Circuit Court for Prince George's County
Case No. CT150944X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1065

September Term, 2016

KEITH DARNELL KELLY

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 4, 2017

Keith Kelly, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of first-degree assault; second-degree assault; two counts of reckless endangerment; wearing, carrying, or transporting a handgun; transporting a handgun in a vehicle; and illegal possession of a regulated firearm.[1] Appellant asks four questions on appeal:

> I. Did the trial court err in allowing the State to elicit testimony about the gun recovered from the house where he lived with his wife when a court had earlier granted appellant's motion to suppress the gun?
>
> II. Did the trial court err in allowing the State to make allegedly improper and prejudicial statements in closing argument?
>
> III. Did the trial court err in declining to give appellant's requested instruction to the jury on defense of property?
>
> IV. Did the trial court err in admitting allegedly irrelevant and prejudicial evidence?

For the reasons that follow, we shall affirm the judgments.

FACTS

The State's theory of prosecution was that on the afternoon of July 10, 2015, appellant fired a handgun at Antar Parkman, missing him, after the two had argued earlier that day. Parkman, his friend James Porter, appellant's wife, and several police officers testified for the State. The theory of defense was that appellant fired a BB gun, not a

[1] The court sentenced appellant to a 25 year term of imprisonment for first-degree assault; a consecutive and suspended five year term for reckless endangerment; and a consecutive and suspended 15 year term for possession of a regulated firearm. The court merged his remaining convictions.

firearm, at Parkman when Parkman threw a brick at his car. Appellant presented no testimonial witnesses.

On July 9, 2016, a woman, whom Parkman was dating and who lived across the street from him in District Heights, Maryland, told Parkman that appellant, who lived about a block away, had knocked on her door near midnight the night before but she had told him to go away. Several days earlier, appellant had apparently left, in her mailbox, a letter he had written to her. Around 11:00 a.m. on July 10, Parkman went to appellant's house to confront him. Parkman knocked on the door and when appellant answered, Parkman told him to stop knocking on his girlfriend's door because "it was creeping her out." According to Parkman, appellant responded by shaking his hand, apologizing, and telling him that he did not know she had a boyfriend. Parkman then left.

Around 1:00 p.m., Parkman was mowing his front yard when Jamar Porter and another friend stopped by. A short time later, Parkman noticed appellant and a man he knew from the neighborhood as "Ricky" drive past his house in a black Hyundai. The two men proceeded to drive by Parkman's house another four to five times every five or ten minutes. One time, appellant stopped in front of Parkman's house, paused for a few seconds, and then drove off.

The last time appellant drove past Parkman's house, appellant stopped a few cars past the house, jumped out of his car with a gun at his side, and ran toward Parkman saying, "I'll kill you." Appellant wore a black glove. Parkman started running away, and as he turned to look back, appellant fired the gun at him, missing him. Parkman testified that he saw a flash come out of the gun and the shot was very loud. Appellant chased Parkman a

short distance but then returned to his car while Parkman ran to a nearby police station and told them what had happened. Parkman identified appellant from a photographic array as the shooter. He denied throwing a brick or any object at appellant's car.

Jamar Porter testified that he was talking to Parkman outside his house when a man, who he later identified as appellant, drove by. Appellant proceeded to drive by several more times. Porter testified that once when appellant drove by, Parkman walked into the middle of the street to try to stop appellant's car, but appellant tried to run over Parkman. The last time appellant drove past Parkman's house he stopped a few houses past the house. As Parkman walked over, appellant exited his car with a gun. Appellant had a glove on his hand. As Parkman turned and ran, Porter heard what sounded like a gunshot and saw a flash. Porter dropped to the ground and rolled underneath his car. He spoke to the police later that day and identified appellant's picture from a photographic array as the shooter. Porter never saw Parkman throw a brick or any object at appellant's car.

The police were dispatched to the area immediately after the shooting, and appellant was stopped and arrested a short distance away in a black Hyundai. The police recovered a black glove from the driver's foot well of the car pursuant to a search incident to arrest. A 9 millimeter shell casing was found on the street in the area where appellant had fired his gun.

Appellant's wife, Melissa James-Kelly, testified that she and appellant lived together, that she owned a 9 millimeter handgun, but that on the day of the shooting appellant did not have access to her handgun because she had it on her person. A firearms expert testified that a handgun uses a small explosion to propel a bullet down its barrel, but

a BB gun does not involve an explosion: instead it uses compressed air, which does not produce a flash. The expert testified that it was not possible for a BB gun to fire the shell casing recovered.

The State introduced into evidence appellant's videotaped interview and his two written statements, made at the police station following his arrest and waiver of his *Miranda* rights.[2] Appellant wrote in his first statement that he did not know why he was being questioned for shooting at someone he did not know. An hour later, he wrote in his second statement that he and Parkman had had an angry confrontation at his house in which Parkman told him that the woman whose door appellant had earlier knocked on "was his girl, and don't let the shit happen again, cause he don't play that and he would 'fuck me up[.]'" Parkman added as he walked away, "[S]tay the fuck off my street" and appellant retorted, "I can drive where ever I want to drive." A few hours later, appellant picked up a friend, got his BB gun from his house, and drove past Parkman's house. When he drove by, Parkman stood in the street as if to stop him. Appellant sped up, and Parkman moved. It was only when Parkman threw a brick and hit the back of his car that appellant slammed on his brakes and pointed his BB gun at Parkman, who ran away.

DISCUSSION

I.

Appellant argues that the trial court erred in allowing his wife, Melissa James-Kelly, to testify about the gun she kept in their home. Appellant argues that the testimony was

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

inadmissible because a suppression court had earlier granted his motion to suppress the gun, finding that it was recovered pursuant to an illegal search of the Kelly's home. The State responds that the testimony was admissible for two reasons: the testimony was not "derived" from the illegal search of appellant's home, and under the doctrine of attenuation.

The warrant requirement of the Fourth Amendment to the United States Constitution was designed to protect citizens from unlawful searches. The exclusionary rule is a judicially created rule that prohibits the use of evidence, physical or verbal, that was gained as a result of an unlawful search or seizure. *United States v. Leon*, 468 U.S. 897, 908-09 (1984) and *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). The exclusionary rule applies to all primary and derivative evidence, known as the "fruit of the poisonous tree," that the police obtained because of the Fourth Amendment violation. *Wong Sun*, 371 U.S. at 488. The purpose of this high cost rule is to deter the police from exploiting their illegal conduct. *Leon*, 468 U.S. at 906 (citations and quotations omitted). We have stated:

> The doctrine of the "fruit of the poisonous tree" extends the scope of the exclusionary rule to bar not only evidence directly seized, but also evidence indirectly obtained as a result of information learned or leads obtained in the unlawful search; in its broadest sense it prohibits the prosecution from using in any manner, prejudicial to the accused, information derived from facts learned as a result of the unlawful acts of law enforcement agents. Once a defendant, with requisite standing, has timely and factually asserted that the challenged evidence was derived from information obtained in an unlawful search and seizure, the court must afford him an opportunity to explore in detail the circumstances under which the evidence was acquired; if the defendant establishes that the evidence resulted from an unlawful search and seizure such evidence cannot be used at all unless the prosecution can convince the trial court that it had an independent origin or that the

> information gained in the unlawful search did not lead directly or indirectly to the discovery of the challenged evidence.

Williams v. State, 231 Md. App. 156, 175–76 (2016) (quoting *Everhart v. State*, 274 Md. 459, 481-82 (1975) (citations omitted)). The test for determining if evidence is fruit of the poisonous tree is not simply whether "it would not have come to light *but for* the illegal actions of the police" but rather whether it is "come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 487-88 (italics added).

The exclusionary rule does not apply in this case because the police obtained the information elicited from James-Kelly at trial *hours before* the Fourth Amendment violation – the illegal consent search.[3] Therefore, James-Kelly's testimony regarding the gun does not come within the broader "but for" test rejected by the Supreme Court in *Wong Sun* nor was it obtained by "exploitation" of the illegal search. We explain.

Prior to trial, appellant moved to suppress the 9 millimeter handgun that the police recovered from the home he shared with his wife. Several police officers and appellant's wife, Melissa James-Kelly, testified at the ensuing hearing. From their testimony it was elicited that after the shooting, around 4:30 p.m., the police went to the Kelly's home and

[3] Although there are three judicially acknowledged exceptions to the exclusionary rule by which evidence can be shown to have been purged of the primary taint: the attenuation doctrine, the independent source test, and the inevitable discovery rule, because the information at trial was elicited from James-Kelly before the illegal search of her home, we need not address any of the three exceptions. *See Miles v. State*, 365 Md. 488, 520-22 (2001)(discussing the Supreme Court's three judicially created exceptions to the exclusionary rule).

spoke with appellant's wife. She was told she needed to leave the house and that a search warrant was "on its way." She arranged for a friend to pick her up and she was allowed to pack some items and feed her newborn child. She testified that about a half an hour after the police arrived, the following occurred:

> [The officer] asked me did I have a weapon in the house. And I said, yes. I have a registered gun in the house. He said who was it registered to? I said it was registered to myself.
>
> He asked, why did I have a registered gun? I said, I have the registered gun because my house was broken into, and I felt I needed protection.
>
> He – he asked me where I kept the gun. I proceeded to tell him, I keep the gun upstairs, but because I had a Cesarean I can't be going up and down the steps. I had to bring the gun down with me. So, he was, like, okay.

Sometime thereafter, the police told her that she could not leave the area, but she was not allowed to enter her house either. She and her child remained in limbo for several hours, waiting sometimes outside her house and sometimes inside her neighbor's house, during which she repeatedly asked whether the warrant had arrived. Around 10:30 p.m., six hours after the police arrived, an officer suggested to her that she consent to a search of the house because it was "going to take a long time for the warrant to come" and she was "just going to be, you know, out here till the warrant comes if [she didn't] sign" a form consenting to a search. She signed the consent form, escorted the officers into her home, and directed them to where she stored her 9 millimeter handgun in a drawer in the nightstand by her bed. The police seized the gun. At the conclusion of the testimony and parties' arguments, the circuit court granted appellant's motion to suppress the handgun

recovered, ruling that James-Kelly's consent to search the home was involuntary because the police had coerced her into giving consent.

On the first day of trial, defense counsel moved to prohibit the State from calling James-Kelly as a witness, arguing that examination of her about the handgun would insinuate that appellant had access to the firearm, which the suppression court had suppressed. The State advised the court that its intent was to ask James-Kelly about her owning and possessing a firearm in the home, but it would not ask her anything about the search of the home or introduce the firearm into evidence. The court denied the motion without prejudice.

On the second day of trial, the State called James-Kelly to testify. Defense counsel again objected, arguing:

> I would object because the firearm owned by her is not necessarily a firearm that my client necessarily had access to. It is also the firearm that, again, that was subject to the exclusion in this case. I think it would just prejudice the jury by asking her about it. Sort of going around in a backwards way to get in evidence of a firearm.

The State responded that her testimony was probative and not prejudicial – that she would testify that she owned a registered 9 millimeter gun that she kept at the house where she and appellant lived, but the State would not ask her about the search or introduce the gun. Defense counsel again objected, arguing:

> I think it is more prejudicial than probative given that the State could have done their procedures, investigative procedures differently. The evidence was suppressed. That should not be allow[ed] to come into evidence that she owned a nine millimeter. She is not on trial here. That is all the State is inquiring. There is no indication of whether or not [appellant] had access to it on this particular date in question and whether she owned it that day.

The court overruled the motion.

The following is the entirety of James-Kelly's testimony regarding the handgun. On direct examination the following was elicited:

> [THE STATE]: Ms. Kelly, do you own any firearms?
>
> [JAMES-KELLY]: I do own a firearm.
>
> THE STATE]: And on July 10th of 2015 did you own a firearm?
>
> [JAMES-KELLY]: Yes, I do.
>
> [THE STATE]: What kind of firearm?
>
> [JAMES-KELLY]: I own a nine millimeter, but I'm not sure why this is being brought up in this case.

On cross-examination the following was elicited:

> [THE STATE]: On the day in question, did [appellant] have access to your firearm?
>
> [JAMES-KELLY]: No, he didn't.

On re-direct examination, the following was elicited:

> [THE STATE]: Did [appellant] reside at the house with you?
>
> [JAMES-KELLY]: Yes, he do.
>
> [THE STATE]: Was the firearm kept in a locked safe?
>
> [JAMES-KELLY]: I do have a locked safe that is coded.
>
> [THE STATE]: At the time was it kept there?
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.

> [JAMES-KELLY]: No, it wasn't. Because at that time I had my Caesarian [sic] and I had to have it next to me.

On re-cross examination, the following was elicited:

> [DEFENSE COUNSEL]: You said that he did not have access. Did you have your firearm on you that day?
>
> [JAMES-KELLY]: Yes, I did.

Appellant argues that the trial court erred in allowing the State to elicit testimony from his wife regarding the handgun because the circuit court had earlier granted his motion to suppress the gun. Appellant argues that any information about the gun was obtained "by exploitation of the initial illegal search" In making this argument, appellant ignores James-Kelly's suppression hearing testimony where she testified that she told the police on the scene *hours before* the search the same information that she testified to at trial.[4] Therefore, James-Kelly's testimony that she owned a gun and whether appellant had access to the gun was not derived from the illegal search, and therefore, not fruit of the poisonous tree.

[4] We note that in her suppression hearing testimony, James-Kelly testified that she told the police that she owned a handgun but she did not specify that she owned a *9 millimeter* handgun. At trial, the State elicited that she owned a 9 millimeter handgun. To the extent that the type of gun was not disclosed to the officers before the illegal search, we find no error in admitting her testimony on this fact at trial because appellant did not raise this particular objection in his motion in limine prior to her testimony and he did not object or move to strike her trial testimony on this matter. *See* Md. Rule 4-323(a)("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."). *See also* Md. Rule 8-131 and our preservation discussion in part **II.**, *infra*.

II.

Appellant argues that the trial court erred in allowing the State to make "repeated improper and prejudicial statements" during closing argument. Specifically, appellant argues that the State argued "facts not in evidence" when it mischaracterized his wife's testimony about whether he had access to her handgun. Appellant concedes that he did not object to the statements made by the State but, citing *Lawson v. State*, 389 Md. 570, 599-605 (2005), urges us to review his appellate argument under the doctrine of plain error. This we decline to do.

As related above, James-Kelly testified that appellant did not have access to her handgun on the day of the shooting, but she also testified that her handgun was in the house on the day of the shooting and that she and appellant lived together. Appellant directs our attention to three instances during closing and rebuttal closing arguments where the State allegedly mischaracterized his wife's testimony:

> [THE STATE]: He was upset at this point. He said I know what I'll do. The same access he had to the gun, *the gun that his own wife testified was accessible to him*. The same nine millimeter handgun, not a revolver, not an automatic rifle, the same nine millimeter handgun that his wife owns, that is accessible to the defendant.
>
> * * *
>
> [The firearms examiner] testified that [the] shell casing he examined . . . [came] from a nine millimeter handgun.
>
> Who do we know has a nine millimeter handgun? *From her own testimony, the defendant's wife. Again, the same nine millimeter handgun that was present at that household July 10th. The same one that was not secured. The same one the defendant had access to the whole entire time. That is who had the nine millimeter handgun.*

* * *

> [This] is a circumstantial evidence case. We have the witnesses who saw, not just one, two. We have the defendant's house right over here. *We have his wife owning a nine millimeter that he has access to*. We have a shell casing from almost if not the exact spot where the victims testified that the shooting happened.

Appellant made no objection to the above statements.

When an unobjected error is claimed, we look to Md. Rule 8-131(a). That Rule provides: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" We have said:

> 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. 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.

Sydnor v. State, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002). Nonetheless, an appellate court should recognize unobjected to error 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). 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 have said: "[T]he notion of 'plain error' requires, as a rock-bottom minimum, a legal error by the judge, not a tactical miscalculation by defense counsel; the judge does not sit as co-counsel for the defense. Neither does the appellate court." *Nelson v. State*, 137 Md. App. 402, 424 n.5 (2001).

At the outset, we note that in reference to the three statements by the State in closing argument, the State argued only in its first statement that appellant's wife testified that appellant had access to the handgun, in its second and third statement the State argued only that appellant had access to the handgun. In any event, we decline to review appellant's argument. We note that defense counsel chose not to object to the allegedly prejudicial statement during the State's closing argument, but instead, corrected the State's misstatement in its own closing argument. Specifically, defense counsel argued: "[James-Kelly] told you that she did own a firearm, and she said that she had her firearm that day, and she said that [appellant] did not have access to the firearm that day." We also note that the trial court correctly instructed the jury that "closing arguments of the lawyers are not evidence" and that "if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence." Under the circumstances presented, we decline to overlook the lack of preservation and exercise whatever discretion given to us under Md. Rule 8-131. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003)(the five words, "We decline to do so[,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis and footnote omitted), *cert. denied*, 380 Md. 618 (2004).

III.

Appellant argues that the trial court committed reversible error when it declined to instruct on defense of property even though he allegedly produced sufficient evidence at trial to warrant the instruction. The State responds that appellant has not preserved his argument for our review because he did not timely object below. We agree with the State.

Md. Rule 4-325(a) governs instructions to the jury and provides that "[t]he court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments[.]" Rule 4-325(a). The Rule further provides: that "[n]o 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." Rule 4-325(e).

After the parties rested, a bench conference about jury instructions ensued. The court advised the parties: "I got your requests. This is what I'm inclined to give. If you have any objections or comments, now is the time to tell me." Over the next seven typed transcript pages of the charging conference, the court advised the parties what instructions it was inclined to give and both parties raised objections and requests. At the end of the conference when the court asked the parties if they had raised all their objections/requests, defense counsel stated, "I have no others." After the court instructed the jury, defense counsel never objected to the instructions given. Appellant only raised the issue of defense of property and noted an objection to the failure to give such an instruction *after the State gave its closing argument*. Under the clear language and purpose of Rules 4-325 and 8-131, appellant did not timely note his objection and has therefore waived his argument on appeal.

IV.

Lastly, appellant argues that the trial court abused its discretion when it allowed a particular excerpt from his videotaped interview with the police to be played for the jury. Appellant asserts that in "clip 4" of the videotaped interview he told the police that "he has

given people bullets." Appellant argues that this statement should not have been admitted because it was irrelevant and unduly prejudicial. The State responds that appellant's argument is not properly before us because he has not provided the content of clip 4 for our review. We agree.

The videotaped interview with the police, which lasted from around 4:30 p.m. on the day of the shooting until around 1:00 a.m. the next morning, is over eight hours long. A total of 11 clips from the interview were played for the jury; six clips were excluded when the trial court granted appellant's motion in limine as to those clips. Clip 4, which was played for the jury, was never transcribed, nor are the times when clip 4 began or ended reflected in the record. Therefore, there is no indication what part of the over eight hour long interview comprised clip 4.

Md. Rule 8-411(a)(3) states that an appellant "shall" order "a transcription of any audio or audiovisual recording or portion thereof offered or used at" trial that is "relevant to the appeal," unless the parties have stipulated to the content of the recording. Because appellant has not provided a transcript of clip 4, it is impossible for us to adequately evaluate the merits of his argument. Accordingly, appellant's argument is not properly before us. *Cf. Holt v. State*, 129 Md. App. 194, 208 (1999)(failure to provide transcript of the lower court's opinion about a severance motion waives appellants' allegation of error in denying the motion to sever the drug offenses from the murder charges for we "cannot review that which we have not seen."); *Whack v. State*, 94 Md. App. 107, 126-27 (1992)(holding that appellant's failure to provide tapes and transcripts is dispositive of contention relying on those materials), *cert. denied*, 330 Md. 155 (1993); *Jacobs v.* State,

45 Md. App. 634, 641–42(where a tape of a telephone call was played for the jury and the tape was admitted into evidence, we held that the failure to include a transcript of the tape, which was clearly appellant's burden, disposed of appellant's claim that relied on the tape), *cert.* denied, 288 Md. 737 (1980).

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.