UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2477

September Term, 2015

RODERICK ALLEN LOWE

v.

STATE OF MARYLAND

Berger,
Reed,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: August 17, 2016

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, Roderick Allen Lowe, was tried and convicted by a jury in the Circuit Court for Montgomery County (Galant, J.) of attempted robbery and theft. Appellant was sentenced to ten years' incarceration for attempted robbery and eighteen months' incarceration for theft, to be served concurrently. Appellant filed the instant appeal, in which he raises the following issues[1] for our review:

> 1. Was the trial court's admonition to the deadlocked jury impermissibly coercive and did appellant fail to preserve the issue for our review?
>
> 2. Did the receipt of the verdicts rendered by the jury constitute plain error and did appellant fail to preserve the issue for our review?
>
> 3. Was appellant's conviction for attempted robbery supported by the evidence?

FACTS AND LEGAL PROCEEDINGS

On June 1, 2015, Ly Mai, accompanied by her 12-year-old daughter and 10-year-old son, stopped at a Taco Bell drive-thru in Montgomery County, Maryland. Mai's daughter sat in the front passenger seat of the vehicle and her son was seated behind the driver's seat. Mai testified that she ordered food and then drove her car forward in the drive-thru lane with her car window still open, stopping short of the window where the cashier receives payment

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[1] The issues, as framed by appellant are:

> 1. Whether the trial court plainly erred by coercing the deadlocked jury to come to a verdict?
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> 2. Whether the trial court plainly erred by accepting inconsistent verdicts from the jury?
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> 3. Whether appellant was improperly convicted of attempted robbery?

because there was another vehicle in front of her. According to Mai, she was talking to her children and holding her credit card in her hand when a man approached her vehicle from an unknown direction and suddenly put his hand through her open window onto her neck, holding her back. Pictures of Mai's neck, taken by police 30–45 minutes after the incident was reported, were admitted into evidence as a State's exhibit. The man, whom she had never seen before, demanded several times, "Give me your shit."

During the confrontation, Mai testified that she dropped her credit card and that her daughter, who was sitting in the seat next to her holding a smartphone, attempted to fend the man off of Mai. When the man noticed the cell phone, he let go of Mai's neck, seized the phone from Mai's daughter and fled. Mai then drove up to the cashier window, informed the employees at the Taco Bell that she had been robbed and asked them to call the police. When the police arrived at the parking lot, Mai and her daughter gave statements describing the man, whom they eventually identified as appellant at a show-up 15–20 minutes later.

An indictment charging appellant with robbery, second degree assault and theft under $1,000 was returned by the Grand Jury in the Circuit Court for Montgomery County, based on the June 1, 2015 incident. Appellant's trial was held on November 9 and 10, 2015. After the State had presented its case-in-chief, counsel for appellant moved for judgment of acquittal as to the three counts, arguing that no property had been taken from the victim by threat or force. Appellant's counsel also argued that, because Mai had testified that it was her daughter's phone that had been taken, the State has failed to establish the element of

ownership of the property that had been taken. The trial judge denied appellant's Motion for Judgment of Acquittal as to all counts.

Appellant, testifying on his own behalf, asserted that Mai had arranged to buy marijuana from him that day through a mutual friend. According to appellant, he had sold marijuana to Mai on a prior occasion, approximately a year earlier; the transaction had been arranged by a mutual friend. Although appellant was uncertain of the precise location, he testified that the prior transaction had taken place at a fast-food establishment that had a "drive-thru." The transaction at issue, according to appellant, was to take place at the Taco Bell where he was instructed to meet Mai between 7:00 p.m. and 8:30 p.m. Appellant waited inside the restaurant and watched for Mai's silver SUV vehicle. When it pulled up, he approached the open window of the vehicle, leaned inside and gave Mai a bag of marijuana. Mai then handed appellant $45 instead of the $75 which, according to appellant, had been the amount agreed upon.

According to appellant, he refused to accept the money because he "does not do credit." When he asked Mai to return the bag of marijuana to him, which she still held in her hands, she refused, whereupon appellant grabbed the bag and a struggle ensued; the bag tore and the marijuana fell to the ground. Appellant testified that, when he saw the marijuana fall, he realized it would be a "total loss." Consequently, he grabbed a cell phone that he saw on the dashboard of the vehicle and told Mai that she could have the phone back when she paid

for the marijuana. Appellant denied that he choked Mai or that he took the phone out of her daughter's hand.

The jury was dismissed at the end of the first day of trial with instructions to return the next morning for deliberations. Shortly after noon of the following day, the jury sent a note to the judge stating that they were "not able to come to a consensus." The judge met with the parties and opined that an "*Allen*[2] charge" would be "appropriate." After the jury entered the court room, the judge addressed the jury, thereafter administering an *Allen* charge. The judge then instructed the jury in accordance with MJPI-Cr. 2:01, Jury's Duty to Deliberate.[3] After further deliberations, the jury found appellant guilty of attempted robbery and theft under $1,000 and not guilty of second degree assault.

STANDARD OF REVIEW

"[T]he standard of review for jury instructions is that, so long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them." *Tharp v. State*, 129 Md. App. 319, 329, (1999) (quoting *Farley v. Allstate*, 355 Md. 34, 46 (1999)). Furthermore, jury instructions are "viewed as a whole—within the context of all the

[2] *Kelly v. State*, 270 Md. 139, 140 n.1 (1973) ("The term '*Allen* charge' is derived from *Allen v. United States*, 164 U.S. 492 (1896)."). The Court of Appeals held that the original language of *Allen* was coercive and that a jury instruction based on the American Bar Association Standards (ABA) 15–4.4 would be adequate to instruct a jury without coercion.

[3] The Maryland Pattern Jury Instruction (Criminal) ("MPJI-Cr") § 2:01, follows the language of the ABA-approved instruction. *Graham v. State*, 325 Md. 398, 409 n.4 (1992).

instructions given—and not in isolation." *White v. State*, 100 Md. App. 1, 19 (1994); Md. Rule 4–325(c).

Regarding *Allen*-type instructions, the Court of Appeals has held "that instructions which deviate from the ABA recommended charge will be 'closely scrutinized to insure that they conform to the spirit of the American Bar Association's developed standards,' and that the presence of the coercive 'language constitutes reversible error.'" *Goodmuth v. State*, 302 Md. 613, 621 (1985) (quoting *Burnett v. State*, 280 Md. 88, 98 (1977)).

DISCUSSION

A. Trial Judge's Prefatory Remarks and Pattern Jury Instruction

Appellant first contends that, despite the absence of an objection to the jury instruction, this Court should provide relief based on the trial judge's plain error. Appellant asserts that he "was deprived of a unanimous verdict made by the free and un-coerced consent of the jury," when the trial judge "deviated substantially" from the standard jury instruction when he informed the jurors that the State, appellant and community had "a very important interest" in resolving the case, including his "personal hope" that they would "reach some verdict one way or another."

The State responds that appellant acknowledges that there was no objection and, therefore, the issue has not been preserved. Furthermore, the State argues that the judge's prefatory remarks, given before the pattern instruction, were not coercive and did not "alter the spirit or substance of the pattern instruction." Subsequently, the trial judge instructed the

jury by "recit[ing] the pattern instruction in its entirety." Accordingly, the State asserts, we should not review for plain error. We agree.

Md. Rule 8–131(a) provides, generally, that

> [t]he issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The Court of Appeals has made it "abundantly clear" that, '[e]ven errors of Constitutional dimension may be waived by failure to interpose a timely objection at trial.'" *Robinson v. State*, 410 Md. 91, 106 (2009) (quoting *Taylor v. State*, 381 Md. 602, 614 (2004)). Furthermore, the fact that a constitutional right "can be characterized as 'fundamental' does not change the requirement that any claimed violation of that right be preserved by contemporaneous objection." *Robinson*, 410 Md. at 106 (citing *State v. Rose*, 345 Md. 238, 248 (1997)).

The right to a fair trial, provided for in the Sixth Amendment of the Constitution and Article 21 of the Maryland Declaration of Rights, "includes a requirement that trial judges refrain from making statements that may influence improperly the jury." *Stabb v. State*, 423 Md. 454, 463 (2011). Although deviations in substance of pattern jury instructions will not be tolerated, *Ruffin v. State*, 394 Md. 355, 373 (2006), alleged instructional errors must have contemporaneous objections to preserve for appellate review. *Tyler v. State*, 105 Md. App.

495, 562–63 (1995), *rev'd on other grounds* 342 Md. 766 (1996). "Where the judge could easily have corrected the error if it had been drawn to his attention, the Court generally will not consider the contention." *Austin v. State*, 90 Md. App. 254, 265 (1992).

In the instant case, appellant's defense counsel did not object, contemporaneously or otherwise, to the alleged instructional errors, *i.e.*, prefatory statements concerning the resolution of the case. Appellant concedes that there was no objection to the alleged problematic statements. Nor does the record reflect deviations in the substance of required jury instruction, *e.g.,* failure to adequately explain reasonable doubt or a jury's duty to deliberate. Accordingly, the issue has not been preserved for our review.

Furthermore, we decline to review for plain error. "Rule 4–325(e) contemplates erroneous instructions on the law, error above the level of harmless error and at times of constitutional dimension, and *yet still commands that a vigilant attorney make timely objection before such error will be preserved for appellate review.*" *Austin*, 90 Md. App. at 268 (Emphasis supplied). Appellant cites *Pinder v. State*, 31 Md. App. 126 (1976) to support his argument that this Court has "recognized and corrected" error in cases involving an unpreserved *Allen* instruction. However, in *Pinder*, in addition to the judge's "prefatory remarks," the *Allen* instructions given did not comport whatsoever, "to the ABA recommended language approved in *Kelly* in 1973." *Pinder*, 31 Md. App. at 133-34. *See supra* n. 3.

Appellant also cites *Taylor v. State*, 17 Md. App. 41, 46 (1973) in support of his argument that we review for plain error. In *Taylor*, however, we held

> [a]pplying *Brown* [*v. State*, 14 Md. App. 415 (1972)] to the circumstances of the instant case, we hold that the errors committed by the trial judge in his remarks (instructions) to the jury were 'irremediable errors of commission,' since they were of such a nature that he could not have corrected them even if he had attempted to do so.

In the case *sub judice*, the trial judge's alleged "coercive" language did not rise to the level of "irremediable errors of commission" that threatened the fundamental fairness or substantial justice of the trial. At issue are the prefatory remarks the trial judge made before instructing the jury.

> So, I am going to read this instruction to you, and then I'm going to ask you to continue to deliberate. We are going to provide lunch for you today, all right, and I hope that you can reach some verdict one way or the other. As you know, [] both the State and [appellant] have a very important interest, as does the community, in seeing a resolution of this case if at all possible.

As the State notes, in its brief, the trial judge's prefatory remarks consisted of three lines and the subsequent pattern instruction was recited "in its entirety." Within those prefatory remarks, there is no indication from the record that the trial judge emphasized resolution over individual judgment or coerced the jurors to render a unanimous verdict that they would otherwise not be able to render. Specifically, the use of the modal verb "can" indicates possibility, rather than obligation. Furthermore, the judge, in acknowledging the importance of the resolution to the parties and community, tempered the assertion with the concluding phrase "if at all possible," again indicating possibility, not a mandate to the jury

to abandon all individual judgment and reach a verdict at any and all costs. Accordingly, we decline to exercise our plenary discretion to review for plain error.

B. 'Inconsistent' Verdicts

Appellant next contends that, notwithstanding his failure to interpose an objection as he did regarding his first claim of error, the jury returned inconsistent verdicts, which constituted plain error warranting reversal. Appellant asserts that finding him guilty of attempted armed robbery, *i.e.*, taking a substantial step towards committing a robbery of Mai, is legally inconsistent with finding that he did not commit second degree assault. Specifically, because the jury did not find that appellant "choked" Mai or engaged in other "offensive contact," the essential element of force in the crime of attempted robbery was not proven beyond a reasonable doubt.

The State again responds that appellant made no objection and, therefore, the issue has not been preserved. Furthermore, the State asserts that on the evidence presented, "it was not necessary for the jury to find that Lowe committed a battery in order for it to find that Lowe attempted to rob the victim" and, therefore, the verdicts were legally consistent. Therefore, reversal for plain error is unwarranted.

"[L]egally inconsistent verdicts are those where a defendant is acquitted of a 'lesser included' crime embraced within a conviction for a greater offense." *McNeal v. State*, 426 Md. 455, 458 n.1 (2012). In *Price v. State*, 405 Md. 10 (2008), the Court of Appeals held that inconsistent verdicts of conviction and acquittal are impermissible in Maryland.

The majority opinion's conclusion in *Price* appeared to be a sweeping one.

> Accordingly, with regard to the instant case, similarly situated cases on direct appeal *where the issue was preserved*, and verdicts in criminal jury trials rendered after the date of our opinion in this case, inconsistent verdicts shall no longer be allowed.

Interestingly, the *Price* majority opinion . . . [did not] mention any requirement with respect to preservation of the issue for appellate review.

Travis v. State, 218 Md. App. 410, 448 (2014) (alteration in the original) (emphasis supplied) (quoting *Price*, 405 Md. at 29). This Court noted, in *Travis*, that the concurring opinion of Judge Harrell, in *Price* is instructive regarding preservation for appellate review.

> Because the jury must always be given the opportunity to correct any inconsistency in its verdicts, the concurring opinion made it unmistakably clear that any objection to the verdicts on inconsistency grounds must be made before the verdicts have become final and the jury has been discharged.
>
> > [W]e should not permit the defendant to accept the jury's lenity in the trial court, only to seek a windfall reversal on appeal by arguing that the jury's verdicts are inconsistent. Accordingly, *a defendant must note his or her objection* to allegedly inconsistent verdicts *prior to the verdicts becoming final* and the discharge of the jury. *Otherwise, the claim is waived*.

Travis, 218 Md. App. at 451-52 (quoting *Price*, 405 Md. at 40 (Harrell, J., concurring) (second emphasis supplied)).[4]

Significantly, *Travis* explains why the preservation requirement is necessary.

> The reason for this iron-clad preservation requirement is clear. When inconsistent jury verdicts of conviction and acquittal are rendered, it is more frequently the

[4] We note, in *Travis*, that Judges Battaglia and Wilner joined Judge Harrell in that part of the concurrence.

> acquittal that is at odds with the true belief of the jurors than it is the conviction. The verdict of acquittal is frequently returned in the interest of lenity and actually is a windfall for the defendant. It would be with exceeding ill grace that a defendant would accept the benefit of a jury's incongruous acquittal even while condemning the incongruous conviction, when logically the two should rise or fall together. The concurring opinion pointed out why a defendant might be well advised to keep silent rather than risk losing his incongruous acquittal.

Travis, 218 Md. App. at 452.

In the case *sub judice*, appellant concedes that he did not object, contemporaneously or otherwise, to the alleged inconsistent verdicts prior to the verdicts becoming final or before the discharge of the jury. Accordingly, appellant's claim is not preserved for our review.

We also decline to review for plain error. " Plain error review is reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Yates v. State*, 429 Md. 112, 130 (2012) (quoting *Savoy v. State*, 420 Md. 232, 243 (2011)).

> Among the factors the Court considers 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. This exercise of discretion to engage in plain error review is rare.

Yates, 429 Md. at 131 (citations omitted) (internal quotation marks omitted).

The rarity with which plain error review should be used in conjunction with the "iron-clad" preservation requirement for review of inconsistent jury verdicts, informs our decision to decline plain error review. The inconsistent jury verdicts of conviction and acquittal, by

themselves, do not warrant plain error review; otherwise the "exception" would always swallow the rule. Appellant, by simply stating that the alleged error is "highly material and prejudicial," without any supporting argument, has not carried his burden in convincing this court that he is deserving of plain error review. *Lovelace v. State*, 214 Md. App. 512, 545 (2013) ("In order to obtain plain error review, a party must show that the trial court committed reversible error."). Although the State proffers, in the alternative, that "it was not necessary for the jury to find that Lowe committed a battery in order for it to find that Lowe attempted to rob the victim" and that the verdicts were legally consistent, this Court declines to address this argument as the issue has been severed by the absence of objection and lack of plain error. Accordingly, we decline to exercise our plenary discretion to review for plain error.

C. Notice of Attempted Robbery Conviction

Appellant finally contends that, "because count one of the indictment was captioned 'robbery' and not 'attempted robbery,'" appellant did not have proper notice of the charge against him and he was "unfairly surprised" at trial. Appellant concedes, however, that the statute cited in the indictment, Md. Code Ann., C.L. § 3–402, prohibits attempted robbery as well as robbery. Additionally, citing *Hagans v. State*, 316 Md. 429 (1989), appellant acknowledges that attempted robbery is a lesser included offense of robbery.

The State cites the record to counter appellant's contention that he was not on notice of the attempted robbery charge. Specifically, the State cites the language of the charge,

which included reference to Md. Code Ann., C.L. § 3–402(a), exchanges during *voir dire* and a trial discussion about jury instruction to support its assertion that appellant was on notice and not "unfairly surprised" at trial concerning a charge of attempted robbery. The State, also citing *Hagans, supra*, asserts that, even if the indictment had charged robbery, the lesser-included offense of attempted robbery could have been submitted to the jury.

Article 21 of the Maryland Declaration of Rights, requires that an accused be informed of the charges against him, including the "specific conduct with which he is charged." *Dzikowski v. State*, 436 Md. 430, 445 (2013) (quotations and citations omitted). "[A] conviction upon a charge not made is not consistent with due process." *Turner v. New York*, 386 U.S. 773, 775 (1967). *See also Landaker v. State*, 327 Md. 138, 140 (1992) (holding that a "conviction upon a charge not made would be sheer denial of due process"). Significantly, in determining the "character of the offense," we look to the "body of an indictment, not the statutory reference or *caption*." *Thompson v. State*, 371 Md. 473, 489 (2002) (Emphasis supplied) (citing *Busch v. State*, 289 Md. 669, 678 (1981)).

Moreover, a defendant may be convicted of an uncharged lesser included offense, provided that it is not "a more serious offense in terms of the maximum penalty prescribed by the Legislature." *Hagans*, 316 Md. at 452.

In the instant case, appellant concedes that Md. Code Ann., C.L. § 3–402 prohibits the crime of attempted robbery as well as the crime of robbery. Appellant also concedes that the charge included language that appellant "did attempt to feloniously rob . . ." and

acknowledges the decision of the Court of Appeals in *Thompson*, *supra*. Furthermore, appellant and the State both acknowledge that attempted robbery is a lesser-included offense of robbery. *Haggins, supra.* Assuming, *arguendo*, that the indictment charged robbery, there is nothing prohibiting the submission of the offense of attempted robbery to the jury. Therefore, for the foregoing reasons, we hold that appellant was provided adequate notice and was not unfairly surprised at trial that the jury convicted him of attempted robbery.

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