

Circuit Court for Baltimore City  
Case No. 1160490003

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1632

September Term, 2016

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TERMAINE BAILEY

v.

STATE OF MARYLAND

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Nazarian,  
Arthur,  
Friedman,

JJ.

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Opinion by Nazarian, J.

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Filed: September 25, 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.

Termaine Bailey was charged in the Circuit Court for Baltimore City with armed robbery, conspiracy to commit armed robbery, and numerous related offenses. After waiving his right to a jury trial, Mr. Bailey was tried by the circuit court and convicted of robbery, second-degree assault, accessory after the fact, and related offenses. The trial court merged some of the convictions for sentencing purposes, but not others.

On appeal, Mr. Bailey contends that the circuit court erred by failing to consider the probative value of the complainant's prior convictions in assessing his credibility, by refusing to grant a five-minute recess for counsel to run a criminal history check on the complainant, and by imposing separate sentences for his convictions for accessory after the fact and second-degree assault, which, he submits, should have merged for sentencing purposes with his robbery conviction. The State counters that Mr. Bailey's first contention is not preserved for appellate review and that the court did not abuse its discretion in denying defense counsel's request for a five-minute recess, but concedes that the circuit court erred in imposing separate sentences for the accessory after the fact and second-degree assault convictions. We agree with the State, affirm the convictions, vacate the sentences imposed for the accessory after the fact and second-degree assault, and remand for correction of Mr. Bailey's commitment record.

## **I. BACKGROUND**

Mr. Bailey was charged with armed robbery, conspiracy to commit armed robbery, and numerous related offenses. He waived his right to a jury and elected a bench trial, which began on August 25, 2016 and ended the next day.

During the trial, Marcus Trent testified that he and Mr. Bailey had known each other for a few years and had worked together at two different businesses. According to Mr. Trent, he sometimes loaned money to Mr. Bailey and paid Mr. Bailey to drive him places because he did not own a car. Mr. Trent was in the process of looking for a car, though, and Mr. Bailey had taken him to several dealerships to shop for one.

On January 9, 2016, Mr. Trent asked Mr. Bailey to drive him to a car dealership in Prince George's County where Mr. Trent had been negotiating to purchase a 7-Series BMW. Mr. Trent brought \$3,000 in cash, which he carried in duffle bag, for a down payment. When they arrived at the dealership, Mr. Trent went inside while Mr. Bailey waited outside in his car.

The negotiations took longer than expected, and at one point Mr. Bailey came into the dealership to find out why it was taking so long. Mr. Trent explained that he was still waiting for approval to purchase the car. Mr. Bailey asked Mr. Trent how much money he had with him for a down payment and Mr. Trent told him he had \$3,000. Mr. Bailey assured Mr. Trent that he would be able to purchase the car with that amount of money as a down payment. As it turned out, though, the car salesman explained to Mr. Trent that due to his poor credit, he would not be able to purchase the 7 series BMW unless he gave the dealership another \$1,000 toward the down payment. The negotiations ultimately failed, and Mr. Trent left with Mr. Bailey.

After leaving the dealership, Mr. Bailey told Mr. Trent that he had to pick up a friend and take him to the west side of Baltimore. Soon after, Mr. Bailey stopped the car and a

short man wearing a hood and a ski mask that covered his mouth got in the back seat. By itself, this development apparently didn't arouse suspicion. Then Mr. Bailey pulled over to a side street and stopped. Mr. Trent heard "rumbling" from the back seat and then the man grabbed him by the neck and said, "I'll kill you, I'll kill you, I'll kill you." Mr. Trent asked Mr. Bailey what was "going on?" but Mr. Bailey didn't respond. The man in the back seat started getting more aggressive and Mr. Bailey pulled out something that looked like an "old Western hand gun[]." Mr. Trent didn't see the silver part of the gun, but felt something hard on his ribs.

Realizing the situation had become serious, Mr. Trent opened the car door and started to get out when Mr. Bailey grabbed the duffle bag. Once outside, Mr. Trent continued to struggle with the man from the back seat, who ultimately fled and took Mr. Trent's cell phone with him. Mr. Trent chased him for a few seconds, but was prevented by his asthma from chasing him further. Mr. Trent realized that his bag was gone and ran after Mr. Bailey, who drove away. Mr. Trent saw Mr. Bailey's car turn left and then stop to pick up the man who had been in the back seat. Mr. Trent flagged down a police officer to report the robbery.

During cross-examination, Mr. Bailey's counsel discovered that the State had provided the defense with the incorrect spelling of Mr. Trent's first name—"Markus" rather than "Marcus." Defense counsel asked the court for a five-minute recess to run a criminal history check with the correct spelling of the witness's name, but the court denied the request.

Mr. Bailey also testified, and he disputed Mr. Trent's version of events. He explained that he and Mr. Trent were gambling buddies; they would pool their money together to gamble and share their winnings. According to Mr. Bailey, the two of them had pooled their money the night before the alleged incident and Mr. Bailey had won \$6,000 playing poker. Mr. Bailey left the casino without giving Mr. Trent his half of the money. The next day, Mr. Trent was angry because he did not receive his share of the gambling proceeds and he needed the money to purchase a car. Mr. Bailey thought that things were fine between the two of them, and denied that any kind of robbery had occurred.

At the conclusion of the trial, the court found Mr. Bailey guilty of robbery, conspiracy to commit robbery, second-degree assault, accessory after the fact, and related offenses. In the course of explaining its ruling, the court found Mr. Trent's version of events more credible than Mr. Bailey's and indicated that it did not consider impeachable convictions when determining a witness's credibility:

[Mr. Trent] did, in fact, admit that he does have some impeachables, and I'm going to tell you, for this Court impeachables for a court trial [sic], because I'm a judge and I know how to separate stuff, I really don't care what your impeachables are. I really am not impressed one way or the other with impeachables. If you had one last week, if you had one 15 years ago, it doesn't impress me. I'm only concerned if you are facing a jury that the jury would get to hear that which they are entitled to hear. This Court is not impressed one way or the other and this is—and I don't make my ruling based on the fact that someone must not be telling me the truth or must be telling me the truth because they have convictions of some sort. I never—don't give credence to that in any way whatsoever so those things on both sides of the table, whether

it was brought out or it wasn't. I understand that there are and were impeachables, although I didn't hear what they were, about Mr. [Trent]<sup>1</sup>, it would not have concerned me one way or the other. I listen to the evidence and I make my decision based on what I heard here in Court and the evidence that's presented to me not somebody's record that they had.

The court sentenced Mr. Bailey to twelve years in prison for robbery, ten years for second-degree assault, and five years for the accessory after the fact conviction, with the two latter sentences to run concurrently with the robbery sentence. This timely appeal followed.

## II. DISCUSSION

Mr. Bailey raises three contentions on appeal.<sup>2</sup> *First*, he contends that the circuit court erred in failing to consider the probative value of Mr. Trent's prior convictions. *Second*, he contends that the circuit court erred in refusing to grant defense counsel a five-minute recess to check Mr. Trent's criminal history using the correct spelling of his first name. And *third*, he contends that the circuit court erred in imposing separate sentences for his convictions for accessory after the fact and second-degree assault, which should

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<sup>1</sup> The court actually used Mr. Bailey's name, but the context makes clear that it meant to refer to Mr. Trent.

<sup>2</sup> In his brief, Mr. Bailey phrases the Questions Presented as follows:

1. Did the trial court fail to exercise or abuse its discretion in refusing to consider the probative value of the complainant's prior convictions?

2. Did the trial court fail to exercise or abuse its discretion in refusing to grant defense counsel a five-minute recess to ameliorate a state mistake in order to cross-examine the complaining witness adequately?

3. Did the trial court err in imposing a separate sentence for Mr. Bailey's conviction for accessory after the fact?

4. Did Mr. Bailey's second-degree assault conviction merge into his robbery conviction for sentencing purposes?

have merged for sentencing purposes with his robbery conviction. The State agrees with his third argument.

**A. Mr. Bailey’s Contention That The Court Abused Its Discretion In Failing To Consider The Probative Value Of Mr. Trent’s Prior Convictions Is Not Preserved For Appellate Review And Does Not Warrant Plain Error Review.**

Mr. Bailey’s *first* contention is that the circuit court abused its discretion by failing, he claims, to consider the probative value of Mr. Trent’s prior convictions. The State counters that the issue is not preserved for appellate review because defense counsel did not object to the court’s purported abuse of discretion during the trial. *See* Md. Rule 8-131(a); *Taylor v. State*, 381 Md. 602, 612 (2004) (“Maryland appellate courts have consistently held that, pursuant to Maryland Rule 8-131(a), and its predecessors, Rules 885 and 1085, appellate courts will not ordinarily decide issues not raised or decided by a trial court.” (citations omitted)). Mr. Bailey concedes that the issue was not raised in the circuit court, but asks us to exercise our discretion and invoke plain error review.

To be sure, appellate courts have discretion under Md. Rule 8-131(a) to address an unpreserved issue, but we do so rarely:

It is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court’s ruling, action, or conduct be presented in the first instance to 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.

*Chaney v. State*, 397 Md. 460, 468 (2007). “[A]ppellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.” *Kelly v. State*, 195 Md. App. 403, 432 (2010) (citations omitted). Accordingly, we will review an unpreserved error under the plain error doctrine “only when the unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.” *Id.* at 432 (citations omitted). And an appellate court need not provide “justification nor explanation” when it declines to take notice of plain error. *Morris v. State*, 153 Md. App. 480, 507 (2003).

We disagree that the court, in explaining the relative (and negligible) weight it gives to impeachable convictions in bench trials, failed altogether to consider them. But even if we agreed that the court erred, that sort of error does not “weig[h] strongly in favor of recognizing plain error review.” Plain error is “error which vitally affects a defendant’s right to a fair trial.” *Richmond v. State*, 330 Md. 223, 236 (1993). Maryland Rule 5-609<sup>3</sup> permits a party to impeach a witness with certain prior convictions for the purpose of attacking a witness’s credibility, but the fact-finder is free to accord them whatever weight

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<sup>3</sup> Md. Rule 5-609 provides in pertinent part:

(a) **Generally.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness’s credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.



it finds appropriate. And it is not for us to say that a fact-finder erred by giving too much or too little weight to a conviction or set of convictions, even in a case that turns on credibility. It's true that this case turned largely on credibility, but the court was free to make its credibility determination from the totality of the evidence presented at the trial, and was not compelled to disbelieve Mr. Trent simply because he had a criminal record.

We acknowledge that a trial court's failure to exercise discretion can be an abuse of discretion. *Colter v. State*, 297 Md. 423, 426 (1983). But even if we found that the circuit court abused its discretion in failing to consider Mr. Trent's prior convictions, we still would decline to invoke plain error review because this is not the sort of error that would have deprived Mr. Bailey of a fair trial. *See Diggs v. State*, 409 Md. 260, 286 (2009) (“We will intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.” citation omitted); *compare Chaney v. State*, 397 Md. 460 (invoking plain error review of an order requiring restitution as a condition of probation because the outcome could affect hundreds of future cases and implicated important Constitutional and statutory rights); *Diggs v. State*, 409 Md. 260 (2009) (exercising plain error review when the trial judge's “egregious and repeated behavior reflecting partiality and bias” denied the defendants a right to a fair and impartial trial); *Richmond v. State*, 330 Md. 223 (1993) (exercising plain error review when the trial court gave an erroneous jury instruction that vitally affected the defendant's right to a fair trial).

**B. The Circuit Court Did Not Abuse Its Discretion In Denying Mr. Bailey’s Counsel’s Request For A Brief Recess.**

During his cross-examination of Mr. Trent, defense counsel discovered that the State had provided him with the incorrect spelling of Mr. Trent’s first name. Counsel requested a brief, five-minute recess so that he could check Mr. Trent’s criminal history with the correct spelling (“Marcus” instead of “Markus”), but the court denied the request:

[DEFENSE COUNSEL]: Your Honor, Court’s indulgence for a moment. I’d ask to take a brief recess. This is part of the problem that I have with regard to his record. The State has presented its spelling of his name. It’s been misspelled.

THE COURT: Okay.

[DEFENSE COUNSEL]: So I want the opportunity to review something before I continue with the cross-examination.

THE COURT: No, sir. No, sir. You all lived with this case since at least January, at least January, so whatever you all were needing to check out, that could be checked out.

Mr. Bailey contends that the circuit court failed to exercise its discretion or abused its discretion by denying his counsel’s request. We disagree.

The decision to grant or deny a continuance is left to the sound discretion of the trial court. *Abeokuto v. State*, 391 Md. 289, 329 (2006) (citations omitted). Absent abuse of discretion, appellate courts will not disturb a trial court’s denial of a request for a continuance. *Id.* The Court of Appeals has defined abuse of discretion as “discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.*

Citing *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 243 (2011), Mr. Bailey argues that the court’s denial of a continuance prohibited him from

cross-examining Mr. Trent adequately. But this case is not *Neustadter*. There, the plaintiff requested a continuance because his religious beliefs prohibited him, or anyone advocating on his behalf, from participating in the trial on a religious holiday. *Neustadter*, 418 Md. at 236. The court denied the request and the trial proceeded without the plaintiff or his attorney. *Id.* at 237. The Court of Appeals found that the trial court abused its discretion because it failed to reasonably accommodate the plaintiff’s right to engage in religious conduct and to meaningfully participate in his trial. *Id.* at 244.

Here, by contrast, the denial of a continuance to run a criminal history check did not “greatly prejudice” Mr. Bailey, as he contends. Mr. Trent already had admitted that he had been incarcerated and that he had engaged in impeachable criminal conduct, including fraud, theft, and unauthorized use. Moreover, there’s no indication that additional investigation would have revealed relevant, non-cumulative impeachable convictions.

We agree that “due diligence combined with surprise” can justify a continuance, *Touzeau*, 394 Md. 654, 670 (2006) but are unpersuaded that in this case, the “surprise” misspelling of Mr. Trent’s first name was coupled with due diligence. As the circuit court noted, defense counsel had been involved in the case for at least seven months and “it’s not hard with Marcus to go from M-A-R-K-U-S to M-A-R-C-U-S.” Mr. Bailey and Mr. Trent had known each other for many years, had worked together, and spent a lot of time together. Due diligence could have revealed the correct spelling of Mr. Trent’s first name, and we find no error in the court’s decision to deny defense counsel’s request for a brief continuance.

**C. The Circuit Court Erred In Imposing Separate Sentences For Mr. Bailey’s Accessory After The Fact And Second-Degree Assault Convictions.**

At the conclusion of the trial, the circuit court found Mr. Bailey guilty of, among other offenses, robbery, second-degree assault, and being an accessory after the fact. The court imposed a twelve-year prison sentence for robbery, a five-year prison sentence for accessory after the fact, and a ten-year prison sentence for second-degree assault, with the latter two sentences to run concurrently with the sentence for robbery. Mr. Bailey contends that the circuit court erred in imposing separate sentences for accessory after the fact and second-degree assault. The State concedes, and we agree, that the sentences for those convictions should have merged for sentencing purposes with Mr. Bailey’s sentence for robbery.

“*An accessory after the fact* is one who, with knowledge of the other’s guilt, renders assistance to a felon in the effort to hinder detection, arrest, trial or punishment.” *State v. Hawkins*, 326 Md. 270, 281 (1992) (emphasis in original) (citation omitted). A principal to a crime, on the other hand, “is one who actually commits a crime, either by his own hand, or by an inanimate agency, or by an innocent human agent.” *Id.* at 280 (citation omitted). In *State v. Hawkins*, the Court of Appeals held that “although a verdict of guilty of being an accessory after the fact may stand with a verdict of guilty of the substantive offense when the evidence is sufficient to sustain them, a separate sentence may not be imposed on the conviction of the crime of accessory after the fact.” 326 *Md.* at 294. That is exactly what happened here: the circuit court found Mr. Bailey guilty of the substantive

offense of robbery as well as being an accessory after the fact, and erred by imposing separate sentences for the two convictions.

The court erred as well when it imposed separate sentences for robbery and the second-degree assault. A court violates the Double Jeopardy Clause of the Fifth Amendment if it imposes multiple punishments for the same offense. *Twigg v. State*, 447 Md. 1, 14 (2016) (citation omitted). If multiple offenses are deemed to be the same for double jeopardy purposes, the convictions merge. *Newton v. State*, 280 Md. 260, 265 (1977). To determine whether two offenses are the same for double jeopardy purposes, we apply the required evidence test, *Snowden v. State*, 321 Md. 612 (1991), which looks at whether one or both offenses require proof of a fact the other does not:

If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

*Twigg*, 447 Md. at 13 (citations omitted).

In this case, the robbery and second-degree assault offenses are the same under the required evidence test: robbery is defined as “the felonious taking and carrying away of the personal property of another from his person or in his presence, by violence or putting in fear, or, more succinctly, as larceny from the person, accompanied by violence or putting in fear.” *Ball v. State*, 347 Md. 156, 184 (1997) (citation omitted); MD. CODE (2002, 2012 Repl. Vol.), § 3-401 (e) of the Criminal Law Article; second degree assault is either: “1) intent to frighten; 2) attempted battery; or 3) battery.” *Thompson v. State*, 229 Md. App.

385, 413 (2016) (internal quotations and citations omitted). Relevant here are the first and third types of assault, “intent to frighten” and “battery.” Robbery includes all of the elements of both of those types of assault with the additional element of larceny. The second-degree assault conviction here arose out of the same conduct that formed the basis of the robbery conviction, and amounted to the same offense—Mr. Bailey picked up a masked man who grabbed Mr. Trent by the neck so they could take his money. As such, the offenses should have merged for sentencing purposes, so we vacate the sentences for accessory after the fact and second-degree assault, and remand so that Mr. Bailey’s commitment record can be corrected.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED EXCEPT AS TO SENTENCES FOR ACCESSORY AFTER THE FACT AND SECOND-DEGREE ASSAULT, WHICH ARE VACATED, AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ASSESSED 75% TO APPELLANT, 25% TO THE MAYOR AND CITY COUNCIL OF BALTIMORE.**