UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2546

September Term, 2014

BRIAN KARL JONES

v.

STATE OF MARYLAND

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

JJ.

Opinion by Woodward, J.

Filed: February 9, 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, Brian Karl Jones, was tried and convicted by a jury in the Circuit Court for Wicomico County of attempted second degree murder, first degree assault, second degree assault, wearing, carrying and transporting a handgun, reckless endangerment, possession of a firearm after being convicted of a disqualifying crime, trespass, and use of a firearm in the commission of a felony. The court imposed an aggregate sentence of forty years and suspended all but twenty five years.

Appellant appealed and presents three questions for our review:

1. Was the evidence insufficient to convict appellant of trespass?
2. Did the trial judge err in admitting evidence of a prior bad act?
3. Did the trial judge's instruction on attempted second-degree murder constitute plain error?

FACTUAL BACKGROUND

On the afternoon of May 13, 2014, Vanessa Stanley was inside Becky's International Market located in the Wali Shopping Plaza, 1122 Parsons Road, Salisbury, Md. Her son, appellant, was already at the market when she arrived. Sometime later she observed Arnell Bivens[1] pull up to the market in a truck. Stanley had grown up with Bivens's mother and knew Bivens, who went by the nickname "Apple Jack," from when he was a child. While inside the market, she saw appellant and Bivens outside "having words about something." She exited the market and observed Bivens walk around the corner to the back of the market whereupon appellant followed. As she too went toward

[1] The victim's name, Arnell Bivens, was also spelled Bivans throughout the record.

the back of the market, she heard a loud noise. When she arrived at the back of the market, she observed Bivens on the ground and appellant "was just standing there" with what "could have been a gun" in his hand. Stanley testified at trial that she then positioned her body between Bivens and appellant to protect Bivens in the event there was a second shot, because "if that's what my son was going to do, then I would have stood there and took that bullet." She then observed appellant take off running.

While this incident unfolded, Officers John Oliver and Robert Kemp of the Salisbury City Police Department were working an assignment with Maryland State Trooper Michael Porta[2] in the area. All three officers were in an unmarked vehicle at approximately 2:10 pm when they all heard "one loud pop, [which] sounded like a shot being fired." They then headed towards nearby Parsons Road. Before they reached Parsons Road, they observed a man running at a high rate of speed from Wali Plaza towards the nearby Pemberton Manor Apartments. The police officers maintained visual contact with this subject for all but a brief moment as he ran from the rear of the market to an apartment building on Fairground Drive, which was within the Pemberton Manor complex. The officers also saw Bivens bleeding by the roadway. When they observed the suspect enter 1009 Fairground Drive, the officers followed and secured the two entrances/exits to the building.

After backup officers arrived, the police officers went door to door in building 1009 and made contact with its occupants. Upon reaching the door to apartment number five,

[2] Trooper Michael Porta's name was also spelled Porter throughout the record.

Officer Oliver knocked on the door and saw that it was slightly open. Upon receiving no response, he entered and announced several times, "police, if you're in here come out with your hands up." After again receiving no response, he continued further into the apartment. Officer Oliver entered a room where he found an open closet. He observed that a computer desk had been shoved inside the closet and clothing had been piled on top of the desk. When he moved some of the clothing, Officer Oliver observed someone hiding behind the desk. After yelling "police, let me see your hands," Officer Oliver pulled the desk away from the closet, whereupon Trooper Moore and Officer Kemp pulled appellant out of the closet.

During this time, other officers came into contact with the bleeding Bivens, who refused to answer any questions. He was transported to the hospital by ambulance where a small caliber bullet was recovered from his back. Later that same day, a search warrant was executed at the apartment where appellant was found hiding. A Galesi Brescia model 6.35-milimeter handgun was located inside the closet where appellant was found. Both the bullet which was recovered from Bivens's back, and the handgun which was found in the closet where the appellant was found hiding, were submitted to the Bureau of Alcohol, Tobacco, Firearms and Explosives for analysis. There, the bullet and handgun were analyzed by Arnold Esposito, an expert in the area of firearms identification and analysis. Esposito test fired the handgun and found it to be operable. Upon further examination, it was discovered that the bullet recovered from Bivens had been fired from the handgun that was discovered in the closet with appellant.

At trial, Caroline Reed, the property manager of the Pemberton Manor Apartments, testified that appellant had been barred from the apartment complex as of December 29, 2009. She explained that "[b]arred means you have a lifetime bar, you're not allowed on the property, and more than likely it was due to previous circumstances." She further testified that she had been told by a resident that appellant was a friend of the family residing in building 1009, apartment five. Officer Oliver testified at trial that he knew that appellant was not allowed to be at 1009 Fairground Drive and that he had "been familiar with [appellant] for a number of years and [appellant] has been trespassed [sic] from the Village of Mitchell Pond [apartments] as well as the Pemberton Manor Complex."

Appellant was charged on the day after the shooting and housed in the Wicomico County Detention Center. In response to a request made by the Wicomico County State's Attorney's Office, all of appellant's ingoing and outgoing mail was intercepted and examined. On July 16, 2014 the detention center seized an outgoing piece of mail addressed to a Shanae Jackson. Appellant's name and inmate number were written on the return address. The letter included the following threat: "I shoot guns and know how to fight. . . . Bet you better get out of Salisbury cause I'm going [sic] shoot you how I did Apple Jack[.]"

As previously indicated appellant was convicted of attempted second degree murder and related offenses, and was sentenced to a total period of incarceration of twenty-five years. This timely appeal followed. Additional facts will be supplied as necessary to our discussion of the questions presented.

DISCUSSION

I.
Trespass: Sufficiency of Evidence

"Wanton trespass on private property" is prohibited by Md. Code (2002, 2012 Repl. Vol.) § 6-403(a) of the Criminal Law Article, which provides: "A person may not enter or cross over private property … of another, after having been notified by the owner or the owner's agent not to do so, unless entering or crossing under a good faith claim of right or ownership."

Appellant argues that there was no evidence presented by the State that he was ever notified that he was banned from the property. The State counters that this argument was not preserved for appellate review because appellant did not argue it in his motion for judgment of acquittal. Further, the State points out that the defense counsel conceded in closing argument that appellant knew that he was not allowed on the property.

Appellant also contends that no rational trier of fact could have found him guilty of trespass beyond a reasonable doubt, because there was evidence at trial that appellant was assisted in hiding by the occupants of the apartment in which he was found, and thus he had a reasonable belief that his intrusion on the property was permitted. In response, the State argues that appellant did not have a good faith claim of right to enter the apartment complex because he was attempting to evade capture by police after shooting Bivens.

We agree with the State on both points. First, appellant's contention that the State failed to present evidence of notice to appellant that he was banned from the property was not preserved for appellate review. Maryland Rule 4-324(a) requires that "the defendant shall state with particularity all reasons why the motion [for judgment of acquittal] should

be granted." As we stated in *Prioleau v. State*, "[a]n appellant may not argue grounds in support of a claim of legal insufficiency unless those grounds were presented to the trial court." 179 Md. App. 19, 30-31 (2008), *aff'd*, 411 Md. 629 (2009). "A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal." *Tetso v. State*, 205 Md. App. 334, 384, *cert. denied*, 428 Md. 545 (2012).

At the close of the State's case, defense counsel made a motion for judgment of acquittal as to all counts. Specifically, as to the trespass charge, defense counsel argued:

> [I]t's clear he's been invited to that property, it's clear he's been hidden by other people who live in that property and is therefore a guest of the people there. The fact that Pemberton has banned him from the property does not defeat the ability of the lessor of the property to invite people to their residence and it appears that that is what they have done.

At the close of the appellant's case, defense counsel renewed the motion "on the same basis that was already made."

It is clear from the above that appellant did not argue to the trial court that the State failed to prove the element of notice as it pertained to the trespass charge. In fact, in closing, defense counsel argued that "everyone knew he wasn't supposed to be there," thus apparently conceding that appellant knew that he was banned from the property. The sole argument made by defense counsel regarding the trespass count was that appellant was an invited guest of the residents of apartment five. Appellant's argument, raised for the first

time on appeal, that he was not notified that he was banned from the apartment complex is not preserved for our review.

Even if preserved, we would conclude that there was sufficient evidence to support a rational inference that appellant knew that he was banned from the apartment complex. This inference is based upon the testimony of the property manager that appellant had been banned for approximately four and half years at the time of the instant offense, and from the testimony of Officer Oliver that he knew that appellant was not allowed to be at 1009 Fairground Drive and that appellant had "been trespassed" from the apartment complex previously. Officer Oliver's testimony suggested that he had previous contact with appellant in relation to appellant's trespassing on the property.

Second, we address appellant's contention that he reasonably believed that his intrusion on the property was permitted and, therefore, no rational trier of fact could have found him guilty of trespass beyond a reasonable doubt.

When reviewing the sufficiency of the evidence, we must determine

> whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. We defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence.... While we do not re-weigh the evidence, we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.

Neal v. State, 191 Md. App. 297, 314 (citations and internal quotation marks omitted), *cert. denied*, 415 Md. 42 (2010).

As we stated in *In re Jason Allen D.*, 127 Md. App. 456, 476 (1999), *overruled on other grounds by In re Antoine M.*, 394 Md. 491 (2006), a person cannot be guilty of trespass if that person had a good faith and honest belief that he or she had a right to enter onto the property. Such belief must not be reckless or negligent, but reasonable. *Id.* at 481. Once a defendant meets his or her burden of production by generating a bona fide claim of right defense, the burden shifts to the State to convince the trier of fact beyond a reasonable doubt that the defendant lacked a bona fide claim of right. *Id.* at 483.

We are satisfied that appellant generated a genuine jury issue as to his belief that his presence in the apartment was permitted. During cross-examination, Officer Oliver testified as follows:

> [DEFENSE COUNSEL]: Based on your observations of the closet when you arrived into that bedroom, did it appear that Mr. Jones could have put himself in that position on his own?
>
> [OFFICER OLIVER]: My belief is absolutely not. The way that he was hunkered down in the corner very small and tight and the computer table, computer desk as far as it was pushed into the closet, with all the clothes piled high I think it's highly unlikely that a person could possibly pull that in and put all those clothes in while being hunkered down in the manner that he was in the corner.

The State, however, elicited evidence to refute appellant's claim that he believed that he was allowed to be on the property, and even if he did hold such belief, it was unreasonable. As previously stated, there was testimony from the property manager that appellant had been banned from the property for approximately four and a half years at the time of this incident. There was also testimony from Officer Oliver that he knew appellant had "been trespassed" from the apartment complex. A rational trier of fact could infer from the testimony of these witnesses that appellant knew that he was banned from the apartment complex.

Moreover, after shooting Bivens, appellant ran at "a high rate of speed" to the Pemberton Manor Apartments, where he hid in a closet of apartment five. These facts do not support the contention that appellant was invited to the apartment by its residents, or that he reasonably believed that he was allowed onto the property. While presumably it was the residents of apartment five that assisted appellant in hiding in the closet, tellingly they did not stay to encounter the police.[3]

Finally, as we stated in *In re Jason Allen D.*, the trespass statute may be invoked "against persons who trespass on … property without a bona fide claim of right, or who *otherwise engage in criminal activity*." 127 Md. App. at 489 (emphasis added). Appellant entered the property in an attempt to elude police capture after shooting Bivens. Clearly appellant was engaging in criminal activity. Accordingly, we hold that there was sufficient

[3] Testimony was presented at trial that officers made contact with three people who had "come from" apartment five, but who were stopped by police in a different location in the complex. None of these individuals were identified at trial, nor did they testify.

evidence from which a rational trier of fact could reasonably conclude that appellant did not have a bona fide claim of right to be on the property.

II.

Evidence of Prior Bad Act

Appellant next argues that the trial judge erred in admitting, over his objection, the property manager's testimony that he had a lifetime ban from the property and that "more than likely" it was "due to previous circumstances." Appellant asserts that this testimony was inadmissible "other crimes" evidence. Without conceding that the property manager's testimony qualified as evidence of a prior bad act, the State counters that its admission was harmless. We conclude that the trial court did not err in admitting the property manager's testimony.

Pursuant to Md. Rule 5-404(b), "[e]vidence of other crimes, wrongs, or acts … is not admissible to prove the character of a person in order to show action in conformity therewith." Property manager Reed testified that appellant had been banned from the Pemberton apartment complex "more than likely … due to previous circumstances." To prove the offense of trespass, it was necessary for the State to elicit testimony that appellant had been banned from the property. It logically follows from evidence of appellant's ban from the property that such ban was the result of a prior event involving appellant, even absent any reference to that effect. Reed never elaborated or specified what were the "previous circumstances." Her testimony was simply a statement of the obvious and was neither prejudicial nor probative. *See Somers v. State*, 156 Md. App. 279, 313-14 (2004)

(holding that testimony from a police officer that he was familiar with defendant and knew his name from prior cases was not evidence of prior bad acts).

Additionally, even if we assume, *arguendo*, that the trial judge erred by admitting Reed's testimony, we hold its admission was harmless. An error is harmless if "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). Here, appellant's own mother testified that just moments after she heard a loud noise, she saw appellant standing over Bivens wounded body with what "could have been a gun." Appellant immediately fled the scene and was located hiding in the closet of a nearby apartment building, along with the gun that was used to shoot Bivens. Finally, a letter bearing the appellant's name and inmate number on the return address line, which was seized in the outgoing mail of the detention center where appellant was being housed pending trial, included the following threat: "I shoot guns and know how to fight. . . . Bet you better get out of Salisbury cause I'm going [sic] shoot you how I did Apple Jack[.]" In light of this overwhelming evidence, we are satisfied that the vague testimony of "previous circumstances" could not have contributed to the rendition of the guilty verdicts.

III
Jury Instruction

Finally, recognizing his failure to object to the trial judge's instruction on attempted second-degree murder, appellant argues that the trial judge's instruction on this offense constituted plain error. Appellant asserts that the instruction "undermined the State's

burden of proof" by erroneously instructing the jury that they could have found the appellant guilty of attempted second-degree murder if they found appellant intended only to inflict serious bodily harm when he shot Bivens. In response, the State points out that, although the initial oral instruction was "muddled" by the trial judge, it was subsequently corrected in response to a question posed by the jury. The State concludes that as a result, appellant was not prejudiced by the error, and therefore appellant's conviction for attempted second-degree murder should be affirmed.

The trial judge instructed the jury, with respect to attempted second-degree murder, as follows:

> Now count two is second degree attempted murder or attempted second degree murder. Again that requires a substantial step beyond mere preparation toward the commission of murder in the second degree. In order to convict the Defendant of attempted murder in the second degree the State must prove: that the Defendant took a substantial step beyond mere preparation toward the commission of murder in the second degree; that he had the apparent ability at that time to commit the crime of murder in the second degree; and that he actually intended to kill Arnell Bivens.
>
> Perhaps I should tell the jury the difference between murder in the first degree and murder in the second degree, because I don't have those instructions, unless you don't think it's necessary.
>
> Let me just tell you murder in the first degree – there are two kinds of murder, first degree murder and second degree murder. The Defendant is not charged with murder, he's charged with attempted murder in the first degree and attempted murder in the second degree. First degree murder is the more serious of the two. First degree murder is the intentional killing of another human being with willfulness, deliberation and premeditation. And the State must prove, in the case of an actual murder, that whoever the Defendant was caused the death of a certain individual, that the killing was

> willful, deliberate and premeditated, not justified, no mitigating circumstances.
>
> **Second degree murder again requires the death of an individual caused by a particular Defendant and it can be the result of deadly conduct, either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result**; and again it cannot be justified and there cannot be any mitigating circumstances.

(Emphasis added).

At the conclusion of the instructions, the jury retired to begin their deliberations. Approximately forty-six minutes later, the trial court came back on the record in response to several questions from the jury. Among other things, the jury requested a copy of the first four charges, which were attempted first degree murder, attempted second-degree murder, first degree assault, and second degree assault. In response, the court sent back copies of the jury instructions on each of those counts.

The written jury instruction on attempted second degree murder that was sent back to the jury during their deliberations read as follows:

ATTEMPTED SECOND DEGREE MURDER

> Attempted Second Degree Murder, is a substantial step, beyond mere preparation, toward the commission of murder in the second degree. In order to convict the defendant of attempted murder in the second degree, the State must prove:
>
> (1) that the defendant took a substantial step, beyond mere preparation, toward the commission of murder in the second degree;
> (2) that the defendant had the apparent ability, at that time, to commit the crime of murder in the second degree; and
> (3) that the defendant actually intended to kill Arnell Bivens

MPJI Cr 4:17.13.

This instruction is virtually identical to Maryland Criminal Pattern Jury Instruction 4:17.13. Defense counsel did not object to either the first instruction read aloud by the trial court, or to the second written instruction that was given to the jury during their deliberations.

Maryland Rule 4–325(e) states: "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." Generally, "the failure to object to a jury instruction at trial results in a waiver of any defects in the instruction, and normally precludes further review of any claim of error relating to the instruction." *State v. Rose*, 345 Md. 238, 245 (1997).

One of the key purposes of Md. Rule 4-325(e) "is to correct errors while the opportunity to correct them still exists. Only thus is an error preserved for appellate review. It is not the purpose and design of the rule to provide an avenue for a party to lay away ammunition in the arsenal of appeal." Vernon v. State, 12 Md. App. 157, 163 (1971).

Maryland Rule 4-325(e), however, provides a limited exception, stating: "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." But, appellate review under this plain error doctrine "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004).

That an error is plain and material is not the test the reviewing court invokes in determining whether the exception to the rule should be applied. "Even if the error meets both of these tests, its consideration on appeal is not a matter of right, for the use of the word 'may' makes it permissive, and necessarily leaves its exercise to the discretion of the appellate court." *Austin v. State*, 90 Md. App. 254, 263 (1992). "On the question of overlooking non-preservation, the appellate discretion is plenary." *Id.* at 262.

In *Austin*, this Court reviewed a factually similar case to the present one. Austin was tried and convicted of attempted second degree murder for shooting and injuring his romantic rival. *Id.* at 259. The trial court incorrectly instructed the jury that they could find Austin guilty of attempted second degree murder if they found that he had "inten[ded] to kill or inflict such bodily harm that would likely to cause death." *Id.* at 260.

In discussing the erroneous attempted second-degree murder instruction, we stated:

> The error in this case, although unmistakably a misstatement of the law, was by no means egregious. In defining an attempted crime, it has always been a conventional practice to begin by defining the consummated crime and then to spell out those special attributes that constitute the attempt to commit it. It was … as late as 1986, that our legal analysis recognized for the first time that the mens rea for attempted murder is narrower than the mens rea for consummated murder. The old (pre–1986) case law was rife with less sophisticated and overly broad definitions. That the trial judge intoned, dutifully, what the case law had pronounced from time immemorial was hardly egregious error. As an error, it was garden-variety, not extraordinary.

Id. at 268-69.

This Court determined that the erroneous instruction probably did not have a crucial bearing on the verdict because Austin had shouted "[y]ou're going to die, bastard," as he

shot the victim in the head. *Id.* at 259. We noted, however, that, even had Austin met his burden and persuaded us that the erroneous instruction had influenced the verdict, "he could only persuade us that, as he shot his victim twice in the head, he intended not murder but mayhem. That hardly engenders a sense of outraged innocence." *Id.* at 270. "The touchstone remains our discretion." *Id.* at 272. This Court recognized that the instruction was wrong, but refused to overlook Austin's failure to preserve the issue for appellate review. *See id.* at 261. We explained: "Under the clear command of the rule, the appellant may not assign as error this erroneous instruction. We decline, therefore, to consider the contention. Nothing persuades us, in the exercise of our discretion, to take the extraordinary step of overlooking the appellant's procedural failure." *Id*.

In the present case, the trial court's oral instruction as to attempted second degree murder was erroneous. We conclude, however, that the initial error was corrected by the issuance of the second written instruction. The written instruction was a correct statement of the law and was substantially the same as the attempted second degree murder instruction contained in the Maryland Criminal Pattern Jury Instructions. There being no error, there is no basis for the exercise plain error review.

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