UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1114

September Term, 2016

EDWARD BRAD WARD, JR.

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: August 8, 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.

In November 2015, Brooke Connell had her purse stolen while she was shopping at a Wal-Mart in Berlin. Connell claimed that the thief assaulted her when she grabbed her purse back as he fled the scene. Three days later, Edward Brad Ward, Jr., appellant, was arrested in connection with the incident and charged principally with theft, second-degree assault, and attempted robbery. A one-day jury trial on the charges was conducted in the Circuit Court for Worcester County. At the trial, Ward took the stand and admitted stealing the purse, but denied ever assaulting Connell. During his cross-examination by the State, Ward was questioned about his silence during his police interrogation regarding questions about the alleged robbery. The court permitted these questions over the objection of defense counsel. At the conclusion of the trial, the jury convicted Ward on all counts. After the trial, Ward moved to dismiss his counsel and filed a motion for a new trial. The trial court granted his request to dismiss his attorney, but then denied his motion for a new trial. The court then sentenced Ward to twelve years in prison.

Ward appealed, and now presents two questions for our review:

1. Did the trial court err in allowing the State to impeach Ward's testimony with evidence of his silence during a police interview?

2. Did the trial court err in refusing to consider Ward's motion for a new trial under Maryland Rule 4-331(a)?

For the following reasons, we find that the trial court did err in allowing evidence of Ward's silence. However, we conclude that any resulting error was harmless. We also reject Ward's new trial claim and affirm the judgments of the circuit court.

BACKGROUND

A jury trial was held on May 2, 2016 on Ward's attempted robbery, theft, and second-degree assault charges. At trial, several different versions of the events at issue were presented to the jury.

Brooke Connell testified that around 8:00 p.m. on November 20, 2015, she went shopping at a Wal-Mart in Berlin. As she was leaving the Wal-Mart, Connell stopped to look through a Redbox DVD rental console. While she was looking through the Redbox, Ward walked up and grabbed the purse sitting in her shopping cart and said, "I got you." Ward testified at trial that he had his friend Karen Landon drive him to Wal-Mart on the night of the incident. Ward admitted at trial that he saw Connell's purse when he entered the Wal-Mart and decided to steal it. Ward grabbed the purse and ran out into the parking lot. Connell chased after him while screaming for help.

Up to this point, the encounter was captured by video surveillance, which was played for the jurors at the trial. It was after this point that Connell and Ward's versions of the events diverged. Connell testified that Ward got into the passenger side of the car driven by Landon. Connell approached the car from the driver's side and screamed at Ward to give her purse back. She then opened the driver's side door, reached over the driver, and grabbed her purse. Connell and Ward then struggled pulling the purse back and forth. Connell testified that Ward punched her in the face, although she was able to yank the purse away from him. After she had recovered the purse, the car sped off.

Ward testified that when he first jumped into the car, Landon had to get out of the car to retrieve her keys that she had left in the lock to the trunk. When Landon stepped out of the car, Connell entered from the driver's side and climbed over the driver's seat. Connell screamed at him about how she needed the money in the purse for her kids. Ward testified that he realized the situation had gone too far and wanted to avoid a confrontation. Ward claimed that he allowed Connell to grab her purse back and never punched her. Ward thought that Connell may have been pushed by Landon or struck by the car door.

Officers took photos of Connell when they arrived at the scene. At trial, the parties argued over whether the photos showed any evidence of injury. Connell testified that her lip became more swollen and bruised after the pictures were taken when more time had passed. The dispute between Ward and Connell over whether there was any physical violence when she re-took her purse became the main issue at trial, because it provided a key element for both the attempted robbery and second-degree assault charges.

Soon after the incident, the police identified Landon as the driver based on Connell's description of the car. On November 23, 2015, the police interviewed Landon.[1] Landon told them that she had driven Ward to Wal-Mart for him to get pizza. Landon claimed that she did not know that Ward "was going to do it." While Landon

[1] A video of Landon's interview with the police was played for the jury. Landon did not testify at trial.

was waiting in her car for Ward to return from the store, she got out to repair a broken muffler. As she was working on the muffler, she heard Connell screaming. Landon ran to the front of the car as Ward yelled at her to get in. Landon claimed she got back into the car after Ward pulled a knife out and demanded that she get in. At that point, she realized that she had left her keys in the trunk and got out to retrieve them. While she was out of the car, Connell entered the car from the driver's side. Landon claimed that she did not see what happened when Connell got into the car with Ward. After Connell left, Landon got back into the car and drove around for hours before taking Ward back to her house. Soon afterwards, the police arrived at Landon's house, but she refused to answer the door. Landon told the police that she did not answer the door because Ward was still at her house and would not let her. When asked about Ward, Landon told the detective, "I don't know what he's going to tell y'all. I'm sure it's going to be a whole story because he already said he wasn't going down without a fight."

Based on Landon's interview, Ward was also charged with false imprisonment and reckless endangerment. The police then interviewed Ward. The State played the interview for the jury at trial. During the interview, the detective informed Ward that he was charged with falsely imprisoning Landon, in addition to his robbery, assault, and theft charges. Ward immediately responded by telling the detective that he never falsely imprisoned Landon. When the detective tried to ask further questions about the incident at Wal-Mart, Ward refused to answer and informed her that he was not going to incriminate himself. During his cross-examination at trial, the State asked Ward if he

ever denied committing the other crimes he was accused of. Defense counsel objected to this line of questioning, but was overruled by the court.

At the conclusion of the trial, the jury convicted Ward of attempted robbery, second-degree assault, and theft. After the trial, Ward filed a motion to discharge counsel and a motion for a new trial. The court granted the discharge of counsel, but struck the motion for a new trial as an improperly (but timely) filed *pro se* motion by a represented party. Ward later filed an amended motion for a new trial that was subsequently denied by the court.

On July 5, 2016, the court sentenced Ward to twelve years of imprisonment. Ward filed a timely notice of appeal.

DISCUSSION

I. Evidence of Silence

On November 23, 2015, Ward was arrested and taken in for questioning. Detective Jessica Collins advised Ward of his *Miranda* rights, which he waived. Ward then explained to Officer Collins:

> There may be some things I might answer, may be some that I won't. I'm not going to sit here—it's not like I'm going to play games with you, but I'm also—I mean, there's some things I might answer and some things I might not. I mean, I'm just keeping it real with you[.]

Officer Collins then informed Ward that he was being charged with robbery, second-degree assault, reckless endangerment, theft, and false imprisonment. Ward immediately responded by asking, "False imprisonment? Who did I false

imprisonment?" After Officer Collins told him it was Landon, Ward denied ever falsely imprisoning her and insisted that Landon was lying, claiming that "anything that happened was mastered by her and for her." When Officer Collins told Ward that she had video evidence of what occurred at the Wal-Mart, Ward said he was "not playing a game with" Detective Collins, and that he was going to have to go to trial. Ward went on to say, "I can't say anything that's going to incriminate myself besides I can tell you that exactly what I told you, that what [Landon] fed you was a bunch of BS." Throughout the interview, Ward never confessed to any of his alleged crimes. However, he never denied committing theft, assault, or attempted robbery.

During his testimony at trial, the State asked Ward about his interview with the police. During this line of questioning, the following occurred:

[The State]:	[ ] Do you remember Detective Collins telling you that you had some very serious charges?
[Ward]:	Yes, sir.
[The State]:	Do you remember Detective Collins telling you that among those charges were robbery, assault, theft, reckless endangerment and false imprisonment?
[Ward]:	Yes, sir.
[The State]:	**Did you ever at any time say. I didn't do the robbery?**
[Defense Counsel]:	Objection, Your Honor.
[The Court]:	Overruled.

[Ward]:	The point to that is that if I'm—if you're arresting me, I have my right not to sit there and say, oh, I did this or I did that. That's my right. So I get—my right was to tell her that I don't want to tell—I didn't want to tell her anything about it.
[The State]:	Okay.
[Ward]:	That was my right.

(Emphasis added).

On appeal, Ward contends that the court erred by allowing this evidence of his silence. On the issue of post-arrest silence, the Court of Appeals has stated:

> Evidence of post-arrest silence, after *Miranda* warnings are given, is inadmissible for any purpose, including impeachment. As a constitutional matter, allowing such evidence would be fundamentally unfair and a deprivation of due process. As an evidentiary matter, such evidence is also inadmissible. When a defendant is silent following *Miranda* warnings, he may be acting merely upon his right to remain silent. Thus, a defendant's silence at that point carries little or no probative value, and a significant potential for prejudice.

Grier v. State, 351 Md. 241, 258 (1998) (Citations and internal quotation marks omitted).

The State concedes that the trial court improperly permitted the use of Ward's silence for impeachment. However, the State argues that because other evidence of the same kind was introduced without objection, Ward's claim of error is not preserved and any error was harmless.

"Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008). Prior to Ward's testimony, the State called Detective Collins to testify. During her direct

examination, the State asked Detective Collins if she remembered the conversation she had with Ward. Detective Collins indicated that she did. The State then asked her, "Did Mr. Ward ever deny that he committed the robbery?" To which Detective Collins answered, "No." This question and answer came in without objection from defense counsel. This was the same question that Ward now claims was erroneously admitted over defense counsel's objection when it was asked at a different point in the trial. Accordingly, Ward's objection was waived because the same evidence was already admitted earlier in the trial.

Moreover, "[t]he law in this State is settled that where a witness later gives testimony, Without objection, which is to the same effect as earlier testimony to which an objection was overruled, any error in the earlier ruling is harmless." *Robeson v. State*, 285 Md. 498, 507 (1979). In *Robeson*, the defendant was convicted of murder and assault with intent to murder. *Id.* at 500. Two state's witnesses testified that the defendant shot the victims over a drug dispute. *Id.* The defendant then took the stand and denied shooting either victim. *Id.* During the cross-examination, the prosecutor asked the defendant if he ever went to the police and told them what happened. *Id.* Defense counsel's objection was overruled by the trial court. *Id.* The prosecutor continued and asked the defendant, "Did you ever tell the police what happened?" *Id.* The defendant stated that he did not do so until after he was arrested. *Id.* The prosecutor asked, "You didn't call police and say you were innocent?" *Id.* at 501. Again, he answered no. *Id.*

The Court of Appeals in *Robeson* assumed for the purposes of the appeal that the trial court erred in overruling the objection. *Id.* at 504. However, based on the evidence that had already been elicited without objection, the Court held that it was still harmless error. *Id.* at 504. The Court explained its holding:

> Prior to the particular question at issue, the defendant admitted that he knew that there was a warrant out for his arrest, that he was hiding from the police, and that he was hiding because he did not want to get arrested. There was no objection to this testimony. Then the question concerning pre-arrest silence, to which there was an objection, was asked. However, the question was in the context of whether the defendant went "down to the police" to tell them that he had nothing to do with the crime. If the defendant were hiding throughout this period so that he would not be arrested, as he had previously testified without objection, it is obvious that he did not "Go down to the police and tell them" anything. **In light of the context in which it was asked, the question to which objection was made added nothing to what had already been admitted. Thus, it did not harm the defendant beyond whatever harm may have resulted from the prior questioning**.

Id. at 506-07 (Emphasis added).

In the instant case, Ward's entire interview with Detective Collins was played for the jury. The jury heard the detective tell Ward about his charges and heard that he did not deny committing them, with the exception of the false imprisonment charge. The jury also heard him tell the detective that he refused to incriminate himself by answering her questions. Therefore, the jurors already knew that Ward never told the detective that he did not do the robbery. Much like *Robeson*, "[i]n light of the context in which it was asked, the question to which objection was made added nothing to what had already been

admitted." *Id.* at 507. Accordingly, any error that came from admitting the question did not result in harm to Ward.

II. Motion for New Trial

Md. Rule 4-331 provides, in relevant part:

> **(a) Within Ten Days of Verdict.** On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.
>
> **(b) Revisory Power.**
>
> > *(1) Generally.* The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:
> >
> > (A) in the District Court, on motion filed within 90 days after its imposition of sentence if an appeal has not been perfected;
> >
> > (B) in the circuit courts, on motion filed within 90 days after its imposition of sentence. Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Motions for a new trial filed within ten days of a verdict are reviewed under Rule 4-331(a). The language of the rule simply provides that the court can grant a new trial if it is "in the interest of justice." "The list of possible grounds for the granting of a new trial by the trial judge within ten days of the verdict is virtually open-ended." *Love v. State*, 95 Md. App. 420, 427 (1993). "This broad base for awarding a new trial is tightly circumscribed by the timeliness requirement that the Motion be filed 'within ten days after a verdict.'" *Id.* "Except for the special case of newly discovered evidence, the ten-day filing deadline is an absolute." *Jeffries v. State*, 113 Md. App. 322, 332 (1997).

Motions filed within 90 days of sentencing are reviewed under Rule 4-331(b). Under Rule 4-331(b), the court can only grant a new trial if it finds "fraud, mistake, or irregularity."

In the instant case, the court only considered Ward's motion for a new trial under Rule 4-331(b) and denied it. On appeal, Ward contends that the court erred by not considering his motion for a new trial under the more permissive language of Rule 4-331(a).

The jury reached its verdict on May 2, 2016. The day after the verdict, Ward sent a letter to the court asking to dismiss his trial counsel. The letter was filed on May 6, 2016. On May 11, 2016, Ward filed a *pro se* motion for a new trial alleging an inconsistent verdict, ineffective assistance of counsel, and juror misconduct. This motion was within the ten-day period required for Rule 4-331(a); however, Ward was still represented by counsel at the time. "Every pleading and paper of a party represented by an attorney shall be signed by at least one attorney who has been admitted to practice law in this State[.]" Md. Rule 1-311(a). "The signature of an attorney on a pleading or paper constitutes a certification that the attorney has read the pleading or paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for improper purpose or delay." Md. Rule 1-311(b). In other words, represented parties are not permitted to file *pro se* pleadings with the court. "If a pleading or paper is not signed as required . . . it may be stricken and the action may proceed as though the pleading or paper had not been filed." Md. Rule 1-311(c).

On May 18, 2016, a hearing was held on Ward's motion to discharge counsel. At the beginning of the hearing, the court told Ward that it would only consider his motion to dismiss counsel. The court told Ward that it would not consider his *pro se* motion for a new trial, because he submitted an unsigned pleading while he was still represented by counsel. By the plain language of the Rule, Ward's *pro se* motion was in violation of Rule 1-311, and the court properly exercised its discretion to disregard it pursuant to Rule 1-311(c). Ward did not object when the court struck his *pro se* motion and told him that it would need to be refiled.

At the conclusion of the hearing, the court discharged Ward's defense counsel. Ward then asked if he could hand file his motion for a new trial in court. When the court said no, Ward asked if he was going to miss the filing deadline. The court told Ward that the "trial is not concluded until sentencing is completed." The court appears to have misstated the rule on motions for a new trial as the timing for a motion for a new trial is related to the verdict, not the sentencing. Nevertheless, this hearing was already more than ten days after the verdict; therefore, the court's statement had no effect on the timeliness of Ward's filing.

On June 13, 2016, Ward filed an amended motion for a new trial. On July 5, 2016, the court held a hearing on the motion. The court reiterated that Ward's initial motion for a new trial was a nullity, because it was filed *pro se* while he was still represented by counsel. Therefore, the court declined to consider the motion under Rule 4-331(a), because it was not filed within ten days of the verdict. The court found that it

was also premature under Rule 4-331(b) because Ward had not been sentenced yet, but stated that it would consider the motion anyway. The court declined consideration of the ineffective assistance of counsel claim in Ward's motion, finding that it was a post-conviction remedy.

At no point did Ward object to the court's rulings. Instead, Ward acquiesced and proceeded to argue that his motion should be granted under Rule 4-331(b). "Both the Court of Appeals and this Court have held that when a party acquiesces in the court's ruling, there is no basis to appeal from that ruling." *Green v. State*, 127 Md. App. 758, 769 (1999). Accordingly, any argument that the court erred by not reviewing his motion under Rule 4-311(a) is not preserved.

Nevertheless, even if the court had erred in not considering the motion under 4-331(a), Ward's claims did not warrant relief. At the hearing, Ward argued that it was an inconsistent verdict to find him guilty of theft and attempted robbery. Ward relied primarily on *Gray v. State*, 10 Md. App. 478 (1970). In *Gray*, this Court noted that "if subsequent to the larceny the owner should come upon the thief and be prevented from retaking his property by violence, the thief would be guilty of larceny and assault, but not robbery." *Id.* at 481. Although that language supports Ward's argument, it has since been overruled by later cases. In *Burko v. State*, this Court acknowledged that "when one commits a larceny and then displays a weapon so as to overcome the resistance of the witness, the crime is then elevated to robbery." 19 Md. App. 645, 657-58

(1974), *vacated on other grounds*, 422 U.S. 1003 (1975). The Court of Appeals further clarified this position in *Ball v. State*:

> We agree that the better view is that the use of force during the course of a larceny in order to take the property away from the custodian supplies the element of force necessary to sustain a robbery conviction. The mere fact that some asportation has occurred before the use of force does not mean that the perpetrator is thereafter not guilty of the offense of robbery.

347 Md. 156, 188 (1997). Based on these cases, the jury's verdict was not inconsistent. Ward committed theft when he initially stole the victim's purse and ran off. When the victim attempted to retake her purse and Ward punched her, there was sufficient evidence for an attempted robbery conviction.

As for Ward's ineffective assistance of counsel claim, this Court has noted that "[n]ormally, appellate review of a trial attorney's conduct is best done in post-conviction proceedings, rather than on direct appeal, where a trial-like setting will provide the opportunity to develop a full record concerning relevant factual issues, particularly the basis for the challenged conduct by counsel." *Ruth v. State*, 133 Md. App. 358, 367 (2000) (internal quotation marks omitted).[2] Accordingly, trial courts have the discretion to decline to review ineffective assistance claims at the motion for a new trial stage. The

[2] In *Ruth*, this Court did review an ineffective assistance of counsel claim that had been raised in a motion for new trial. 133 Md. App. at 367. However, in that case the trial court heard testimony and accepted evidence regarding appellant's ineffective assistance of counsel claim at the motion hearing. Therefore, there was a full record for the appellate court to review. *Id.* No such record exists here.

court's exercise of discretion in this case was proper because the trial record was insufficient as to this issue and Ward's trial counsel was not even present at the motion for a new trial hearing due to his discharge at the previous hearing.

The final allegation in Ward's motion was juror misconduct. Ward claimed that one of the jurors "made contact with the victim" during the trial and that they were "mouthing words to each other." Although Ward claims that both he and his attorney were aware of this at the time it occurred, this issue was never raised at trial. Accordingly, this error was not preserved at trial. *Torres v. State*, 95 Md. App. 126, 134 (1993) ("A post-trial motion cannot be permitted to serve as a device by which a defendant may avoid the sanction for nonpreservation.").

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