Circuit Court for Baltimore City
Case Nos. 115126012 & 115126013

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1661

September Term, 2016

DONNELL WALKER

v.

STATE OF MARYLAND

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: July 18, 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.

Following a five-day trial, a jury sitting in the Circuit Court for Baltimore City convicted appellant Donnell Walker of first-degree murder and use of a firearm in a crime of violence for the death of Victor Gwaltney, and reckless endangerment related to the shooting of Corey Staley. Appellant presents three questions on appeal:

1) Did the lower court err in failing to allow a continuance, or issue process, to permit Mr. Walker to call one of the alleged victims – who was *en route* to testify – as a defense witness?

2) Did the lower court err in allowing a non-expert witness to testify as to the function and capability of a "revolver" pistol?

3) Did the lower court err in accepting inconsistent verdicts?

We perceive no error and affirm.

BACKGROUND

At approximately 1:00 p.m. on March 25, 2015, Philip Coleman was "foraging" for cans and other pieces of metal near the 4100 block of 10th Street in Baltimore. As Coleman approached 10th Street, he observed a man whom he recognized as appellant standing near a tree. Coleman initially thought appellant was urinating, but upon "focusing," saw that appellant was holding a silver revolver. Coleman approached appellant and told him to put the gun away, to which appellant responded, "Hey, Pop, how you doing?" Appellant then mounted a bicycle and pedaled away from Coleman on 10th Street toward a group of people. Coleman returned to his foraging, but soon heard a "pop." Turning to the sound, Coleman observed appellant firing at the group of people. Coleman watched a man from the group, later identified as Gwaltney, fall to the ground as appellant continued to shoot at him. Appellant then "fumbled" with the gun before firing into a group of fleeing

bystanders. Coleman heard someone from the crowd scream that he had been shot. Later that day, Coleman identified appellant in a photographic array as the shooter.

Frances Ranwick, a resident of nearby Mariban Court, also witnessed the shooting while standing outside of her house. Like Coleman, Ranwick saw appellant standing near a tree prior to the shooting and thought he was urinating. Ranwick then observed appellant pedal a bicycle toward a group of people, leap off the bicycle, and shoot a person in the head. When the man fell, appellant stood over him and continued to shoot him. Appellant ran past Ranwick as he fled the scene. Ranwick also identified appellant as the shooter in a photographic array.

Police officers responded to the scene, and the two shooting victims were transported to the hospital. Gwaltney was pronounced dead the next day; Staley sustained a non-fatal injury to his abdomen. Dr. Jack Titus, an expert qualified in forensic pathology, performed an autopsy on Gwaltney. Dr. Titus determined that Gwaltney was shot six times and that some of the wounds exhibited signs of stippling, signifying that the shooter fired from close range.

Pursuant to the police investigation, Thomas Hebert, an expert qualified in DNA analysis, analyzed swabs taken from the handlebars of a bicycle recovered from the scene. As to the right handlebar, Hebert concluded that there were at least four contributors to the DNA evidence, but he could not make any comparisons to any known samples. On the left handlebar, however, Hebert determined that there was one major contributor and two minor contributors to the DNA profile. Hebert concluded with 99.9% accuracy that appellant was the major contributor to the DNA profile on the left handlebar of the recovered bicycle.

The State charged appellant with first- and second-degree murder as to Gwaltney, and attempted first- and second-degree murder, first- and second-degree assault, and reckless endangerment as to Staley. The State also charged appellant with use of a handgun in the commission of a crime of violence, carrying a handgun, and discharging a handgun within city limits.

At trial, appellant presented two alibi witnesses. Appellant's sister, Blair Walker ("Blair"), testified that at the time of the crimes, she lived with appellant, her mother, and two sisters. She told the jury that, on the afternoon of March 25, 2015, she was at home having a conversation with one of her sisters when she received a phone call informing her that her brother had been shot. Blair went to appellant's room and found him watching television in his underwear. Appellant's mother, Tina Walker ("Tina"), testified that, upon learning that Gwaltney had been shot, she returned home and told appellant the news. Tina stated that appellant started crying. Tina then went to the scene of the crime, while Blair and appellant remained at home.

The jury convicted appellant of first-degree murder of Gwaltney and use of a firearm in a crime of violence, as well as reckless endangerment of Staley. The court sentenced appellant to life imprisonment for murder, suspending all but fifty years; appellant received concurrent sentences of fifteen years for use of a firearm in a crime of violence and five years for reckless endangerment. This appeal followed. Additional facts shall be included as necessary to resolve the issues presented.

DISCUSSION

I.

Appellant first contends that the trial court infringed upon his right to present a defense by failing to grant a continuance or issue compulsory process to require Staley's presence to testify. Specifically, appellant maintains that the court abused its discretion in not granting a continuance because Staley was en route, and a continuance would have been reasonable under the circumstances. Appellant further argues that once Staley arrived, the court erred in refusing to issue compulsory process in order to ensure Staley's presence in court the next day. We hold that appellant waived these contentions.

Appellant began the presentation of his case shortly after 2:11 p.m. on July 28, 2015, the third day of trial. At that time, appellant informed the court he would call Blair and Tina as witnesses, and that Staley and a Kantera Johnson were potential defense witnesses. Appellant's counsel indicated that he was unsure whether Staley would testify because "he is still on [sic] route." At 3:28 p.m., appellant attempted to call Staley as a witness. Staley was not present, but appellant's counsel proffered that he was "in traffic" and "should be here momentarily." Accordingly, the court took a brief recess to allow for Staley's arrival.

When the court reconvened at 3:48 p.m., Staley had still not arrived. The parties proceeded to enter a stipulation on the record, after which appellant called Detective Dallessandro as a witness. At the conclusion of Detective Dallessandro's testimony, appellant once again called Staley, who was still not present. Appellant's counsel represented to the court that Staley was in the courthouse and would be arriving "in another minute."

Appellant's counsel then engaged in a brief colloquy with appellant concerning his right to testify or remain silent. After another pause, the court permitted counsel to search for Staley in the hallway, noting that it was 4:12 p.m. The court stated that it would give counsel until 4:15 p.m. for Staley to arrive. After a pause, counsel informed the court that Staley was "very close, but not in the building." The following colloquy then occurred:

> THE COURT: Calling Corey Staley. You may shout out one more time in the hallway. Officer, please shout out one more time in the hallway, Corey Staley, Corey Staley. It is now 4:19. At 3:29 this afternoon, we called Corey Staley for the first time. He was not present. I was surprised by counsel of his understanding that his witness was perhaps 30 minutes away. Through successive stalls and breaks, uh afforded every reasonable opportunity for the defense to secure the presence of Corey Staley, a name that's not unfamiliar to the Court and to the jury. At 4:05, we were advised that he was at the front door. It is now uh, pretty close to 4:20 and uh, the Court's patience and allowance given the time of day and the availability of the jury is depleted. Um, Corey Staley has been called one more time. Has not responded to the call. Are there any further proofs to be offered by the defense?
>
> [APPELLANT'S COUNSEL]: Your Honor, uh, I can only say I've been relaying the information that's been relayed to me.
>
> THE COURT: Are there any further proofs to be offered?
>
> [APPELLANT'S COUNSEL]: Other than the testimony of Corey Staley, a material witness from both perspectives – –
>
> THE COURT: Does the Defense rest?
>
> [APPELLANT'S COUNSEL]: That would be the case with that – –
>
> THE COURT: Thank you.

The court then informed the jury that the evidence phase of the trial had concluded and dismissed the jury for the day.

The parties proceeded to review jury instructions. During this process, Staley arrived:

> [APPELLANT'S COUNSEL]: Here's Mr. Staley.
>
> THE COURT: A little too late.
>
> [APPELLANT'S COUNSEL]: Thank you for making an effort to arrive here, sir. Unfortunately, the trial evidentiary phase has ended.
>
> MR. STALEY: What's going down?
>
> [APPELLANT'S COUNSEL]: I understand that you made a big effort to be here from Delaware. Nonetheless, the Court waited quite a long time. At this point, we are moving forward although I would ask the Court to consider as much as he's now in the City of Baltimore, um.
>
> THE COURT: The evidence has been completed. The defense case has rested. The State has opted not to put on any rebuttal evidence. We are going to proceed with the instructions of law tomorrow morning.
>
> [APPELLANT'S COUNSEL]: Over a respectful objection.

Later, appellant's counsel raised the possibility of Staley testifying the following morning. The court stated that it would require legal authority to permit Staley to testify and invited appellant's counsel to email the court and opposing counsel with any research before court the next day.

At the beginning of court the next morning, the following colloquy occurred:

> THE COURT: Is there a motion to . . . address the . . . presentation of Mr. Staley?
>
> [APPELLANT'S COUNSEL]: There is not at this juncture, Your Honor. He is as present today as he was at the appropriate time yesterday. In other words, not. We will submit on that.
>
> THE COURT: And I wanted to note for the record because I don't think it was clear, but I excused the . . . jury between 4:20 and 4:25 yesterday without

> Mr. Staley having appeared. But while we were reviewing the jury instructions and before our recess for the day outside of the presence of the jury, before our recess at 4:50, Mr. Staley did arrive. Um, and I had said something to the affect [sic] of, if you were expecting, if [appellant's counsel] was expecting to . . . pursue the presentation of Mr. Staley . . . I'd be anxious to receive whatever he wanted to send to me by email with a copy to [the State], of course. But I didn't receive anything by email. Uh, I did do so [sic] research. I was prepared to address any motion or uh, uh - -
>
> [APPELLANT'S COUNSEL]: We thank the Court, *but the matter became somewhat moot*.

(Emphasis added).

This Court has observed that a defendant has a "fundamental right" to present witnesses in his or her defense, but that right, "though fundamental, is not absolute." *Muhammad v. State*, 177 Md. App. 188, 273 (2007) (quoting *Wilson v. State*, 345 Md. 437, 448 (1997)). Additionally, "broad discretion is entrusted to the trial judge to control the flow of the trial and the reception of evidence." *Id.* at 273-74. As such, we ordinarily review a trial court's decision as to the calling of witnesses for abuse of discretion. "Abuse occurs when a trial judge exercises discretion in an arbitrary or capricious manner or when he or she acts beyond the letter or reason of the law." *Id.* at 274 (quoting *Cooley v. State*, 385 Md. 165, 175 (2005)). Similarly, "[t]he decision whether to grant a request for continuance is committed to the sound discretion of the court." *Abeokuto v. State*, 391 Md. 289, 329 (2006).

Here, we cannot determine whether the trial court abused its discretion because appellant never requested the relief he claims the trial court failed to grant. Following several delays in the proceedings while awaiting Staley's arrival, the court asked appellant's counsel if he had additional witnesses or evidence. Appellant's counsel

responded, "Other than the testimony of Corey Staley, a material witness from both perspectives[.]" Appellant then rested. At this juncture in the proceedings, appellant did not request a continuance to afford him more time to secure Staley's testimony.

Staley then arrived during the discussion of proposed jury instructions, after the court had dismissed the jury for the day. The court explained that the evidence phase of the trial had been concluded and trial would resume the next day with jury instructions. Appellant's counsel noted "a respectful objection," but did not request a continuance or the issuance of a subpoena for Staley. Appellant contends that his counsel "was in the midst" of requesting compulsory process, directing our attention to a reference that Staley was "in the City of Baltimore." We decline to infer what appellant's counsel *intended* to say – the record is devoid of any attempt to seek a continuance or the issuance of a subpoena. Moreover, at the conclusion of the July 28, 2015 proceeding, appellant's counsel expressed a desire to call Staley the next morning, if he "*happens* to be present." (emphasis added). We cannot reasonably interpret this statement as a request for a subpoena requiring Staley's presence.

We also note that, the following morning, the court invited appellant to make a motion to re-open the evidence for the purpose of calling Staley as a witness. Appellant's counsel declined that invitation, stating "[t]here is not [a motion] at this juncture." After the court indicated that it had done some research on the issue of re-opening the evidence and was prepared to consider an appropriate motion, appellant's counsel responded, "We thank the Court, but the matter became somewhat moot." While appellant's counsel did

not specifically articulate why the issue had become moot, it is clear that he did not request the court to take further action relating to Staley.[1]

Finally, we briefly address appellant's reliance on *Wilson v. State*, 345 Md. 437 (1997). There, Wilson subpoenaed his witness and requested a body attachment when the witness failed to appear for trial. *Id*. at 443. In contrast, appellant's counsel never requested a continuance or compulsory process, and declined the court's invitation to argue for re-opening of the evidence to permit Staley to testify. We decline to decide a matter not properly raised and decided in the trial court. Md. Rule 8-131(a). Nor will we find trial error where appellant failed to request the relief he now seeks on appeal.[2] *See Hyman v. State*, 158 Md. App. 618, 631 (2004) (holding that appellant had effectively waived review for relief he had not requested at trial).

II.

Appellant next contends that the trial court erred in allowing the State to introduce testimony from Detective Sean Dallessandro relating to the differences between semiautomatic handguns and revolvers. Appellant argues that this testimony "was based on specialized knowledge, training and experience and, accordingly, could not be offered unless, and until, he was qualified and accepted as an expert." We disagree.

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[1] In his brief, appellant claims the issue was moot because "Staley was not present that morning to call as a witness." It is not apparent from the record that Staley's absence was the reason the issue became moot.

[2] We also note that appellant's counsel failed to proffer the substance of Staley's testimony, beyond describing Staley as an "[e]xceptionally interesting witness[.]"

During Detective Dallessandro's direct examination as part of the State's case, the following occurred:

> [THE STATE]: How familiar, how familiar are you with handguns and firearms?
>
> [DETECTIVE DALLESSANDRO]: Very.
>
> Q: Can you tell the ladies and gentlemen of the jury the difference between a, the difference between the evidence that would be left behind, that could be left behind with a semiautomatic handgun versus a revolver?
>
> A: Yes, I can. A semiautomatic handgun ejects what is called a shell casing. You have a full cartridge that goes inside. This would be your shell casing. That would have powder inside. On the bottom you would have a primer. Now, the primer once it's struck, it ignites the gunpowder inside, that propels the projectile through the barrel. Now, when this activity happens with semiautomatic, a slide would come back or some sort of internal and external component and it takes the shell casing away from the projectile after it leaves the barrel and it ejects it out onto your scene whether straight up, over to the side or even – –

The State continued:

> Q: All right. So keeping your voice up, you were just indicating that a semiautomatic would kick out the cartridge which could be left at the crime scene, correct?
>
> A: Yes. The cartridge would be, would exit, would be discharged from the handgun through a number of different areas depending on the firearm. Now, a revolver has an enclosed cylinder that sits behind the actual barrel itself. Now, this cylinder, some of them can go to the side to the load or they actually come off onto a lever and you can load them that way and expel your shell casings afterward when you're loading and unloading, but when you're firing with a revolver, all of the shell casings stay inside that cylinder. They are not ejected out onto any sort of scene.
>
> Q: And if you were to fire all of the bullets that are contained in a revolver cylinder, how would you I guess reload the gun so that it would be ready to use?

At that point, appellant's counsel objected, arguing that "[w]e're starting to get into a realm of expertise for which this gentleman has not been specifically qualified." The court overruled the objection, and the questioning continued:

> [THE STATE]: Sure. I think what I, I think my question was after a revolver is fired and there's a certain number of bullets inside of that, what you call a cylinder, how would a person load, reload the weapon so that it is ready to be fired again?
>
> [DETECTIVE DALLESSANDRO]: Depending on which kind of revolver it is, whether the cylinder itself is locked in place, there would be a door that goes over to the side and you would have to turn it upside down. Sometimes, there's a plunger, actually there's always a plunger underneath on this style that actually forces the shell casing out and you would either put it on the ground or empty it into your hand and then reload from there or the wheel or the cylinder would go to the side. You can dump it out in your hand, ground, pocket, whatever you want and then reload them in there, close it up and you're ready to go.

"The admissibility of evidence ordinarily is left to the sound discretion of the trial court." *Moreland v. State*, 207 Md. App. 563, 568 (2012). "We will not disturb a trial court's evidentiary ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Id.* at 568-69 (internal quotation marks omitted). "A court's decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* at 569 (internal quotation marks omitted).

"Expert opinion testimony is testimony that is based on specialized knowledge, skill, experience, training, or education. Expert opinions need not be confined to matters actually perceived by the witness." *Ragland v. State*, 385 Md. 706, 717 (2005). Before

expert testimony may be admitted, the trial court must determine: "(1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony." Md. Rule 5-702. Lay opinion testimony, on the other hand, is "testimony that is rationally based on the perception of the witness." *Ragland*, 385 Md. at 717. Lay opinion testimony may be admitted so long as it is "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Md. Rule 5-701.

The *Ragland* Court approved the Third Circuit's explanation of lay opinion testimony under Federal Rule of Evidence 701[3] in *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196-98 (3rd Cir. 1995):

> The prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences . . . . Other examples of this type of quintessential Rule 701 testimony include identification of an individual, the speed of a vehicle, the mental state or responsibility of another, whether another was healthy, the value of one's property.

385 Md. 718.

In *Ragland*, the Court of Appeals made clear the importance of distinguishing between expert and lay testimony. In that case, Ragland was convicted of distribution of a

[3] Except for minor stylistic differences, Federal Rule of Evidence 701 is identical to Maryland Rule 5-701.

controlled dangerous substance. *Id*. at 709. At trial, two police officers testified as non-expert witnesses that, in their opinions, they had observed Ragland participate in a drug transaction. *Id.* at 710-14. On appeal, the Court of Appeals held that the trial court abused its discretion in admitting the officers' testimony as lay rather than expert opinion. *Id.* at 726. The Court noted that both officers testified to their "extensive history of training and experience in investigation of drug cases," and based their opinions on those experiences. *Id.* Further, the Court observed that "[t]he connection between the officers' training and experience on the one hand, and their opinions on the other, was made explicit by the prosecutor's questioning." *Id.* Ultimately, the Court announced that "Md. Rules 5-701 and 5-702 prohibit the admission as 'lay opinion' of testimony based upon specialized knowledge, skill, experience, training or education." *Id.* at 725.

Although *Ragland* emphasized that testimony based upon specialized training and experience cannot be admitted as lay opinion, our subsequent case law has made clear that a witness with specialized training and experience is still capable of offering lay opinion testimony. For example, in *In re Ondrel M.*, a police officer testified as a non-expert that he smelled the odor of marijuana emanating from inside a vehicle. 173 Md. App. 223, 228 (2007). The officer further testified that he was able to recognize the smell of marijuana because "in his training at the police academy and in his work in the field as a police officer, he had been exposed previously to the smell of burning marijuana." *Id.* On appeal, Ondrel M. relied on *Ragland* to argue that the officer's police academy training and continuing education, as well as his experience in the field, automatically precluded him from offering lay opinion testimony as to the smell of marijuana. *Id.* at 244. This Court disagreed. We

held that "[i]n determining whether an opinion offered by a witness is lay opinion or expert testimony, it is not the status of the witness that is determinative. Rather it is the nature of the testimony." *Id.* In finding no error in the admission of the officer's testimony, we stated:

> We conclude that the fact that [the officer] based his opinion regarding the odor of marijuana on his prior training and experience as a police officer does not render the opinion, *ipso facto*, an expert opinion. His opinion was based on his personal perception of the odor that he smelled upon approaching the car in which appellant was a passenger. This Court has stated that "[t]he rule of admissibility of lay opinion testimony is no different when . . . the lay opinion is offered by a police officer."

Id. at 245 (quoting *Warren v. State*, 164 Md. App. 153, 168 (2005)).

Our decision in *Prince v. State*, 216 Md. App. 178 (2014) is also instructive. There, a police officer provided non-expert trial testimony concerning his placement of trajectory rods through bullet holes in a vehicle. Distinguishing *Ragland*, we held that "the process of sliding trajectory rods through existing bullet holes, taking photos of the result, and reporting [the officer's] actions does not require expertise or analysis grounded on an officer's particular training or experience." *Id*. at 200. In concluding that the officer's lay testimony was properly admitted, we stated:

> A police officer who does nothing more than *observe* the path of the bullet and place trajectory rods (in the same manner as any layman could) need not qualify as an expert to describe that process. Officer Costello relied on his own observations and placed the rods into the holes made by the bullet fired by Mr. Prince. He conducted no experiments, made no attempts at reconstruction, and "was not conveying information that required a specialized or scientific knowledge to understand."

Id. at 202 (citation omitted).

In this case, the trial court did not abuse its discretion in admitting Detective Dallessandro's lay opinion testimony. As a preliminary matter, we agree with the State that appellant did not object to Detective Dallessandro's testimony as to the differences in the firing mechanisms of a semiautomatic handgun and a revolver. *See* Md. Rule 5-103(a)(1) (requiring timely objection to admission of evidence). Rather, appellant's counsel objected to the State's question as to how a revolver is loaded and unloaded. In describing the process of loading a revolver, Detective Dallessandro did not rely on any scientific or technical information, nor did he refer to any specialized training in the operation of firearms. In short, Detective Dallessandro "was not conveying information that required a specialized or scientific knowledge to understand." *Prince*, 216 Md. App. at 202 (citation omitted). Accordingly, we hold that the court properly admitted Detective Dallessandro's testimony.

III.

Finally, appellant contends that the jury's verdict is inconsistent because he was found not guilty of first-degree assault of Staley, but guilty of the use of a firearm in a crime of violence in the murder of Gwaltney. Appellant maintains that the jury could not have found that he failed to use a firearm to commit assault, but at the same time convict him of using a firearm to commit a crime of violence. Appellant concedes that he failed to timely raise this issue, but he urges this Court to recognize it as plain error.

We agree that this issue is not preserved. In *Givens v. State*, 449 Md. 433, 486 (2016), the Court of Appeals held that, to preserve a challenge to an allegedly inconsistent jury verdict, the defendant must object prior to the verdict becoming final and the court's

discharge of the jury. "[T]he objection must occur before the trial court's acceptance of the verdicts after the jury has been polled and/or hearkened." *Id*. at 479 (citations omitted). Here, appellant failed to lodge an objection based on allegedly inconsistent verdicts. Indeed, appellant's only request after the verdict had been announced was to poll the jury. Appellant, therefore, failed to preserve this issue for review.

Nevertheless, appellant urges us to exercise our discretion and review for plain error. This Court has noted that plain error review "is a 'rare, rare phenomenon,' undertaken only when the un-objected-to error is extraordinary." *Perry v. State*, 229 Md. App. 687, 710 (2016) (quoting *Pickett v. State*, 222 Md. App. 322, 342 (2015)), *cert. denied*, __ Md. __ (2017). We have also noted that "Maryland courts have 'characterized instances when an appellate court should take cognizance of unobjected to error as compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *White v. State*, 223 Md. App. 353, 403 n.38 (2015) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). Stated another way, "appellate review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Correll v. State*, 215 Md. App. 483, 516 (2013) (internal quotation marks omitted) (quoting *Robinson v. State,* 209 Md. App. 174, 203 (2012), *overruled on other grounds by Dzikowski v. State*, 436 Md. 430 (2013)).

In *Givens*, the Court of Appeals affirmed that plain error review requires the satisfaction of four factors: 1) that there must be an error or defect that the defendant has not intentionally relinquished or abandoned, i.e. affirmatively waived; 2) that the legal error must be clear and obvious; 3) that the error must have affected the defendant's substantial

rights, which, in the ordinary case, means that the defendant must demonstrate that the error affected the outcome of the trial; and 4) that, if the other three prongs are satisfied, the appellate court has the discretion to remedy the error, and the appellate court should exercise that discretion only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. 449 Md. at 480. The *Givens* Court further noted:

> In [*State v.*] *Rich*, this Court elaborated on the "discretion" prong of plain error review as follows: "The few cases where we have exercised our discretion to review unpreserved issues are cases where prejudicial error was found and the failure to preserve the issue was not a matter of trial tactics."

Id. at 481 (internal citation omitted).

We decline to exercise our discretion to review for plain error in this case. Appellant has made no attempt to argue that his failure to object to the allegedly inconsistent verdicts before the verdicts became final was not a matter of trial tactics. Further, the error is neither clear nor obvious.[4] The requirements for plain error review are therefore not satisfied.

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

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[4] We note that it is doubtful that the jury's verdict for the first-degree murder of Gwaltney is legally inconsistent with its reckless endangerment verdict related to a separate victim (Staley).