UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2797

September Term, 2014

ROBERT WILLIAM STONE, JR.

v.

STATE OF MARYLAND

Wright,
Graeff,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: May 10, 2016

Robert William Stone, Jr., appellant, was convicted following a jury trial in the Circuit Court for Howard County on charges of attempted first-degree burglary, malicious destruction of property, resisting arrest, and unlawful taking of a motor vehicle. The court subsequently sentenced Stone to serve a total of fifteen years and sixty days in prison for his convictions. In his timely filed appeal, Stone raises three questions for our consideration, which we have rephrased as follows:

> 1. Did the trial court err by allowing the prosecutor to make improper comments during the State's closing argument?
>
> 2. Did the trial court err in allowing the admission of irrelevant evidence?
>
> 3. Did the trial court err in finding that appellant waived his right to counsel by inaction?

Discerning neither reversible error nor abuse of discretion, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL HISTORY

Around 9:00 a.m. on November 17, 2012, Lynda Rooney called the Howard County Police Department to report that her 2011 Honda Accord had been stolen from the driveway in front of her home on Pear Tree Way in Columbia, Maryland. Her vehicle was later located by the police parked in Mystic Court, near a footpath that led to Daystar Court.[1] The police installed a GPS tracker on the car so that they could apprehend the individual who had taken it.

[1] Stone's girlfriend resided in Daystar Court. When Stone was arrested, he told police he often stayed at her home.

On November 21, 2012, the police tracked the stolen vehicle to a residential neighborhood on Ridermark Row. Around 7:19 p.m. the officers observed a man dressed all in dark clothing, including gloves and a ski mask, approach the stolen vehicle. Upon spying one of the officers, the man sprinted toward the car. Several officers pursued and apprehended the man, who was later identified as Stone. It took several officers to hold Stone down to place him in restraints.

While canvasing the neighborhood after the arrest, one of the officers observed that the glass door to the basement of a nearby home had been smashed. Upon returning home, Venkata Raju, the owner of the residence, confirmed that the sliding glass doors to his basement had been intact when he left his home around 5:00 p.m. that night. While the doors were shattered, Raju could not identify any items that were missing from the home.

Subsequent forensic testing indicated that glass found on Stone's shoes and ski mask was consistent with the glass from the broken doors of Raju's residence. DNA consistent with Stone's was recovered from the gear shift of Rooney's red 2011 Honda Accord.

Following a two-day trial on September 23 and 24, 2014, the jury found Stone guilty on charges of attempted first-degree burglary, malicious destruction of property, resisting arrest, and unlawful taking of a motor vehicle. The jury acquitted Stone on charges of first-degree burglary, third-degree burglary, and fourth-degree burglary. On January 22, 2015, the circuit court sentenced Stone to seven years for attempted burglary; a consecutive five years for the unlawful taking of a motor vehicle; a consecutive three

years for resisting arrest; and a consecutive sixty days for malicious destruction of property. Stone filed timely notice of the instant appeal on February 18, 2015.

DISCUSSION

I. Improper Comments in Closing Argument

During the State's closing argument, the prosecutor made several comments that Stone now contends were improper.[2] Stone now asserts that the circuit court erred by failing to act *sua sponte* to curtail the prosecutor's improper and prejudicial statements. Stone concedes that defense counsel raised no objections to these arguments at the time they were made. We must, therefore, conclude that Stone'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*, 179 Md. App. 72, 102 (2008) (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"); *Bates v. State*, 127 Md. App. 678, 703 (1999) (argument about prosecutor's improper comments not preserved for appellate review when "counsel neither objected when the argument

[2] Specifically, the prosecutor asserted, at one point, that the glass recovered from Stone's shoes and clothing "matched" the glass from the broken sliding door, instead of indicating, as he did in rebuttal, that the glass on Stone was "consistent with [the] elemental composition and optical properties" of the glass from the door. The prosecutor also remarked in passing that Stone had possession of the valet key for the stolen vehicle, a fact that was not in evidence.

was made nor at any later point [and] did not request a mistrial or a curative instruction"), *overruled on other grounds*, *Tate v. State*, 176 Md. App. 365 (2007).

Stone, nonetheless, suggests that this Court should exercise its discretion to undertake plain error review. "Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which 'vitally affect[ ] a defendant's right to a fair and impartial trial.'" *Malaska v. State*, 216 Md. App. 492, 524, *cert. denied*, 439 Md. 696 (2014) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009) (quotation marks and citation omitted)). This discretion should be rarely exercised because considerations of fairness and judiciary efficiency call for assertions of error to be raised at trial so that "a proper record can be made with respect to the challenge, [and] the other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Chaney v. State*, 397 Md. 460, 468 (2007). We should engage in plain error review only when we are confronted with an outcome-affecting error of such magnitude that it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (quotation marks and citation omitted).

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 (1999) (citing *State v. Bell*, 334 Md. 178, 187-88 (1994)). There are several factors this Court considers when deciding whether to undertake plain error review, including: 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 (2014) (citing *Morris v. State*, 153 Md. App. 480, 518-24 (2003)).

Stone 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). Stone 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.").

Stone asserts that, in this case, where the State's case was largely circumstantial, the State's remarks, arguing facts not in evidence "cannot be considered harmless" and, therefore, "reversal is required." The mere fact that a comment made by the prosecutor may have been improper or prejudicial, however, 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 omitted)). Stone fails to articulate how any error committed by the circuit court was either plain or material to his rights. Nor does he contend that his case presents any unique questions, the resolution of which would serve to guide other courts and practitioners in future cases.

Plain error review is an extraordinary remedy, to be undertaken only in instances of "truly outraged innocence[.]" *Herring v. State*, 198 Md. App. 60, 87 (2011) (quoting *Jeffries v. State*, 113 Md. App. 322, 325-26 (1997)). In this case, where the allegedly improper comments, in context, were not so egregious as to rouse defense counsel to object at the time they were made, we are not persuaded that the circumstances of Stone's case are sufficiently compelling to justify plain error review. We, therefore, decline to take up the issue.

II. Admission of Scientific Evidence

In the course of Stone's trial, the State presented the testimony of an expert witness to compare samples of glass that were recovered from the shoes and clothing that Stone was wearing at the time he was arrested and from the broken door of the Raju home on Ridermark Road. The expert testified that the glass taken from Stone was "consistent in elemental composition and optical properties with the known glass . . . from Ridermark Row" and therefore, "the recovered glass from the shoes and ski mask could have come from the known source." The expert explained, however, that because glass is made in large batches that have similar characteristics, she could not say definitively that the broken door was the only possible source of the glass fragments that were recovered from Stone, but only that the door "could be a source" of the fragments. Defense counsel raised no objections to the expert's testimony. The prosecutor then moved to admit the expert's laboratory report over a defense objection. The circuit court overruled the defense objection, and the report was admitted into evidence.

Stone now contends that the circuit court erred by admitting the expert's testimony and her laboratory report, characterizing the evidence as "irrelevant and prejudicial[,]" because the expert could not state conclusively that the glass fragments recovered from his shoes and clothing had come from the broken glass doors. Stone avers that an inconclusive test result is evidence of nothing; that evidence of nothing is irrelevant; and that irrelevant evidence is not admissible.

Because the defense did not object to the expert's testimony regarding the fact that the glass fragments recovered from Stone were consistent with the glass from the broken door, any arguments regarding the circuit court's admission of that testimony was not properly preserved for appellate review. *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"). Moreover, the expert's testimony included a verbatim recitation of the results of her analysis that was included in her report. Thus, the report was merely cumulative of the expert's testimony, which was admitted without any objection from the defense. *See Dove v. State*, 415 Md. 727, 743-44 (2010) ("testimony is cumulative when it repeats the testimony of other witnesses introduced during the State's case-in-chief"). Therefore, any error in the circuit court's subsequent admission of the report was harmless, beyond a reasonable doubt.

Even if this issue had been properly preserved, we would conclude that the circuit court did not err by admitting either the testimony of the expert or the expert's report indicating that the fragments of glass found on Stone's clothing were "consistent" with the glass from the broken doors on the Raju home. Trial courts have broad discretion in

determining the relevancy of proffered evidence. *Merzbacher v. State*, 346 Md. 391, 404 (1997); *Best v. State*, 79 Md. App. 241, 259 (1989). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Subject to particularized exceptions not pertinent here, "all relevant evidence is admissible. Evidence that is not relevant is not admissible." Md. Rule 5-402.

We find appellant's argument that this evidence was not "relevant" to the question of his guilt to be meritless. That the glass fragments that were recovered from his clothing had the same elemental composition and optical properties as the glass in the broken door of the Raju home was highly relevant insofar as its presence on Stone's shoes and clothing made it more likely that Stone had been in close proximity to the glass doors when they were broken. The fact that there were other potential sources of the glass fragments was certainly an issue that was proper for defense counsel to explore during cross-examination of the expert and in closing arguments. Such arguments go only to the weight to be afforded to the evidence, however, not to its relevance. Because we are persuaded that the challenged evidence was highly relevant to the charged offenses, we conclude that the circuit court did not err or abuse its discretion in admitting it.

III. Appearance at Trial without Counsel

Stone was implicated in multiple burglaries and vehicle thefts that occurred in Columbia, Maryland, during the period from July to November of 2012. Stone was initially charged via a thirteen-count indictment on December 19, 2012, and his initial

appearance in the circuit court was on January 25, 2013. By order of the court filed October 21, 2013, the counts were severed for the purposes of trial. The thirteen counts in the consolidated case were split for trial as follows: Counts 1-7 were tried on September 23 to 24, 2014; Counts 8-10 were tried on October 23, 2013; and Counts 11-13 were tried on February 19 to 20, 2014, this appeal concerns only Counts 1-7.

At various times during the pendency of his case, Stone was represented by three different private attorneys and an attorney from the Office of the Public Defender. Attorney Alfred Guillame III represented Stone only for the purposes of his Motion to Reduce Bond in February of 2013. Attorney Stephen R. Tully entered his appearance in the case in July of 2013, and he represented Stone at his trial on Counts 8-10 in October of 2013, before withdrawing his appearance for Counts 1-7 and 11-13, effective November 26, 2013. Attorney David B. Shapiro entered his appearance as to only Counts 11-13 on November 26, 2013. Shapiro represented Stone at his trial on Counts 11 to 13 on February 19, 2014, and then moved to withdraw his appearance on March 19, 2014. Janet DeBoissiere entered her appearance on March 19, 2014, and was removed on August 21, 2014.

On February 4, 2014, Stone appeared in circuit court without counsel for trial on Counts 1-7, and requested a postponement to obtain an attorney. The court denied the request finding that Shapiro had waived his right to an attorney by failing to retain counsel. Stone then alleged that he was experiencing chest pains while he was in lock-up waiting for his trial to commence. He was taken to Howard County Hospital for treatment, and his trial was postponed until March 19, 2014.

On March 19, 2014, Stone again appeared before the circuit court, without counsel, on the day his trial was set to begin. Stone explained that he had contacted the Public Defender's Office but that no attorney from that office had time to adequately prepare his defense. Public Defender Janette DeBoissiere was in court and expressed her willingness to represent Stone if the court would grant a postponement so that she could prepare. The court granted the postponement, noting on the record that it would be the last postponement that would be permitted.

On May 7, 2014, Stone filed a *pro se* motion to strike DeBoissiere's appearance. Following a hearing on his motion, Stone chose to allow the representation to continue and withdrew his motion to strike. In July of 2014, Stone filed another *pro se* motion requesting that DuBoissiere withdraw so that he could obtain private counsel. After strongly cautioning Stone regarding the difficulties of proceeding to trial without counsel and stating that if he did not obtain counsel by his trial date he could be ordered to proceed *pro se*, the circuit court granted Stone's motion and struck DeBoissiere's appearance, effective August 21, 2014.

On September 12, 2014, Stone filed a *pro se* request for a postponement so that he could retain an attorney. The circuit court denied the request. Stone appeared in court for his trial on September 23, 2014. Again, Stone appeared without an attorney. The court inquired:

> THE COURT: All right. And, Mr. Stone, you're proceeding today without counsel; is that correct?

> THE DEFENDANT: No, sir. No, sir. My lawyer that I had, David Shapiro, he couldn't be today. He said he will -- if you all could do a postponement, he will enter his appearance this week. My mother contacted me yesterday.

In response to the court's follow-up questions regarding what he had done to secure an attorney since he dismissed his public defender on August 21, 2014, Stone explained that his family was out of money, but that his niece had recently said that she would pay for Shapiro's services. He reiterated that Shapiro would be entering his appearance that week if the case were continued. The court noted that Stone had been informed on multiple occasions that he might not get a postponement if he did not show up with an attorney at trial. The court then took a recess and contacted Shapiro to confirm Stone's claims regarding his representation by Shapiro's office. When court readjourned, the following colloquy occurred:

> [State]: Your Honor, during the court's recess I had the opportunity to speak with Mr. David Shapiro. I had called his office and then called his cell phone.
>
> THE COURT: Well, my secretary just finished talking to him. That's why it probably took so long in him calling me back because he was on the phone with you.
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> [State]: Possibly. And I apologize.
>
> THE COURT: Mr. Shapiro has reported to my administrative assistant that he has not spoken to Mr. Stone. He's spoken to his mother twice. He is not sure if he even meets with Mr. Stone if he will be representing Mr. Stone. So that's what the message was to my assistant just a minute ago, which was why I came back out when I did.
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> THE DEFENDANT: Okay. Can I-
>
> THE COURT: Is that what he told you, [State]?

[State]: No assurances. No arrangements. Yesterday a.m. he received a phone call and at 10:30 p.m. he spoke with Mr. Stone's mother. He needs to meet with him.

THE COURT: Huh-uh. Basically the same thing.

[State]: Yep.

THE COURT: Okay. Mr. Stone?

THE DEFENDANT: Can I speak?

THE COURT: Sure.

THE DEFENDANT: Well, my niece gets paid Thursday and she will be down here a day from Thursday. That was the arrangement. He knows what the arrangement is.

THE COURT: Well, the impression I got even if he meets with you, he may not be representing you.

THE DEFENDANT: Oh, well, he will represent me if they pay him the money.

THE COURT: Okay.

THE DEFENDANT: And they will pay him. She will pay. She's agreed to pay him the money Thursday.

THE COURT: All right. Anything else, Mr. Stone?

THE DEFENDANT: Did you ask him about his schedule between 40 days from --

THE COURT: I did not speak to him.

THE DEFENDANT: Did you ask him between 40 and 55 days what his --

[State]: Are you addressing me? Did I ask him?

THE DEFENDANT: Yeah.

[State]: He said that he does not know if he would even represent you after meeting you -- meeting with you, so there was no sense of - there was no sense for me to even engage. I mean, I'm opposed to it so I'm not going to engage in that.

THE COURT: Okay.

THE DEFENDANT: Okay. Your Honor, can I have a postponement for the period of 40 to 55 days?

THE COURT: Okay. The request for postponement is denied, so we're going to trial today. Okay? All right. That's based on the court's -- the Defendant's request. The court is going to find that -- I mean, and as I said, I did have some concern because to no fault of Mr. Stone, and I accepted representation that he's been unavailable so to speak in lockdown. Hadn't any money to mail a letter to try and contact an attorney. But he did - was able to get money last week because he did send in a written request for postponement that this court denied. The court is balancing that.

The fact is that we've been here on this matter a few times. Forget about the other matters. We were here in March. We were here back in August. We've known about this and Mr. Stone has had problems with [the assigned public defender] the entire time she has been representing him in both of these matters. So that was no new information. And he's never been satisfied.

And so, now we're here today after this case was postponed back in March, April, June, July, August, September. Six months ago. And we're back at the same place. That's the reason why the court is not finding good cause exists to postpone this matter in balancing those factors. So that's why the postponement is denied.

Stone now contends that the circuit court erred in finding that he had waived his right to counsel by neglecting or refusing to obtain an attorney prior to his trial. He does not claim that the court failed to comply with the procedural requirements of Md. Rule 4-

215(d). Nor does he claim that the court failed to provide the advisements required by the rule. Instead, his only claim is that the court erred in determining that his reason for failing to obtain counsel was not "meritorious" and failing to grant a continuance as required by the rule.

The rule regarding waiver of counsel by inaction in circuit court provides:

> If a defendant appears in circuit court without counsel on the date set for hearing or trial, indicates a desire to have counsel, and the record shows compliance with section (a) of this Rule, either in a previous appearance in the circuit court or in an appearance in the District Court in a case in which the defendant demanded a jury trial, the court shall permit the defendant to explain the appearance without counsel. If the court finds that there is a meritorious reason for the defendant's appearance without counsel, the court shall continue the action to a later time and advise the defendant that if counsel does not enter an appearance by that time, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds that there is no meritorious reason for the defendant's appearance without counsel, the court may determine that the defendant has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing or trial.

Md. Rule 4-215(d). When a defendant presents reasons for discharging counsel or appearing without counsel, it is within the "judge's discretion to determine whether the reasons given are meritorious," and the issue is reviewed under an abuse of discretion standard. *Brown v. State*, 103 Md. App. 740, 746 (1995); *see also Grant v. State*, 414 Md. 483, 491 (2010) ("We review a trial court's finding of waiver under [Md.] Rule 4-215(d) only for an abuse of discretion.").

In this case, the circuit court was very familiar with Stone's history of requesting postponements and thereby delaying his trial. The court knew that the last postponement was granted so that Stone could obtain counsel, and he had required a delay of more than

six months because of the difficulty of coordinating the State's multiple witnesses who were all present and ready to proceed at that time. The court also knew that Stone had been previously represented by three private attorneys and a public defender, whom he had subsequently requested to discharge. The court knew personally that Stone had been expressly informed on multiple occasions, both orally and in writing, that his failure to obtain an attorney by his trial date could result in his being required to proceed *pro se*. Even so, when Stone again appeared without counsel, the court gave him the benefit of the doubt and called the attorney Stone had identified to determine if he had, in fact, agreed to represent Stone in this case. It was only after the attorney confirmed that, though Stone's mother had contacted him, there was no formal agreement between himself and Stone, that the court decided that Stone's request for an additional postponement was not meritorious. Thus, it is clear that the circuit court properly inquired regarding why Stone did not have counsel, provided an ample opportunity for Stone to explain the delay, and then carefully considered the merit of Stone's explanation. Under all the circumstances, we discern no abuse of discretion in the circuit court's decision that Stone's explanation lacked merit. We conclude, therefore, that the court did not err by denying his request for a postponement.

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