UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0466

September Term, 2016

TROY PENDLETON

v.

STATE OF MARYLAND

Wright,
Berger,
Shaw Geter,

JJ.

Opinion by Wright, J.

Filed: February 10, 2017

A jury in the Circuit Court for Baltimore County convicted Troy Pendleton, appellant, of attempted third-degree burglary following an attempted break-in on July 3, 2012, at 936 Palladi Drive in the Arbutus area of Baltimore County. On February 28, 2014, the circuit court sentenced appellant to a ten-year prison term, consecutive to any other sentence appellant was then currently serving. On May 19, 2015, appellant filed a petition for post-conviction relief, which he amended on January 21, 2016. On March 30, 2016, the circuit court granted appellant the opportunity to file a belated appeal, in which appellant presents three questions:

> 1. Did the circuit court abuse its discretion in denying defense counsel's motion to dismiss the case based on a discovery violation?
>
> 2. Did the circuit court commit plain error in failing to ask during *voir dire* whether any potential juror would give more or less weight to the testimony of a police officer as compared to that of any other witness?
>
> 3. Did the circuit court commit plain error in permitting the State to question appellant with respect to whether another witness had lied?

For the reasons stated below, we answer these questions in the negative and affirm.

BACKGROUND

On July 3, 2012, Katy Taylor was at home at 936 Palladi Drive with her husband, Officer Jeffrey Taylor, and their two children.[1] At that time, Officer Taylor was on leave to help care for the couple's newborn child, and he was also recovering from surgery to his knee performed on July 2, 2012.

[1] All law enforcement officers in this case are members of the Baltimore County Police Department.

Shortly before 1:00 p.m., the Taylors were in the basement when Officer Taylor heard a loud knocking at the front door. He asked his wife to go upstairs and see who it was. Mrs. Taylor went upstairs with the older child, who was then four-years-old. She looked through the door's peephole and did not recognize the man, whom she identified as appellant, standing at the door. Mrs. Taylor testified that the man was roughly "jiggling" the door handle, and she heard a pounding "like of a shoulder into the door." Then, the man shoved a Howard Johnson room key card into the door frame in an attempt to "shimmy" the lock. Mrs. Taylor grabbed the older child and retreated down to the basement.

Mrs. Taylor told her husband that there was a black man at the door who was trying to break in; she urged her husband to get his service weapon. Officer Taylor told his wife to call 911, and he went upstairs to retrieve his service gun. Officer Taylor paused in front of the door and observed appellant kneeling down in front of the door in an attempt to use a credit card to force the door's lock. Officer Taylor went up another flight of stairs to obtain his service weapon, and then he went back down to the basement. Officer Taylor told his wife to take the children into the back yard, and he walked around the house to confront appellant.

Officer Taylor proceeded through the side yard and around the corner of the house. He "drew down" on appellant, identified himself as a police officer, and ordered appellant to lie down. Appellant complied. A couple of minutes later, other officers, including Officer Kyle Burke, arrived. Officer Burke placed appellant in handcuffs and searched him, recovering a key card and a pair of socks. Officer Burke also observed a

Howard Johnson key card protruding from the door frame. Officer Jason Claggett, the lead officer on the scene, testified that the key card recovered from appellant's pocket was "severely damaged."

Appellant testified in his defense. He claimed that on the night of July 2, 2012, he stayed at a Howard Johnson hotel. During the day, on July 3, 2012, he was talking to a woman he knew as "Sunshine" on the Baltimore Ravens telephone chat line. Appellant stated that he called the chat line "[a]ll the time" for the purpose of meeting women. Appellant testified that he and Sunshine agreed to meet in person before going back to his hotel room, and she told him to pick her up on Palladi Drive. Sunshine did not provide a house number, but she stayed on the phone with appellant and gave him directions as he drove. Appellant stated that when Sunshine told him to stop, he parked his car and got out.

Appellant stated that he saw a curtain moving at 936 Palladi Drive, so he went to the front door and knocked, saying "it's me from the hotel." Getting no response, appellant put his room key card into the door in an attempt to show who he presumed to be Sunshine who he was. Shortly after that, Officer Taylor came around the side of the house and ordered him to lie down.

The State charged appellant with attempted first-degree burglary, attempted third-degree burglary, two counts of fourth-degree burglary, attempted theft of property valued under $1,000.00, and providing a false statement to a police officer. The State *nol prossed* one count of fourth-degree burglary, attempted theft, and providing a false

statement. Thereafter, the jury acquitted appellant of attempted first-degree burglary, but convicted him of attempted third-degree burglary.

DISCUSSION

Discovery Violation

Prior to trial, appellant's counsel sought to dismiss the case on the basis of a discovery violation. At the January 29, 2014 hearing on the motion, appellant's counsel established that the Office of the Public Defender initially represented appellant, but he hired private counsel in late 2012. The State provided discovery to this attorney in March 2013. Then, in late 2013, appellant's trial counsel entered her appearance. Appellant's counsel sought phone records in an effort to corroborate his defense, but the State's discovery responses did not indicate that police recovered any phone linked to appellant. It was established that at a December 18, 2013 proceeding – which was scheduled as a trial date – police brought to court three cell phones recovered from appellant's vehicle which had previously not been disclosed to appellant. Appellant argued that the cell phones could provide exculpatory evidence, and the State's failure to disclose the existence of the phones prejudiced appellant. The motion court denied appellant's motion to dismiss, but ordered the State to charge the phones and make them available to appellant within two days. In denying appellant's motion to dismiss, the motion court determined that the State had not purposefully violated the discovery rules, nor had appellant demonstrated that the phones did, in fact, contain exculpatory information. Trial was re-set for February 12, 2014.

On appeal, appellant contends that the circuit court abused its discretion with this solution and should have, instead, dismissed the charges. Appellant argues that the delay in the case can only be due to a deliberate discovery violation on the part of the State. Appellant notes that because the phones were prepaid, there was no way to pull records for them, and, due to the delay in disclosing their existence, any evidence on the phones may have been unrecoverable. Ultimately, appellant asserts that the court's ruling on his motion to dismiss was premature, as appellant needed to examine the phones first to determine if the State had withheld exculpatory evidence.

The State urges this Court to find that the motion court's remedy was a proper exercise of that court's discretion. The State contends that dismissal is a harsh remedy for a discovery violation, and courts should impose the least severe sanction that still accomplishes the purpose of discovery. Moreover, the State argues that any error was harmless because appellant does not complain that he was denied access to the phones after the circuit court's ruling, nor did he offer any evidence from the phones at trial. The phones, therefore, were "inconsequential," according to the State.

"We review sanctions imposed for discovery violations for abuse of discretion." *Bellard v. State*, 229 Md. App. 312, 340 (2016) (citing *Rosenberg v. State*, 129 Md. App. 221, 259 (1999)), *cert. granted*, __ Md. __ (Dec. 2, 2016). *See also Green v. State*, __ Md. App. __, No. 490, Sept. Term 2015 (filed Dec. 1, 2016), slip op. at 15-16 (noting that imposition of sanction for discovery violation reviewed for abuse of discretion). Indeed, Md. Rule 4-263(n) gives courts broad discretion to fashion remedies for discovery violations. We have remarked that dismissal of a case for a discovery violation

is a harsh remedy and should be avoided, if possible. *See Raynor v. State*, 201 Md. App. 209, 228 (2011) ("'The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules.'" (Quoting *Thomas v. State*, 397 Md. 557, 571 (2007))), *aff'd*, 440 Md. 71 (2014), *cert. denied*, 135 S. Ct. 1509 (2015). The Court of Appeals has noted that "[t]he purpose of discovery is to avoid surprise at trial and to give the defendant sufficient time to prepare a defense." *Hutchinson v. State*, 406 Md. 219, 227 (2008) (citing *Hutchins v. State*, 339 Md. 466, 473 (1995)).

A court abuses its discretion where the ruling is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Patterson v. State*, 229 Md. App. 630, 639 (2016) (quoting *McGhie v. State*, 224 Md. App. 286, 298 (2015), *aff'd*, 449 Md. 494 (2016)). Stated another way, a court abuses its discretion "'where no reasonable person would take the view adopted by the [trial] court[] . . . or when the court acts without reference to any guiding principles.'" *Thompson v. State*, 229 Md. App. 385, 404 (2016) (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 418 (2007)).

We are not persuaded that the motion court abused its discretion in fashioning the limited remedy for the discovery violation in this case. Appellant has not explained how the late access to the cell phones caused any prejudice to him or obstructed his ability to present a defense, nor has appellant contended that the State failed to abide by the court's order. If the court's ruling was "premature" because the phones did, in fact, contain exculpatory evidence, then the burden was on appellant to bring that to the court's

attention. The Court of Appeals has cautioned "that, if a defendant declines a limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, 'the double or nothing gamble almost always yields nothing.'" *Raynor*, 201 Md. App. at 228 (quoting *Thomas*, 397 Md. at 575). We conclude, therefore, that the motion court's remedy in this case was an appropriate exercise of discretion.

Voir Dire

During *voir dire* of the potential jurors, the circuit court posed the following question:

> Mindful of that principle, are there any prospective jurors who would automatically give more or less weight to the testimony of any witness merely because of the witness'[s] title, profession, education, occupation or employment?
>
> Now, let me stop here for a second because this question is asked in a vacuum. I think it is somewhat unclear.
>
> If anybody in this room is a physician – and I'm not picking on you but I'm going to use you as an example – you have two physicians – this is my example – you have two physicians, they went to grade school, high school, college, medical school, they are similarly situated in terms of their, their educational experience and their background. They are having lunch, finish lunch, walking down the street, stop at the street corner and a traffic accident happens in front of them. One of the doctors thought the light was green and the other doctor thought the light was red. And if that's all you had as information, and someone said, well, how would you decide the case, most people would say well, I don't know, I have to have more information, I've got to get all the details. And that's kind of the point of this question.
>
> Stated another way, if you were selected as a juror in this case, would you be able to judge the credibility of each witness'[s] testimony based on the totality of their testimony rather than merely relying on his or her title, profession, education, occupation or employment?

> For example, would any of you automatically give more or less weight to the testimony of a physician, a clergyman, a [p]olice [o]fficer, a firefighter, psychiatrist, a social worker or any other witness merely because of their title, profession, education, occupation or employment? If so, please stand.
>
> And there is no response.

On appeal, appellant contends that the circuit court committed plain error in posing this question to the potential jurors. Appellant concedes that he failed to object at trial, but he argues that this *voir dire* question should have simply asked if any potential juror would give more or less weight to the testimony of a police officer solely because the witness is a police officer. Appellant asserts that this question was "vitally" important because the jury would weigh his credibility against that of testifying police officers. Appellant's argument is, essentially, that the *voir dire* question as posed was verbose and overly complex, rendering it worthless.

The State urges us to affirm. The State contends that the error is not preserved because appellant failed to object at trial. Indeed, the State avers that appellant affirmatively waived any argument as to *voir dire* because at the conclusion of *voir dire*, the circuit court asked counsel if there were any objections, and appellant's counsel said, "No." Moreover, the State contends that plain error review is inappropriate in this case because if there was error, it was not a "blockbuster" error appropriate for plain error review.

This Court has noted that plain error review should be "rarely" exercised. *Yates v. State*, 202 Md. App. 700, 720 (2011), *aff'd*, 429 Md. 112 (2012). We stated that errors

should be first brought to the attention of the trial court "'so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.'" *Id.* (quoting *Chaney v. State*, 397 Md. 460, 468 (2007)). "'Plain error is error which vitally affects a defendant's right to a fair and impartial trial.'" *Kelly v. State*, 195 Md. App. 403, 431 (2010) (quoting *Diggs v. State*, 409 Md. 260, 286 (2009)). We have recognized that we engage in plain error review "'only when the unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Id.* at 432 (quoting *Turner v. State*, 181 Md. App. 477, 483 (2008)). *See also Pickett v. State*, 222 Md. App. 322, 340 (2015) ("'Appellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" (Quoting *Kelly*, 195 Md. App. at 432)).

We decline appellant's invitation to engage in plain error review in this case. Assuming that appellant did not affirmatively waive any objections to *voir dire* by answering "No" to the court's question seeking objections, we are not persuaded that plain error review is appropriate here. Appellant has not convinced us that there was error, let alone that error was a "blockbuster" type of error. *See Olson v. State*, 208 Md. App. 309, 363 (2012) (citing *Martin v. State*, 165 Md. App. 189, 196 (2005)) (noting that plain error review is reserved for "blockbuster' errors"). Indeed, appellant contends that the court should have asked if any potential juror would give more or less weight to the testimony of a police officer, which the court asked, albeit in a roundabout fashion.

Moreover, "plain error review is reserved for cases of 'truly outraged innocence [that] call for the act of grace of extending' plain error review." *Gross v. State*, 229 Md. App. 24, 37 (2016) (quoting *Jeffries v. State*, 113 Md. App. 322, 326 (1997)). This is not one of those cases. Accordingly, we decline to review the *voir dire* question for plain error.

Questioning of Appellant as to Detective Carlton Ramseur

During appellant's direct examination, his counsel asked him about his interview with Detective Carlton Ramseur in which appellant discussed "Sunshine" and his actions on July 3, 2012. During cross-examination, the following occurred:

> [THE STATE]: Now, going back to what you had talked about with Detective Ramseur, did you – you are saying you didn't talk about there being anyone else with you on that day?
>
> [APPELLANT]: Right.
>
> [Q]: Are you sure about that?
>
> [A]: Yes, ma'am.
>
> [Q]: Let me show you what I just marked for identification purposes as State's Exhibit Number 8. I want you take a moment to review that or have you reviewed that statement?
>
> [A]: Uh-huh.
>
> [Q]: And is that about the interview that you had with Detective Ramseur?
>
> [A]: Yes.
>
> [Q]: And you reviewed it before today?
>
> [A]: Yes.

[Q]: And does it at all talk about a discussion you had with Detective Ramseur about your cousin?

[A]: He say that in there.

[Q]: He said that in there?

[A]: He said it in there, but we never had no discussion about that.

[Q]: So you're saying that Detective Ramseur would be lying about that?

[A]: Yes. If it is in here, then I know he said, yes.

[Q]: Okay. And did you ever talk to Detective Ramseur about turning the door knob?

[A]: Never.

[Q]: Never?

[A]: Huh-uh.

[Q]: So if Detective Ramseur wrote that, are you saying that Detective Ramseur would be lying?

[A]: Yes.

.

[Q]: Okay. So what else are you saying are lies?

At no time did appellant object to this line of questioning.

Appellant contends that a witness may not be asked about the credibility of other witnesses because that invades the province of the jury as the determiner of a witness's credibility. Here, appellant argues that the State elicited his opinion as to the credibility of Detective Ramseur. Appellant concedes that he failed to object at any point to these questions, but he urges this Court to review for plain error. Appellant maintains that this error was important to the case because his defense centered on his credibility.

The State urges us to affirm and to decline to engage in a plain error review. Moreover, the State contends that appellant's decision not to object may have been tactical because on redirect examination, appellant's counsel sought to discredit Detective Ramseur and to demonstrate that appellant never adopted Detective Ramseur's statement.

We are not persuaded that plain error review is appropriate in this case. Although the Court of Appeals has remarked upon the impropriety of so-called "were-they-lying" questions, *see Dionas v. State*, 436 Md. 97, 111 (2013), we conclude that the error is not a "blockbuster" one in this case. In *Hunter v. State*, 397 Md. 580, 596-97 (2007), during jury deliberations, the jury asked four questions of the court. The Court of Appeals concluded that at least two of the questions related to a concern about the truthfulness of a witness's testimony, following the State's use of "were they lying" questions during trial. *Id.* The Court determined that the error was not harmless in that case because it was "unable to say, beyond a reasonable doubt, that the jury was not affected by the 'were-they-lying' questions." *Id.* at 597.

In this case, however, the jury posed no questions during deliberations. Furthermore, prior to deliberations, the circuit court instructed the jury that it was the sole judge of witnesses' credibility in this case. Moreover, we are not persuaded that the "were-they-lying" questions posed to appellant constituted an error that was "'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial[,]'" *Kelly*, 195 Md. App. at 432 (quoting *Turner*, 181 Md. App. at 483), considering

that Detective Ramseur's testimony was not central to the State's case. We, therefore, decline to engage in plain error review in this case.

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