UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 129

September Term, 2016

BRENT POPE

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: May 9, 2017

*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.

Brent Pope, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore County of theft of property valued at less than $10,000 but at least $1,000.[1] Appellant asks the following three questions on appeal, which we have slightly rephrased:

I. Did the trial court err in its comments to appellant about the use of his prior convictions for impeachment purposes if he testified?

II. Did the trial court commit plain error during voir dire?

III. Did the trial court commit plain error when it instructed the jury on theft?

For the reasons that follow, we shall affirm.

FACTS

On the morning of August 13, 2014, Rachel Brown entered 14 Dutton Avenue in Catonsville, a house she and her husband had recently purchased. The house looked like it had been "ransacked" and a back window had been shattered, which is not how they had left the house the night before. She called the police. Missing from the house, among other things, was a new I-Mac computer, a "big screen" television and a smaller television, a guitar, golf clubs, a PS3 computer game, and two snow boards. The total value of the missing items was around six to seven thousand dollars.

A detective with the Baltimore County Police Department testified that everyone who sells an item through a Maryland pawn shop is required to show identification and sign a declaration that the property being sold belongs to them. The police ran the serial number for the I-Mac through the pawn shop data base, which led them to a pawn shop in

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[1] The jury acquitted appellant of first-degree burglary. Appellant was sentenced by the court to ten years of imprisonment, all but seven years suspended, followed by three years of supervised probation.

Jessup where it was recovered. The serial number on the outside of the computer had been scratched out, but the serial number on the inside was still intact. The Jessup pawn shop records showed that appellant had pawned the computer five days after it was reported stolen, and an employee of the pawn shop identified appellant at trial as the person who came into the store to sell the computer. The police also went to a pawn shop in Laurel where the snowboards were recovered. The Laurel pawn shop records revealed that appellant had pawned the snowboards ten days after they were reported stolen.

The police investigated a house at 9494 Vollmerhausen in Columbia, Maryland. The owner of the house, John Lehner, advised the police that he and his wife, Justine Lehner, had separated and that she lived at the house. The police executed a search warrant for the house during which Justine was present. After she waived her *Miranda* rights[2], she told the police that she knew appellant. When the police asked her about the specific items missing from the Dutton home, she said that she did not know anything about them. The police arrested her and searched the house, recovering from the master bedroom a Verizon bill with appellant's name and the Vollmerhausen address on it.

Justine testified for the defense. She testified that appellant was her boyfriend, and that he lived with her at the Vollmerhausen address in August 2014. She testified that a few months prior to her arrest, she lost her job, after which she started pawning items from her basement with appellant's help. Justine explained that she stored, in the basement, many items which had belonged to her father, who had died several years earlier. She

[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

testified that appellant had retrieved the computer and snowboards from the basement and then pawned them. She admitted that she had pled guilty in February 2015 to theft relating to the instant offenses, and in exchange, the State had dismissed a charge of first-degree burglary.

DISCUSSION

I.

Appellant argues that we must reverse his convictions because the trial court erroneously told him that the State could impeach him with three of his prior convictions if he took the stand, and based on those erroneous remarks, he decided not testify. He cites *Morales v. State*, 325 Md. 330 (1992) in support of his argument. The State responds that the trial court's remarks were not erroneous, and that appellant did not change his mind about testifying based on the court's remarks.

A criminal defendant has the constitutional right to testify in his defense and the corresponding right to remain silent. *See Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987) (citing the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution). Although a trial court is required to advise an unrepresented defendant about his right to testify and his corresponding right to remain silent, a trial court is not required to advise a defendant that he could be impeached by his prior convictions if he takes the witness stand. *Morales*, 325 Md. at 335. If the trial court elects to do so, however, the trial court must do so correctly. *Id*. *See also Williams v. State*, 110 Md. App. 1, 32 (1996)("A trial judge has no obligation to advise a defendant, whether or not represented by counsel, with respect to

the possibility of impeachment if the defendant elects to testify, but, if the trial judge undertakes to do so, he or she must do so correctly.”).

In *Morales*, the defendant elected to proceed without counsel. *Morales*, 325 Md. at 332. When it came time for Morales to decide whether he would testify, the following colloquy occurred:

> THE COURT: Do you want to take the witness stand and testify? You may. But I need to tell you that you have a right not to testify. Nobody in this country can be made to take the witness stand and testify against themselves. In fact, if they don't, the fact that they didn't, may not be held against them in any way. It may not be considered in any way. In other words, I can't assume, in my mind, that you are guilty just because you decided not to testify. Okay. It's your decision, but I don't want you to say that I better do it, because he is going to think that I am guilty if I don't do it. That won't be the case. I will just have to go on the evidence that I have heard but not the fact that he took the stand.
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> THE DEFENDANT: *I will take the stand.*
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> * * *
>
> THE COURT: *I will give you time to think about this*. Whichever way you want to go. I don't know. I don't know if, for instance, *if you have ever been convicted of a crime before. And I don't want to know right now. But if you take the stand and testify and you have been convicted of a crime before, they may ask you, they meaning the State may ask you about that*. Not to prove that because you were guilty before that you are guilty now, but they may bring it up to show whether or not you should be believed or not. It goes to what they call veracity, believability.
>
> Does that help you decide whether you should or shouldn't?
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> THE DEFENDANT: *I don't want to go up there.*

Morales, 325 Md. at 333–34. Morales did not take the stand and was subsequently convicted of two drug related crimes. At sentencing it was revealed that of his numerous

prior convictions (assault and battery, possession of PCP, possession of PCP with the intent to distribute, theft, disorderly conduct, and numerous motor vehicle offenses), only his prior theft conviction was clearly admissible at trial for impeachment purposes. *Morales*, 325 Md. at 338-39.

On appeal, the Court of Appeals awarded Morales a new trial. The Court explained why Morales's decision not to take the stand was not knowing or voluntary:

> A reasonable inference from the . . . colloquy between the judge and Morales is that Morales intended to testify until the judge advised him to "think about this" and that his convictions could be brought out to show whether he should be believed or not. Since Morales apparently changed his decision to testify *based on the trial court's incorrect implication that all of his prior convictions could be used to impeach him*, the defendant's decision to waive his constitutional right to testify and to exercise his constitutional right to remain silent was not knowingly and intelligently made. If the trial court – although not required to do so – had given the correct information regarding impeachment by evidence of prior convictions, the result would be different.

Id. at 339 (emphasis added). In sum, the Court held that the trial court had erred when it, in a good faith attempt to advise Morales of the risks of testifying, implied that all of Morales's prior convictions could be used to impeach him, and that information caused Morales to change his mind and not testify.

We note that appellant was represented by counsel through opening statements and the State's first witness. Appellant then effectively discharged his attorney. After the State rested and after examining his first witness, appellant indicated to the trial court that he wished to testify. The trial court then asked the State prosecutor whether she had any impeachable offense that she intended to use.

The prosecutor advised that she intended to ask appellant about three prior convictions: a 2006 conviction for fourth-degree burglary; a 2003 conviction for theft of property valued at less than $500; and a 2001 conviction for second-degree escape. The ensuing full colloquy between the trial court and appellant is relevant:

> THE COURT: Okay. Here's what the Assistant State's Attorney has said that she is asking or she's explained to me that she intends to use. The 2006 fourth degree burglary, 2003 theft, and the 2001 escape.
>
> What, if anything do you want to say to any of that?
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> THE DEFENDANT: (Inaudible) unusual. I think we should get all the facts before they bring them in because it wasn't no burglary. It was at my girlfriend's parents, my daughter's grandmother's house and we (Inaudible) I broke the (Inaudible) and I (Inaudible) was fixing (Inaudible). That's not a (Inaudible).
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> THE COURT: Well, I don't know what the facts are.
>
> THE DEFENDANT: Exactly.
>
> THE COURT: Well, but my question to you is what, if any, objection do you have to the State using those three, any – those three or anyone of those, or any multiple –
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> THE DEFENDANT: I was under the (Inaudible) that as long as (Inaudible).
>
> THE COURT: Well, I can say that your assumption was wrong without elaborating, I don't know where you got that assumption but that's not correct.
>
> Now, the State can under certain circumstances use certain (Inaudible) offenses for the purpose of impeachment. And they – *if they were permitted to use any of these offenses for impeachment purposes*, and if you asked me to I would tell the jury that the fact that you have expired convictions for impeachment purposes only and that the jury cannot consider because you have – and I'm paraphrasing right now, I don't have the instruction right in front of me – but I would instruct the – if you asked me to, that those convictions, *if any one of them are permitted*, were being used for impeachment purposes and that the jury could not consider [them].

THE DEFENDANT: Okay. Then I will testify –

THE COURT: Well, I just – listen, that's your decision. I'm just making sure you understand what's going on here.

Now, so to continue where I left off, *if I let the State use any one or multiples of these prior convictions in, in impeaching you, if* you wanted me to, I would tell the jury that they could not consider whether – I will tell the jury that they could not consider those prior convictions for anything other than determining your credibility.

Do you understand that?

THE DEFENDANT: I understand that.

THE COURT: Okay. Now, you listened to what the State's Attorney had to say regarding the three prior convictions that she intends to use. What, if any, argument do you have about whether they should be permitted or not?

THE DEFENDANT: I just want to testify, Your Honor.

THE COURT: So you don't have an argument?

THE DEFENDANT: (Inaudible).

THE COURT: All right. *So is it your choice not to testify*?

THE DEFENDANT: *(Inaudible) because I was under the assumption of something else. Obviously I was wrong. So I choose – I would choose not to testify*.

THE COURT: Why – you told me what your assumption was about and I don't know where you got that but –

THE DEFENDANT: They told me what law it was, but I forget.

THE COURT: Who is they?

THE DEFENDANT: People that I spent – people that's been in trial before.

THE COURT: People in jail?

THE DEFENDANT: Correct.

THE COURT: Uh-huh. Okay. Well, all right. Do you have any questions of this [c]ourt concerning the offenses the State seeks to use to impeach your credibility should you elect to testify?

THE DEFENDANT: Um, no, I don't (Inaudible) I just won't testify.

THE COURT: I just want to take it one step at a time. So going over it one more time, the State seeks to use these three prior convictions.

THE DEFENDANT: I understand what you are saying, Your Honor.

THE COURT: I just need to make sure you do. Okay.

THE DEFENDANT: All right. I understand what you are saying but I understand what position I'm in, so I'm going to choose not to testify. I'll be –

THE COURT: What position do you think you are in? You make –

THE DEFENDANT: *Because I was under the impression as long as – I can't answer any questions that's asked of me truthfully. But as long as I don't bring up my past, they can't be brought up. That's what I thought. Obviously I was wrong, so –*

THE COURT: Well –

THE DEFENDANT: Because I was wrong I would like to –

THE COURT: Let's be clear about something. Do you have other convictions that you maintain are not impeachable offenses?

[THE STATE'S ATTORNEY]: That the Defendant has?

THE COURT: Yes.

[THE STATE'S ATTORNEY]: Yes. I have some in the second degree, for example –

THE COURT: Give me an example.

[THE STATE'S ATTORNEY]: (Inaudible) not impeachable.

THE COURT: Okay. Okay. So what – here's what I'm asking the Assistant State's Attorney, there are some prior convictions that are not permitted to be used if you were to take the stand to testify. For example, a prior assault conviction could not be used to impeach your credibility. So that may be where you are getting this information, but there are some prior convictions that may be used.

THE DEFENDANT: Okay.

THE COURT: Some that definitely can't. And that's why the [A]ssistant State's Attorney isn't – is limited in response to my question to three of whatever – however many other convictions you have. She's intending to or asking the [c]ourt to use these three but no others, and if you have others, she's conceding that if you took the stand she couldn't ask you about those, and in that regard, your prior background could not be brought up.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: Do you understand what I'm saying to you?

THE DEFENDANT: Yes.

THE COURT: So not every conviction can be used to impeach a witness *but there are some that may be permitted to be used*.

So, once again, the Assistant State's Attorney is asking the [c]ourt to allow her to use these three prior convictions to impeach your credibility should you decide to take the stand.

Do you have anything you want to say regarding that?

THE DEFENDANT: No.

THE COURT: All right. Do you have any other questions you would like to ask me?

THE DEFENDANT: No.

THE COURT: All right. Do you have a decision about whether you wish to testify or not testify?

THE DEFENDANT: I choose not to testify.

(Emphasis added). Appellant then rested and the parties proceeded to discuss jury instructions.

Appellant argues that his decision-making process about whether to testify was based on his ability to control whether the jury heard evidence of his prior convictions. He argues that when he believed he had the ability to keep the prior convictions out by not mentioning them when he testified, he was willing to testify, but when he believed that the State would be permitted to use the three convictions, even if he did not refer to them in his testimony, he decided not to testify. He argues that the reasonable inference from the colloquy was that he intended to testify until the trial court advised him that the State could use the three prior convictions to impeach him.

We agree with the State that reversal is unwarranted – the trial court did not advise him erroneously, nor did appellant decide not to testify because of any erroneous advice. Here, the thrust of the trial court's advice to appellant was that the State was seeking to impeach him with three of his many prior convictions, and that the trial court had not determined whether to admit any of the three convictions, but if it did, it would give a limiting instruction. During the colloquy, the court specifically advised appellant that it did not know "if any one of them [the prior convictions] are permitted[.]" This statement alone distinguishes *Morales* where the trial court implied that if Morales took the stand the State could ask him about any of his prior convictions. Additionally, here appellant clearly changed his mind about testifying after the trial court debunked his erroneous belief on which he was basing that decision – that the State could not question him about anything

to which he did not testify, meaning, if he did not testify to any of his prior convictions the State could not ask him about them.

Even if we were to believe that the trial court implied in the colloquy that appellant could be impeached with one of his three prior convictions and appellant elected to remain silent because he believed this advice, we would not reverse because, at a minimum, appellant's 2003 theft conviction was an impeachable crime under Md. Rule 5-609. *See Gregory v. State*, 189 Md. App. 20, 42 (2009)(quoting *Beales v. State*, 329 Md. 263, 269-70 (1993)(a prior conviction of theft is "admissible per se for impeachment purposes")) and Md. Rule 5-609 (b)(setting forth requirement that a conviction more than 15 years old is not admissible for impeachment). Accordingly, under the circumstances presented we find no reversible error.

II.

Appellant argues that the trial court erred during voir dire in two ways. First, the manner in which the trial court prefaced its voir dire questions improperly allowed the prospective jurors to believe that they could decide for themselves whether they could be fair and impartial. Second, the trial court's police-witness bias question was invalid because it was confusing and overly broad. Recognizing that he has not preserved his arguments for our review, he asks us to reverse by finding plain error. The State responds that plain error review is not available because appellant affirmatively waived his argument below.

The requirements for objecting during voir dire are found in Md. Rule 4-323(c), which provides generally:

> For purposes of review . . . on appeal . . ., it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

Therefore, it is sufficient to preserve an objection to voir dire "simply by making known to the [trial] court what is wanted done." *Marquardt v. State*, 164 Md. App. 95, 143 (quotation marks, brackets, and citation omitted), *cert. denied*, 390 Md. 91 (2005). Md. Rule 8-131(a) states: "Ordinarily, the appellate court will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" The Rule requires a timely objection at trial or the issue will be considered waived and cannot be raised on appeal. *Brice v. State*, 225 Md. App. 666, 678 (2015)(citations omitted), *cert. denied*, 447 Md. 298 (2016).

"The purpose of Maryland Rule 8–131 is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge." *Sydnor v. State*, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002). "The Rule is also designed to prevent lawyers from 'sandbagging' the judge and, in essence, obtaining a second 'bite of the apple' after appellate review." *Id.* An appellate court should recognize unobjected to error, however, when "compelling, extraordinary, exceptional or fundamental to assure the defendant of fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992)(quotation marks and citations omitted). Nonetheless, the standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436

(2002), *cert. denied*, 376 Md. 545 (2003). We are mindful that we have long held pro se appellants to the same standards of waiver to which represented defendants are held. *Grandison v. State*, 341 Md. 175, 195 (1995), *cert. denied*, 519 U.S. 1027 (1996)("[W]e have long held that a defendant in a criminal case who chooses to represent himself is subject to the same rules regarding reviewability and waiver of questions not raised at trial as one who is represented by counsel.")(citation omitted).

Appellant did not object to the trial court's preliminary explanation to the prospective jurors about how it would conduct voir dire. After the trial court concluded its voir dire, it specifically asked the parties if they had any "additions or objections" to the "[c]ourt's voir dire." Defense counsel affirmatively advised that she had no objection. Appellant has waived any complaint on appeal, and we do not find the circumstances "compelling, extraordinary, exceptional or fundamental." Accordingly, we decline to exercise whatever discretion is available to us under Rule 8-131.

Likewise, appellant did not object to the police-witness bias question asked by the court, and so also failed to preserve that argument on appeal. Appellant contends, however, that his argument is preserved because defense counsel submitted a different form of the question in the defense's written request for voir dire. Appellant is wrong – he waived any claim to that argument when his defense counsel affirmatively stated that she had no objections to the voir dire questions asked. *Cf. Brice*, 225 Md. App. at 679 (although appellant requested a police-witness bias question in his written proposed voir dire, when the trial court intentionally omitted it from voir dire, appellant waived his right to the requested question when it responded "No" to the court's request for any further comment

or objection to the voir dire questions that had been asked). We do not find the facts here "compelling, extraordinary, exceptional or fundamental" and therefore, we decline to exercise whatever discretion is available to us under Rule 8-131.

III.

Appellant argues that the trial court erred in its jury instruction on theft by deviating from the Maryland Pattern Jury Instructions, allowing the jury to convict him of a crime that does not exist. Recognizing that he did not object below, appellant again asks us to review his argument under the doctrine of plain error. The State again responds that appellant has affirmatively waived his argument for our review.

The State proceeded to trial on the theory that appellant was guilty under the consolidated theft statute, s*ee* Md. Code Ann., Crim. Law, §7-104, as a principal or as an accomplice with his girlfriend, Justine Lehner. The trial court instructed the jury as follows regarding the elements of theft:

> The Defendant is charged with the crime of theft. In order to convict the Defendant of theft the State must prove that the Defendant or someone the Defendant aided and abetted or someone who aided and abetted the Defendant willfully or knowingly obtained or exerted unauthorized control over property of the owner, and that the Defendant or someone the Defendant aided and abetted or someone who aided and abetted the Defendant had the purpose of depriving the owner of the property and the value of the property was over $1,000.
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> * * *
>
> Exclusive possession, either alone or with others, of recently stolen property unless reasonably explained may be evidence of theft. If you find that the Defendant or someone the Defendant aided and abetted or *someone who aided and abetted the Defendant* was in possession of the property shortly after it was stolen and that possession is not otherwise explained by

> the evidence, you may but are not required to find that, find the Defendant guilty of theft.

(Emphasis added). The trial court gave the pattern jury instruction for accomplice liability.

According to appellant, the theft instruction was erroneous because the "third option" – that a juror could convict appellant of theft if they believed "someone who aided and abetted the Defendant was in possession of the [recently stolen] property" – was a non-existent type of theft.

Md. Rule 4-325(e), governing the process of instructing the jury and objections, provides:

> No party may assign as error the giving [of] . . . 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. . . . 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.

Appellant, however, did not object to the instruction given, and therefore, has not preserved his argument for our review. Moreover, when the trial court concluded its instructions to the jury, the court asked the parties if they "need[ed] to approach the bench concerning the [c]ourt's instructions[.]" Appellant replied, "No, Your Honor." Under the circumstances presented, we decline to exercise plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003)(the five-word holding of "We decline to do so." conclusively disposes of a plain error contention), *cert. denied*, 380 Md. 618 (2004).

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.