Circuit Court for Wicomico County
Case No. 22-K-16-000211

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2165

September Term, 2016

BRANDON D. DAVIS

v.

STATE OF MARYLAND

Woodward, C.J.,
Meredith,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: November 22, 2017

Brandon D. Davis, appellant, was convicted by a jury, sitting in the Circuit Court for Wicomico County, of possession of a regulated firearm after having been previously convicted of a disqualifying offense. Upon receiving a sentence of eight years' imprisonment, Mr. Davis noted this appeal, raising three questions for our review:

> I. Whether the trial court erred in formatting *voir dire* questions requested by the defense in a manner that failed to adequately address prospective jurors' racial biases and feelings regarding handguns.
>
> II. Whether the trial court erred in failing to conduct the proper inquiry into whether Karri Davis, a witness called by the State, could invoke her Fifth Amendment right not to testify.
>
> III. Whether the State improperly called Karri Davis as a witness with the anticipation that she would invoke a testimonial privilege, and then argue to the jury that her attempt to invoke a testimonial privilege was evidence of appellant's guilt.

Acknowledging that none of the issues he raises was preserved for review, Mr. Davis nonetheless requests that we recognize plain error. We shall decline that request and affirm.

BACKGROUND

This case stems from a lovers' quarrel. Ms. Karri Casteel was Mr. Davis's girlfriend at the time of the alleged offense, but subsequently, several months prior to the trial in this case, became his wife. (At Mr. Davis's trial, Ms. Casteel identified herself by the name "Karri Rene Davis." To avoid confusion, we shall, throughout this opinion, refer to her as "Ms. Davis," and shall refer to the appellant as "Mr. Davis.") Ms. Davis had awakened early in the morning of July 20, 2015, and discovered that her then-boyfriend, Mr. Davis, had not come home for the evening. Because Ms. Davis had

loaned her truck to Mr. Davis the preceding day, and she suspected that he was staying at the apartment of an ex-girlfriend named Brianna Curtis, Ms. Davis drove, in another vehicle, to Ms. Curtis's apartment, where she spotted her truck, parked nearby. A "dispute" ensued between Ms. Davis and Mr. Davis, and she called the police, "complaining that she needed her keys back from her boyfriend."

Corporal Dean Popovich, of the Salisbury Police Department, responded to that call, arriving at approximately 3:00 a.m. In an attempt to resolve Ms. Davis's complaint, Corporal Popovich approached Ms. Curtis's apartment and "made contact" with Ms. Curtis. Ms. Curtis informed Corporal Popovich that "somebody" else was "there with her," and she "invite[d]" Corporal Popovich inside. Corporal Popovich encountered Mr. Davis, who was "wearing no clothing," in the rear bedroom, and the officer asked Mr. Davis "to get dressed" while the officer waited. After Mr. Davis got dressed, he gave Ms. Davis's keys to Corporal Popovich, and, because he was "free to leave at that time," Mr. Davis then left the apartment complex on foot.

After Mr. Davis had left, however, Ms. Davis approached Corporal Popovich and informed him that she had reason to believe that Mr. Davis possessed a firearm. Acting on that tip, Corporal Popovich returned to Ms. Curtis's apartment and obtained her consent to search the premises. Corporal Popovich went to Ms. Curtis's bedroom, where Mr. Davis had been, and recovered a "fully loaded" silver .357 Magnum handgun with a wooden handle grip from a dresser drawer. The handgun was found on top of Ms. Curtis's underwear.

The weapon was subjected to DNA testing. Jessi Brown, a forensic scientist with the Maryland State Police and the State's DNA expert at trial, testified that there were "at least three contributors" to the mixture of DNA found on the grip and the trigger of the handgun; the "major portion . . . of the profile," however, "was a mixture of one male and one female." Mr. Davis "could not be excluded as a contributor" to the DNA mixture found on the handgun.

Ms. Davis gave statements on two occasions before trial. In addition to the statements she had made to Corporal Popovich on July 20, 2015, she also gave a recorded statement on December 8, 2015, while she was incarcerated at the Wicomico County Detention Center on charges unrelated to this case. In the latter statement, Ms. Davis asserted that Mr. Davis carried a "silver and brown gun everywhere with him" and that, on July 18, 2015, she had "chased him" down at the Salisbury Mall. During that encounter, according to Ms. Davis's statement, Mr. Davis had "flipped out on" her and "showed" her the gun.

A twelve-count indictment was subsequently returned, in the Circuit Court for Wicomico County, charging Mr. Davis with various firearms-related offenses. The case proceeded to a jury trial, and, at the close of all of the evidence, the State nol prossed ten of those counts and submitted two counts, alleging separate violations of Public Safety Article, § 5-133(c), to the jury: Count 1, possession, on July 18, 2015, of a regulated firearm by a person previously convicted of a disqualifying offense; and Count 7, possession, on July 20, 2015, of a regulated firearm by a person previously convicted of a

disqualifying offense.[1] The jury acquitted Mr. Davis of the offense of possession on July 18, but convicted him of the July 20th offense. After the court sentenced Mr. Davis to a term of eight years' imprisonment, consecutive to any sentence he was then serving or "obligated to serve," Mr. Davis noted this timely appeal in which he raises three issues relative to his trial.

DISCUSSION

I.

The first issue Mr. Davis asks us to review relates to the manner in which the trial judge phrased two questions during *voir dire*. Because Mr. Davis made no objection after the questions were asked, however, the State contends that no issue regarding these questions was preserved for appellate review. We agree with the State, and decline to engage in plain error review.

After the court posed a number of *voir dire* questions to the venire panel and elicited their responses, the following colloquy took place:

> THE COURT: All right, any additions?
>
> [THE STATE]: Nothing from the State, Your Honor.
>
> [DEFENSE COUNSEL]: Yes, Your Honor. I don't know if the Court has a copy of my tendered voir dire. I would ask for some version of Defendant's 14 and for some version of Defendant's 32.[2]

[1] A stipulation was entered specifying that Mr. Davis was a "prohibited person," who could not legally possess a regulated firearm under Maryland law.

[2] Defense counsel submitted proposed *voir dire* questions to the court in writing prior to the start of trial. The questions as to which defense counsel urged the court to ask "some version" were:

(continued)

THE COURT: Does that case really say that?

[DEFENSE COUNSEL]: What that case talks about is that it's appropriate for the Court to tailor a question in that regard to the facts of the case. In other words, it should be inquired of them whether or not the nature of the charge, in this particular case it's about guns, people creeped out about guns, some people are.

THE COURT: And you want me to do 32 as well?

[DEFENSE COUNSEL]: 14 and 32.

(Whereupon, the following occurred in open court:)

THE COURT: This charge, you've heard me mention the word firearms more than once already. Does anybody, merely because he or she hears the word firearms cause such emotional turmoil or mental distress right from the start so you think, you don't even think you can begin to be a fair and open-minded juror, simply the nature of the charge?

[No response.]

Now you'll see the Defendant is black. I don't think race has anything to do with this case but I'm not the judge of that, but I'm asking this question, simply because the Defendant is black will that cause any of you to prejudge him in any way or to take a lesser view of the defense's position in this case or to add more weight to the State's case simply because of his race? If so, please come forward.

(continued)

14. The defendant is charged with a crime involving a firearm. Will any of you have difficulty in being fair and impartial due to the nature of the charges in that they involve alleged firearm possession? Baker v. State, [157 Md. App. 600,] 853 A.2d 796 (2004)[.]

* * *

32. Do any[] of you have feelings about Caucasians, African-Americans, or any other ethnicity which would have an impact on your ability to serve as a fair[] and impartial juror in this case?

(No response.)

Defense counsel did not object to the form or the content of either question, and did not request that any additional questions be asked regarding these topics.

Mr. Davis now claims, on appeal, that the circuit court erred in phrasing these two *voir dire* questions as it did, and thereby failed to adequately inquire relative to the prospective jurors' biases regarding race and firearms. Mr. Davis complains that, in violation of *Dingle v. State*, 361 Md. 1 (2000), and *Pearson v. State*, 437 Md. 350 (2014), the *voir dire* questions posed by the circuit court improperly shifted the responsibility to the prospective jurors for determining whether their biases would affect their ability to be fair and impartial, notwithstanding the fact that Mr. Davis's own proposed questions were subject to the same criticism. He also asserts that the sequence in which the *voir dire* questions were posed by the court undermined the purpose of those questions because, Mr. Davis argues in his brief, "the *voir dire* question on bias against African-Americans was the very last question posed to the venire panel" and was not "bundled" with "routine *voir dire* questions," thereby ensuring "the presumably intended result" that there would be "no positive responses."

Acknowledging that defense counsel failed to object in any manner after the trial judge granted counsel's request to ask "some version" of proposed questions 14 and 32, Mr. Davis asks us to notice plain error, insisting that the errors of which he complains were so egregious as to undermine his right to a fair trial. We are not persuaded.

"Plain error is error which vitally affects a defendant's right to a fair trial." *Richmond v. State*, 330 Md. 223, 236 (1993) (citation and quotation omitted). "Plain

error review is reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Yates v. State*, 429 Md. 112, 130 (2012) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). "There is no fixed formula for the determination of whether discretion should be exercised." *Id*. at 131 (internal quotation marks omitted). Whether to notice an unpreserved error, on appeal, and grant plain error review is a matter committed to our discretion. *Molter v. State*, 201 Md. App. 155, 180 (2011) (citation and quotation omitted). Granting plain error review "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004).

In the present case, defense counsel requested that the trial court give "some version" of two proposed questions, one pertaining to potential jurors' biases regarding race, and one pertaining to biases against firearms. The court asked supplemental *voir dire* questions about each of those topics. To the extent the questions propounded by the court deviated from the form approved by the Court of Appeals in *Dingle* and *Pearson*, it was incumbent upon defense counsel to raise an additional objection, or, at a minimum, to inform the court of any perceived deficiency in the court's questions, before *voir dire* concluded, when curative action could have been taken. *Austin v. State*, 90 Md. App. 254, 265 (1994) (noting that, "[w]here the judge could easily have corrected the error if it had been drawn to his attention, the Court generally will not consider the [unpreserved] contention"). Under the circumstances, we are not willing to consider the unpreserved objection to the court's questions.

II.

Mr. Davis contends that the trial court applied the wrong standard in determining that his wife, Karri Casteel Davis, was not justified in attempting to invoke her Fifth Amendment privilege during her testimony. Before addressing this claim, we set forth some background.

Ms. Davis had previously given two statements affirming her knowledge that Mr. Davis had possessed a handgun at a time when he was prohibited from doing so. At Mr. Davis's trial on the illegal possession charges, the State called Ms. Davis as a witness, but she refused to answer questions while on the stand. For instance, when Ms. Davis was asked whether Mr. Davis had taken her vehicle and driven to a former girlfriend's residence, she replied, "I'm not lying for Brianna Curtis or the police anymore, so I don't have anything to say." The trial court examined her, in the jury's presence:

> THE COURT: **Are you trying to say that because you're married to the Defendant you don't want to testify?**
>
> [MS. DAVIS]: **No, Your Honor.**
>
> THE COURT: **All right, then she's not invoking her spousal privilege, if one exists at all.**
>
> [MS. DAVIS]: **Not at all.**
>
> THE COURT: If that is the case, you're not invoking your marital privilege.
>
> [MS. DAVIS]: And he is my husband. I don't have anything else to say.
>
> THE COURT: Unfortunately, you are here as a witness, you have been placed under oath, you do have to answer questions.
>
> [MS. DAVIS]: I just don't want to lie for the police or Brianna anymore.

> THE COURT: Well, go ahead, Mr. [defense counsel], I mean Mr. [prosecutor]. Do your best answering [the State's] questions and then [defense counsel] may have some questions.
>
> [THE STATE]: Your Honor, may I have permission to treat her as a hostile witness?
>
> THE COURT: You may.

(Emphasis added.)

During the questioning that ensued, Ms. Davis repeatedly disavowed her prior statements, and, eventually, the court ordered a recess. When questioning resumed, the following exchange occurred:

> [THE STATE]: Ms. Casteel, prior to the recess we had established that you had made a recorded statement at the jail, and do you recall indicating that on the night of July 19, 2015, that Mr. Davis had your truck at the mall earlier that day? Do you recall making that statement?
>
> [MS. DAVIS]: I don't remember.
>
> [THE STATE]: Okay. Do you recall --
>
> [MS. DAVIS]: **Your Honor, can I plead the fifth, please? I don't have anything else to say.**
>
> THE COURT: You may or may not, it depends on the question, you don't know.
>
> [MS. DAVIS]: **I say I plead the fifth at any question.**
>
> THE COURT: **No, because nobody has charged you with anything. You're not charged with any crime and you're not threatened with prosecution.**
>
> [MS. DAVIS]: Yeah, but he's my husband and I don't have anything else to say.
>
> THE COURT: Let's just do this question by question.

[MS. DAVIS]: Just say I don't remember, okay.

THE COURT: Go ahead, Mr. [prosecutor].

(Emphasis added.)

Defense counsel did not object to the circuit court's comments regarding Ms. Davis's attempt to invoke her Fifth Amendment privilege. Nor did defense counsel ask the court to take any other action regarding Ms. Davis's requests to "plead the fifth." Thereafter, questioning resumed.

Now, Mr. Davis contends that we should recognize plain error because, he alleges, the circuit court applied the wrong standard in evaluating Ms. Davis's claim that she was entitled to assert her testimonial privilege. We are not persuaded. As noted above, plain error review is intended to be a rare exception to the preservation requirements that are applicable in criminal trials. The Court of Appeals noted in *Savoy v. State*, 420 Md. 232, 241-42 (2010), that the rule requiring a contemporaneous objection in order to preserve an issue for appellate review applies even to errors of constitutional dimension. Uncooperative witnesses are not an extraordinary occurrence. The fact that the uncooperative witness in this case was the defendant's wife does not provide any excuse for Mr. Davis's failure to raise during trial the issues he wishes to raise on appeal. We see no compelling reason to conduct plain error review of this unpreserved argument.

As the State points out, it is not "plain" that the circuit court applied the wrong standard to Ms. Davis's claimed Fifth Amendment privilege. Indeed, we presume "that trial judges know the law and apply it properly," *State v. Chaney*, 375 Md. 168, 181

(2003), and it is the appellant's burden to rebut that presumption. *Id.* at 183-84. The court's comment that Ms. Davis was "not threatened with prosecution" could be construed to mean that the court was aware of the correct standard:

> whether there is reasonable cause for the witness to fear self-incrimination from a direct answer to the question posed, or from an explanation of the failure to answer, and whether the danger of self-incrimination is evident from the nature of the question and the circumstances of the case.

Dickson v. State, 188 Md. App. 489, 506 (2009) (citation omitted).

Moreover, because of defense counsel's failure to object and raise any issue about this during trial, the record is inadequate for us to review whether this witness had any legitimate basis to invoke the privilege. And, because there was no contemporaneous objection, the record does not disclose the circuit court's analysis or rationale for denying the witness's requests. Because there was no objection at trial, the court was not asked to explain its reasoning beyond its terse remark that Ms. Davis was "not threatened with prosecution." *See Chaney*, 375 Md. at 181 n.8 (noting that, "[s]ince a trial judge is presumed to know the law, the judge is not required to set out in detail each and every step of his thought process") (citation and quotation omitted). Under these circumstances, we conclude that this is not a case in which plain error review should be conducted. *Cf. Austin*, *supra*, 90 Md. App. at 265 (noting that, "[w]here the judge could easily have corrected the error if it had been drawn to his attention, the Court generally will not consider the [unpreserved] contention").

III.

Finally, Mr. Davis complains that the State acted in bad faith in calling his wife to testify even though it knew that she intended to invoke a testimonial privilege. This claim, like those above, is not preserved; defense counsel did not object on that ground, either during Ms. Davis's testimony, the State's opening statement, or its closing argument.

If Mr. Davis had asserted at trial that the prosecutor acted in bad faith by calling a witness whom the prosecutor knew was intending to invoke a testimonial privilege in the presence of the jury, we would analyze the claim by applying the five factors delineated in *Vandegrift v. State*, 237 Md. 305 (1965):

> 1. that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of the jury;
>
> 2. that the prosecutor knew in advance or had reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and therefore, called him in bad faith and for an improper purpose;
>
> 3. that the witness had a right to invoke his privilege;
>
> 4. **that defense counsel made timely objection and took exception to the prosecutor's misconduct**; and
>
> 5. **that the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury.**

Id. at 308-09 (citation and quotation omitted) (emphasis added). *Accord Adkins v. State*, 316 Md. 1, 12-13 (1989). The ultimate question, however, is "whether the State's

Attorney call[ed] the witness *for the effect of the claim of privilege* on the jury." *Vandergrift*, 237 Md. at 309 (emphasis added).

Here, the record is totally inadequate for us to conduct a review of this issue even if we were inclined to excuse Mr. Davis's lack of any objection. To begin with, it is far from clear that the first factor — "that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege, when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity," *Vandergrift*, 237 Md. at 308 — was established by the mere fact that she was aware that Mr. Davis illegally possessed a handgun or even if she now claims to have falsely accused him of doing so. *See, e.g., Pope v. State*. 284 Md. 309, 331 (1979) (observing that "[e]ven the secret acquiescence or approval of the bystander is not sufficient to taint him with the guilt of the crime").

Nor is it clear that the second factor — "that the prosecutor knew in advance or had reason to anticipate that the witness would claim [her] privilege, or had no reasonable basis for expecting [her] to waive it, and therefore, called [her] in bad faith and for improper purpose," *Vandegrift*, 237 Md. at 308-09 — would have been found to exist had a timely objection been raised. The record from the trial reflects that the State asserted in its opening statement:

> This is going to be a somewhat interesting case, I hope, and it's going to be interesting because it comes out in something of the nature of a love triangle. There are some lady friends of Mr. Davis who were lady friends in the past, maybe lady friends now, maybe more. **What exactly one of those individuals is going to testify to, you and I are going to find out together today, I don't know. I don't know what she's going to say today.** The only witness with respect to July the 18th is Karri Casteel

> [Davis]. All the other witnesses, including Ms. Casteel [Davis], also relate to July the 20th.

(Emphasis added.)

Given that Ms. Davis had previously provided statements to the police, of her own volition in the first instance, it is far from clear that the prosecutor "knew in advance or had reason to anticipate" that she would refuse to answer any questions and seek to invoke her testimonial privilege. But, in any event, the existence of the *Vandergrift* factors is not clearly apparent from the record that was created at trial. As we noted earlier, defense counsel did not "[make a] timely objection and [take] exception to the prosecutor's misconduct"; and, in light of the absence of an objection, there was no occasion for the court to "refuse[] or fail[] to cure the error by an appropriate instruction or admonition to the jury." *Vandegrift*, 237 Md. at 309. Under these circumstances, we decline Mr. Davis's invitation to excuse his failure to preserve this issue and undertake plain error review.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.