKGROUND

On October 18, 2013 and October 20, 2013, the home of Joseph LosCoscco on Davis Boulevard in Suitland, Maryland, was burglarized. The house was broken into, a

[1] Appellant is also known by the name Edward Eugene Shane. At trial, appellant was referred to as "Edward Shane." Although appellant refers to himself as "Mr. Shane" throughout his brief, this Court will use the name "Edward Thompson" as that is the name that appears in the official caption of this Court's record.

[2] Appellant was acquitted on additional charges of first degree burglary, third degree burglary, and theft.

lawnmower, tools, and CDs were taken, and windows and cabinets in the house were damaged.

On both days, LosCoscco's next-door neighbor, Louis Carter saw an unfamiliar red truck parked in front of LosCoscco's house and called the police. Carter's brother, Martin Carter, was also present on the morning of October 20, 2013, and saw the red truck parked outside LosCoscco's house. The Carter brothers reported that there was an unauthorized individual around LosCoscco's house, a white male wearing a black sweatshirt and blue jeans. Martin observed the white male as he walked across LosCoscco's yard and attempted to climb a fence then fell back down.

Officer Anthony Sciaretta of the Prince George's County Police Department responded to LosCoscco's home seven to ten minutes after the Carters placed their 911 call. Officer Sciaretta apprehended appellant, who matched the description provided by the witnesses, after he observed appellant running through the car dealership parking lot that was behind LosCoscco's property and jumping over a fence. The police brought Martin Carter to the car dealership for a show-up, and he identified appellant as the individual he saw outside LosCoscco's house.

The police later executed a search warrant at the home of appellant's aunt, where appellant resided in a room over her garage. In the course of the search, the police recovered several CDs that were later identified as belonging to LosCoscco.

When he was interviewed by the police following his arrest, appellant said that he had been working in the area near LosCoscco's home on the morning of October 20, 2013,

when his truck ran out of gas. He said that he went to LosCoscco's house, found a door open, and went inside to look around for a gas can. When he did not find one, he said that he left the house through the back door and was apprehended by the police. Appellant also provided a written statement to the police.

At trial, appellant testified that he walked around the outside of LosCoscco's house looking for a gas can and was walking back to his truck when he was arrested. Appellant consistently denied that he was present at or inside LosCoscco's house on October 18, 2013. Appellant testified that he could not remember what he told the police or what he wrote in his statement, because at the time that he was arrested, he was under the influence of pain medication and other drugs, and the officers were pressing him for a statement rather than taking him to the hospital to have his knee treated.

At the conclusion of the trial, the jury acquitted appellant on the three counts alleging burglary and theft of LosCoscco's home on October 18, 2013. The jury convicted appellant on the four counts alleging burglary and theft of LosCoscco's home on October 20, 2013.

We shall include additional facts in the following discussion.

DISCUSSION

I.

Cross-Examination Regarding Prior Convictions

Appellant first contends that the trial court erred by "allowing the State to elicit evidence of [appellant's] prior convictions without determining if they were less than 15

years old or exercising any discretion." The State responds that this question was not properly preserved for our review, or in the alternative, that the trial court did not abuse its discretion by allowing the State's inquiries. We concur with the State.

During the State's cross-examination of appellant, the following exchange occurred:

[THE STATE]:	Isn't it true that you've been arrested for larceny before?
[APPELLANT]:	Yes.
[DEFENSE COUNSEL]:	Objection.
THE COURT:	Sustained.
[THE STATE]:	Your Honor, may we approach?
THE COURT:	Yes.
(Counsel approached the bench.)	
[THE STATE]:	That's a crime of moral terpitude [sic].
[DEFENSE COUNSEL]:	Your Honor, we object to that and ask for a mistrial.
THE COURT:	Was he convicted of that?
[THE STATE]:	Yes, he was. According to the information I have.
THE COURT:	Motion denied.
(Counsel returned to trial tables.)	
[THE STATE]:	You have been convicted of that before?

[APPELLANT]:	Yes, I have.
[THE STATE]:	In fact, you've been convicted more than once for larceny before; wouldn't that be true?
[APPELLANT]:	Yes.

Maryland Rule 4-323(a) requires a party to object to the admission of evidence "at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Generally a party is required to raise an objection to every improper question, understanding that '"an objection prior to the time the questions are asked is insufficient to preserve the matter for appellate review.'" *Fowlkes v. State*, 117 Md. App. 573, 588 (1997) (citation omitted), *cert. denied*, 348 Md. 523 (1998).

In this case, it is clear from the record that, although defense counsel objected when the prosecutor questioned appellant regarding his previous arrests, defense counsel failed to raise any objection when the prosecutor subsequently questioned appellant regarding his previous convictions.[3] Because appellant failed to object to the prosecutor's question, this

[3] It is well established that arrests are substantively different from convictions for the purposes of impeaching a witness.

> Maryland courts traditionally have been reluctant to allow impeachment by proof of prior bad acts that did not result in conviction – unless they were specific acts of untruthfulness. The law of Maryland has been clear that a witness may not be impeached by others' accusations or others' statements of the witness' misconduct, including arrests, indictments or criminal charges not resulting in conviction. The rationale given for the
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> (continued…)

issue was not properly preserved for our review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Even had this issue been preserved, we would conclude that the trial court committed no reversible error. Md. Rule 5-609 allows the admission of evidence of a witness's prior convictions as impeachment evidence under certain conditions.[4] On review, this Court will overturn a trial court's ruling admitting impeachment evidence only if the court "'exercise[d] discretion in an arbitrary or capricious manner or ... act[ed] beyond the letter or reason of the law.'" *Thomas v. State*, 422 Md. 67, 73 (2011) (alterations in original) (citations omitted).

> holdings in those cases was in part the hearsay nature of the accusation. It also was in part that the courts feared that undue prejudice and humiliation would result from cross-examination of a witness about such acts, especially because, absent a conviction, there might be little chance that the witness had committed the act. The courts also recognized that the introduction of the question whether the witness had committed the act was likely to distract the jury from the operative issues in the case.

McLain, *Maryland Evidence*, §608:1, 471–75 (2001) (footnotes omitted). Thus, because defense counsel's objection to the prosecutor's question regarding appellant's prior arrests was properly sustained by the trial court, the State's questions regarding convictions addressed an entirely different issue and, therefore, required a separate objection.

[4] Md. Rule 5-609 allows the admission of a witness's prior convictions as impeachment evidence if (1) if the witness testifies; (2) the prior conviction was for "an infamous crime or other crime relevant to the witness's credibility[;]" (3) the conviction occurred within the previous 15 years; and, (4) the court determines that the probative value of the evidence outweighs the prejudice that may accrue to the witness.

In this case, the trial court admitted the impeachment evidence based on the State's proffer that appellant had prior convictions for larceny. We are persuaded that, in the absence of any objection from defense counsel suggesting that appellant's prior convictions occurred more than fifteen years before appellant's trial or that the probative value of the evidence of appellant's prior convictions was outweighed by the prejudice that would accrue to him as a result of its admission, the trial court did not abuse its discretion by inferring that appellant's prior convictions met all of the requirements set forth in Md. Rule 5-609.

We acknowledge that the trial court failed to make any findings on the record in support of its decision to admit the evidence. "Although trial judges are not obliged to detail every step of their logic" in determining whether a prior conviction should be admitted to impeach a defendant, they are urged "to place specific circumstances and factors critical to decision on the record." *Jackson v. State*, 340 Md. 705, 717 (1995); *see also State v. Woodland,* 337 Md. 519, 526 (1995) ("There is no requirement that the trial court's exercise of discretion be detailed for the record, so long as the record reflects that the discretion was in fact exercised."). Even if the trial court's failure to sufficiently articulate its discretionary weighing of the evidence on the record constituted a technical error, it would not rise to the level of substantive error that deprived appellant of a fair trial. *See Sutton v. State*, 139 Md. App. 412, 444 (concluding that failure to articulate weighing of prejudice and probative value on the record did not constitute plain error), *cert. denied*,

366 Md. 249 (2001). Had this issue been properly preserved, we would conclude, therefore, that there was no basis to reverse appellant's convictions.

II.

Failure to Instruct Jury Regarding Limited Use of Impeachment Evidence

After permitting the State to impeach appellant with his prior convictions, the trial court did not instruct the jury that the evidence was admissible only on the issue of defendant's credibility and not as substantive evidence. Generally, when evidence of a prior conviction is admitted for the purpose of impeaching a defendant, the defendant is entitled to a limiting or cautionary instruction, advising the jury that the evidence may only be considered on the issue of credibility, and not as tending to prove defendant's guilt for the offenses with which he is charged. *Whitehead v State*, 54 Md. App. 428, 430, *cert. denied*, 296 Md. 655 (1983). Maryland's pattern jury instruction for impeachment by prior conviction provides:

> You have heard evidence that the defendant has been convicted of a crime. You may consider this evidence in deciding whether the defendant is telling the truth, but for no other purpose. You must not consider the conviction as evidence that the defendant committed the crime charged in this case.

MPJI-Cr 3:22.

Appellant concedes that his attorney neither requested that the trial court provide a limiting instruction, nor objected to the court's failure to provide a limiting instruction at his trial. Md. Rule 4-325(e) provides, in pertinent part, "No party may assign as error the

giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Because appellant raised no objection to the trial court's failure to provide the limiting instruction, this issue was not properly preserved for appellate review. Md. Rule 4-325(e). We need not, therefore, address it any further. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Appellant, nonetheless, urges this court to review the trial court's failure to provide a limiting instruction for plain error. Although this Court may, in its discretion, choose to review an egregious failure of the trial court that fundamentally impacts a defendant's right to a fair trial, it does so very rarely, and in only the most compelling circumstances. *See* Md. Rule 4-325(e) ("An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object."); *Martin v. State*, 165 Md. 189, 196 (2005) (reserving plain error review for "blockbuster errors"); *Kelly v. State*, 195 Md. App. 403 (2010) ("discretion…ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings'") (citations omitted), *cert. denied*, 417 Md. 502 (2011); *Garner v. State*, 183 Md. App. 122, 152 (2008) (stating that "a consideration of plain error is like a trek to Angkor Wat or Easter Island. It is not a casual stroll down the block to the drugstore or the 7-11."), *aff'd*, 414 Md. 372 (2010); *Hammersla v. State*, 184 Md. App. 295, 306 ("[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.'") (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 409 Md. 49 (2009).

In this case, any error that accrued to appellant as a result of the admission of his prior convictions could have been dispelled by the provision of an appropriate limiting instruction. As we have previously opined, "[a]lthough it is appropriate for the trial court to give a limiting instruction that the jury may not consider [evidence] as substantive evidence, the trial court need not do so in the absence of [ ] a request." *Quansah v. State*, 207 Md. App. 636, 658 (2012), *cert. denied*, 430 Md. 13 (2013); s*ee also Bruce v. State*, 318 Md. 706, 729 (1990) (considering a prior inconsistent statement admitted to impeach witness, "the trial judge ordinarily is not required to give a limiting instruction in the absence of a request"). We would conclude that any error in the trial court's failure to provide the pattern jury instruction regarding the limited admissibility of the impeachment evidence was not plain or material to the rights of appellant. *See Fowlkes v. State*, 53 Md. App. 39, 46 (1982) (finding affirmative waiver in defense's failure to object or request limiting instruction), *cert. denied*, 295 Md. 301 (1983).

III.

Plain Error in Closing Arguments

During the State's initial and rebuttal closing arguments, the prosecutor made several comments that appellant now contends were improper. We shall consider the

challenged arguments in their proper context and in light of arguments made by the defense. First, in the initial closing, the prosecutor argued:

> Officer Sciaretta said he saw the defendant. Even the neighbors said they saw the defendant run and jump the fence over into the car dealership lot. Again, everybody else came in and told you a version and the defendant has a different version. So I submit to you who is the person that's not telling the truth? The defendant is a convicted – convicted of theft. He has at least four aliases. Honest people go by their given government birth name. They don't have all these aliases. They don't have at least four aliases. They have the one name. When they're stopped by the police, they give their correct name.
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> He lied to the police that day and gave them a different name. I submit to you he's lying when he gets on the stand and says, I didn't do anything. I didn't go in the house. I went to the 7-Eleven and bought the cd's. Oh, I fell off the roof; but before I go to the hospital, I'm going to go to 7-Eleven first for cigarettes.
>
> I will submit to you, if you fall off a roof and you're hurt, the first thing you will do is get checked out. Call 911. I'm hurt. Call an ambulance. I'm not going to get up, drive my own self to the hospital, and I'm not going to make a pit stop and buy cigarettes, let alone buy cd's from two people in a parking lot. So I submit to you he's a liar and he's lying to you. Please use your common sense and do not fall for his version of what happened.

In response, defense counsel argued as follows:

> [O]ne of the things that [the prosecutor] has said kind of bothers me a little bit. She says use your common sense. And the way she used that phrase, I would describe as saying think about it. He's done it before a long time ago. He did it again. He's been a bad guy, so he must be bad this time.
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> * * *
>
> So the whole guilt through prior bad acts, that's something you have to decide for yourself if that's the deciding line for you. I suggest it's not supposed to be.

In response to defense counsel's argument, the prosecutor made the following comments during rebuttal, the propriety of which appellant challenges in his appeal:

> Ladies and gentlemen, when I said use your common sense, I wasn't the only person that said that. The judge also told you that. I know we've stood here and said because he had stolen before, he's guilty today. That's an inference – you can make that inference. The main reason why I bring that out is to show that he's not credible because of the fact that he has aliases of his past, that he's not to be believed when he gets on the stand, and I would ask that you find him not credible. That's the sole purpose of bringing that out.

Appellant now asserts that the trial court erred by failing to act *sua sponte* to curtail the prosecutor's improper and prejudicial statements. It is clear from the record, and appellant concedes, that defense counsel did not interpose any objection to the prosecutor's comments when they were made, nor after the prosecutor finished her argument.

Because defense counsel raised no objection to the allegedly improper statements, there is no ruling of the circuit court before this Court to review. We must, therefore, conclude that appellant's current arguments were not properly preserved. *See* Md. Rule 8-131(a) ("the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"); *Jones-Harris v. State*, 170 Md. App. 72, 102, (holding that complaints regarding improper remarks in closing arguments are waived if "the improper argument alleged was not brought to the attention of the trial judge either when the argument was made or immediately after the prosecutor's initial argument was completed"), *cert. denied*, 405 Md. 64 (2008); *Correll v.State*, 215 Md. App. 483, 515 (2013) (stating that "argument about prosecutor's improper comments

not preserved for appellate review when 'counsel neither objected when the argument was made nor at any later point [and] did not request a mistrial or a curative instruction'") (citation omitted), *cert. denied*, 437 Md. 638 (2014).

On appeal, appellant urges this Court to exercise its discretion and undertake plain error review of the allegedly improper comments in the prosecutor's rebuttal closing argument. Appellant characterizes the prosecutor's argument as "[telling the] jurors that they could draw an inference that [appellant] was guilty based on past convictions." He concludes that the prosecutor's arguments were "particularly egregious" and "likely to mislead jurors [] because the trial court failed to instruct that [appellant's] convictions could only be used for impeachment purposes."

Appellant accurately points out that this Court may undertake plain error review to evaluate whether "the cumulative effect of the prosecutor's remarks was likely to have improperly influenced the jury[.]" *Lawson v. State*, 389 Md 570, 604 (2005). Appellant fails, however, to proffer any compelling reason for this Court to do so. *See, e.g., Morris*, 153 Md. App. at 522–23 ("The failure we so often see when the 'plain error' exemption is invoked is the failure to realize the chasm of difference between due process and gratuitous process and the different mind sets that reviewing judges, in the exercise of their discretion, in all likelihood bring to bear on those two very different phenomena."), *cert. denied*, 380 Md. 618 (2004).

The power to decide issues not raised below is "solely within the court's discretion and is in no way mandatory." *Conyers v. State*, 354 Md. 132, 148, (citing *State v. Bell*, 334

Md. 178, 187–88 (1994), *cert. denied*, 528 U.S. 910 (1999)). This Court reserves such gratuitous exercises of discretion for those cases where the "'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Smith v. State*, 64 Md. App. 625, 632 (1985) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)); *see also State v. Daughton*, 321 Md. 206, 211 (1990) (holding that plain error is "error which vitally affects a defendant's right to a fair and impartial trial"). When an individual requests that this Court undertake plain error review, there are several factors we consider. Among them are: 1) "the opportunity to use an unpreserved contention as a vehicle for illuminating an area of law"; 2) "the egregiousness of the trial court's error"; 3) "the impact of the error on the defendant"; and 4) "the degree of lawyerly diligence or dereliction." *Steward v. State*, 218 Md. App. 550, 566, *cert. denied*, 441 Md. 63 (2014). The mere fact that a comment made by the prosecutor may have been prejudicial is not sufficient to compel this Court to undertake plain error review. *See, e.g., Morris*, 153 Md. App. at 511-12 ("If every material (prejudicial) error were *ipso facto* entitled to notice under the 'plain error doctrine,' the preservation requirement would be rendered utterly meaningless. . . . The fact that an error may have been prejudicial to the accused does not, of course, *ipso facto* guarantee that it will be noticed." (emphasis in original)).

Our review of the transcript persuades us that in her rebuttal, the prosecutor was attempting to restate defense counsel's own propensity argument and explain to the jury the appropriate and limited use of the evidence regarding appellant's prior convictions. In sum, the prosecutor urged the jury to infer that appellant's prior theft convictions – along

with his four aliases and his objectively unbelievable testimony – made his testimony not worthy of belief. Although the prosecutor's comments in rebuttal were, perhaps, inartfully worded, we discern nothing egregiously improper in the State's arguments. Indeed, they were not so outrageous as to compel defense counsel to object at the time they were made. We are not persuaded that the circumstances of appellant's case are sufficiently compelling to justify plain error review. We, therefore, decline to discuss this unpreserved issue any further.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.