Circuit Court for Montgomery County
Case No. 129985

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2267

September Term, 2016

KVANTE S. DORSEY

v.

STATE OF MARYLAND

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

JJ.

Opinion by Alpert, J.

Filed: November 20, 2017

Kvante Dorsey, appellant, was convicted by a jury sitting in the Circuit Court for Montgomery County of possession of a firearm by a disqualified person, possession of a firearm while engaged in drug trafficking, possession of marijuana with the intent to distribute, and resisting arrest.[1] Appellant asks two questions on appeal, which we have slightly rephrased:

I. Did the trial court err in allowing the State's drug expert to allegedly testify about appellant's state of mind?

II. Did the trial court err when it allegedly gave an incomplete and confusing jury instruction on indirect possession?

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

FACTS

The facts of this case are relatively simple and not in dispute. Around 8:30 a.m. on July 11, 2016, a contractor entered a vacant apartment at 11540 Stewart Lane in Silver Spring. When he entered the apartment, he came upon two unknown individuals asleep in one bedroom, and a man, later identified as appellant, asleep in another bedroom. A firearm lay about ten inches above appellant's head. The police were called.

Officer Glen Altshuler with the Montgomery County Police Department responded to the apartment in uniform and likewise observed two unknown individuals asleep in one bedroom and appellant asleep in another bedroom with a firearm above his head. As to the

[1] The jury acquitted appellant of fourth-degree burglary. The court sentenced appellant to ten years of imprisonment, the first five years to be served without the possibility of parole for possession of a firearm by a disqualified person; a consecutive five year sentence without the possibility of parole for possession of a firearm while engaged in drug trafficking; and concurrent sentences of four and three years respectively for possession of marijuana with the intent to distribute and resisting arrest.

specific placement of the firearm, the officer testified that "[t]he handle or the grip was facing to [appellant's] left away from him, and the barrel was pointed towards the door[.]" The officer added that appellant "had his arms crossed under his head. If he had uncrossed them, his left hand would have landed right on [the gun]." The officer removed the gun and roused appellant, telling him to put his hands behind his back. Appellant resisted but was eventually arrested.[2]

Pursuant to a search incident to arrest, the police recovered from appellant's underwear 12 individual baggies, later determined to contain a total of 12.25 grams of marijuana, wrapped in plastic wrap. Officer Altshuler found a lighter on appellant but no cigarettes. Although the officer saw trash piles throughout the apartment, he did not see any "cigarettes, [] blunts, roaches, bongs, [or] pipes." The seized firearm had a magazine attached and "the slide was locked forward." The firearm, which was "loaded" with 13 bullets, including one in the chamber, was tested and found operable.

Detective John King with the Special Investigations Division of the Drug Interdiction Team for the Montgomery County Police Department was accepted as an expert in the field of drug trafficking and narcotics. He testified that the individual bags seized from appellant were called "dime bags" and contained about a gram of marijuana. He estimated that each bag was worth between $15 and $25. He testified that it was

[2] While the police were occupied with appellant, the two unknown individuals left the apartment unnoticed. One was detained by the police as he left the building; the other escaped.

common for drug dealers to carry guns to protect themselves and their "product." He opined that the evidence in this case showed possession with intent to distribute.

We shall include additional facts where necessary below to fully answer the questions presented.

DISCUSSION

I.

Citing *Gauvin v. State*, 411 Md. 698 (2009), appellant argues that the trial court erred in allowing Detective King to testify as to appellant's state of mind, i.e., that he intended to distribute marijuana. The State responds that the trial court did not err, because Detective King did not opine as to appellant's state of mind. We agree with the State.

Md. Rule 5-702, governing testimony by experts, provides that "[e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." There are, however, certain limitations. Specifically, Md. Rule 5-704 provides that although "testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact[,]" an expert "may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged." Md. Rule 5-704(a) and (b). The admissibility of expert testimony is a matter largely within the sound discretion of the trial court and will rarely constitute a ground for reversal unless an error of law or clear abuse of discretion is found. *Bomas v. State*, 412 Md. 392, 406 (2010) (citing *Bloodsworth v. State*, 307 Md. 164, 185 (1986)).

In *Gauvin v. State*, 411 Md. 698 (2009), and *Barkley v. State*, 219 Md. App. 137 (2014), Maryland appellate courts have addressed, in the context of the offense of possession with intent to distribute CDS, Rule 5-704(b)'s prohibition against an expert testifying as to the mental state of a defendant. In *Gauvin*, the prosecutor asked the police expert witness if he had formed an opinion based on the evidence seized and observations of the witnesses "as to whether or not the PCP that was seized *from Ms. Gauvin . . . was for her* personal consumption or for distribution?" 411 Md. at 701-02 (emphasis added). The trial court overruled defense counsel's objection. The expert then testified: "*That the amount would indicate to me that it was possessed with intent to distribute*. I would base that on different factors." *Id.* at 702 (emphasis added). The expert then explained the relevant factors: the large amount of PCP seized from Gauvin, the amount and denominations of the money recovered from her person, and the presence of rubber gloves, which the expert opined was often used by dealers to prevent the PCP from being absorbed into their skin. *Id.*

On appeal, the Court of Appeals reasoned that the question whether Gauvin intended to distribute CDS was improper because "no expert is entitled to express the opinion that the defendant possessed a controlled dangerous substance with the intent to distribute it." *Id*. at 711. However, the Court reasoned that the answer given by the expert did not "cross[] the line" because the expert's response was not personally focused, he never directly testified about Gauvin's mental state or stated directly that Gauvin had the intent to distribute. *Id.* at 710-11. The Court emphasized the distinction between "an explicitly stated opinion that the criminal defendant had a particular mental state" and "an

explanation of why an item of evidence is consistent with a particular mental state." *Id.* at 708. The Court also noted that the expert's opinion testimony was based upon his "knowledge of common practices in the drug trade, rather than on some special familiarity with the workings of [Gauvin's] mind." *Id.* at 711 (quotation marks and citation omitted). Accordingly, the Court held that the expert's testimony was admissible. *Id.* at 713.

In *Barkley*, *supra*, we were likewise asked to decide whether an expert's testimony was a forbidden opinion about the defendant's mental state of mind in contravention of Rule 5-704(b). In *Barkley*, the police seized and searched the defendant and recovered from him eight $1 bills, a $5 bill, a $10 bill, five $20 bills, and 53 baggies of heroin from his front pant pocket. At trial, the following colloquy occurred between the State prosecutor and the State's expert, Trooper Moore:

> [PROSECUTOR]: And combining all of this evidence, the fact that we don't have any needles or any way of using the heroin, the money in the pocket, the denominations, the number of bags, *are you able to form an expert opinion as to whether an individual with this set of facts* was engaged or possessing the heroin with the purpose of distributing it?
>
> [TROOPER MOORE]: What I've heard today based on the amounts that were located, the manner of the bands, the lack of any type of device to utilize the heroin, it's pretty evident to me just based on my training and experience here in Wicomico County in recent weeks that *it was destined to be distributed* to persons here in Wicomico County.

219 Md. App. at 143.

Before concluding that the expert's opinion did not violate the prohibition in Rule 5-704(b), we discussed *Gauvin* and noted that the offending question in that case focused personally on the defendant because it asked whether or not the PCP was "'seized from *Ms. Gauvin*'" and whether the PCP was "'*for her personal consumption* or for

distribution.'"[3] *Id*. at 151 (emphasis in *Barkley*). In contrast, the question before us in *Barkley* was "appropriately generic" because it was framed as "'whether *an individu*al with this set of facts' would have 'the purpose of distributing.'" *Id*. (emphasis added). In looking to the actual opinion rendered by the expert, we concluded that it "did not even get close to the line" of offending Rule 5-704(b). *Id*. at 155. We explained:

> The [prosecutor's] question itself summed up four undisputed physical circumstances [the packaging of the heroin for easy sale, the number of bags of heroin, the lack of paraphernalia to use the heroin, and the denominations of money recovered from Barkley] and then asked whether any "individual with this set of facts" would intend to distribute. [The testifying officer] did not even know the appellant and had no special knowledge about the appellant's mind. His opinion was based exclusively on "[w]hat I've heard today based on the amounts that were located, the manner of the bands, the lack of any type of device to utilize the heroin." His expert opinion did not offend Rule 5-704(b). The appellant's state of mind could be inferred from the circumstances themselves, as ultimately it was.

Id. (some brackets in original). We now turn to the facts of our case.

After Detective King was qualified as an expert in the field of drug trafficking and narcotics, the State asked him: "In this case, were you consulted to give an opinion on whether or not the facts and circumstances surrounding this case indicate an intent to distribute the controlled dangerous substance of marijuana?" Defense counsel objected, and at the ensuing bench conference argued that the detective could not "give an opinion as to someone's intent to distribute or not[.]" The court asked the State to rephrase and the following transpired:

[3] We noted that the Court of Appeals made clear in *Gauvin* that "it is the actual opinion rendered by the expert and not the antecedent question that is controlling in a Rule 5-704(b) analysis." *Id*. at 150.

> [THE STATE]: Detective King, I just want to rephrase the question. First of all, did you have a chance to review the facts and circumstances surrounding this case?
>
> [THE WITNESS]: Yes, sir.
>
> [THE STATE]: Were you able to develop an opinion regarding whether or not the facts and circumstances of this case are consistent with someone that has an intent to distribute?
>
> [THE WITNESS]: Yes, sir. I based my knowledge – excuse me, my opinion both on the material that was presented to me by the State's Attorney's Office when I was originally consulted, and then I've been in the courtroom for all but probably one question throughout the entire trial because I was in the bathroom and had to run back. So based on the totality of the circumstances, yes.
>
> [THE STATE]: What is your opinion based on what you've heard so far and what you've reviewed?
>
> [THE WITNESS]: *That the evidence in this case is that of possession with intent to distribute*.
>
> [DEFENSE COUNSEL]: Judge?
>
> THE COURT: Overruled.
>
> [THE STATE]: *Consistent with someone that's had the intent to distribute?*
>
> [THE WITNESS]: *Correct.*
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

(Emphasis added). The State then handed the detective several exhibits (the drugs, the drug analysis report, and several photographs of the drugs seized) and asked him if he had reviewed the exhibits. The detective said he had. The following occurred:

> [THE STATE]: Based on the facts of this case and circumstances, what led you to believe that, in this particular instance, there was possession with intent to distribute?

> [THE WITNESS]: So when I approach a case, I have to look at the totality of the circumstances. While this is not a significant amount of marijuana, in my opinion, the way it's packaged is indicative of intent to sell, the reason being is because –
>
> [DEFENSE COUNSEL]: The same objection, Judge. Can I have a continuing objection on that?
>
> THE COURT: Very well.
>
> [DEFENSE COUNSEL]: Thank you.
>
> THE COURT: Go ahead.
>
> [THE STATE]: Go ahead.
>
> [THE WITNESS]: The reason being is because when the officer searched the individual, he found a larger baggie that was wrapped up containing 12, yes, 12 individually wrapped bags within a larger bag, very close to a very private part of his person. The reason why, though, the amount itself is not indicative of possession with intent and the packaging itself is [] because based on the weight, which is 12.25 grams, and the fact that there were 12 individually wrapped bags, one can surmise that each bag may or may not contain just around a gram of marijuana.
>
> This is done, through my experience of both purchasing marijuana in an undercover capacity, interviewing buyers, users, distributors, et cetera, that pre-packaged amounts are done for quick distributions, so the interaction time between the dealer and the buyer is very minimal. So however the distribution occurs, whether it's a barter system, whether they're giving it to someone and receiving money back or no money is exchanged, either way, it's a quick transaction because the dealer doesn't have to then package the amount in front of the buyer.

Like the expert opinions given in *Gauvin* and *Barkley*, the testimony here did not cross the line. Detective King testified that "*the evidence in this case* is that of possession with intent to distribute" and the evidence was "[c]onsistent with *someone* that's had the intent to distribute[.]" (emphasis added). In rendering his opinion, the detective referred to "the evidence" and "someone" and did not refer to appellant's state of mind. Moreover,

Detective King's opinion was based on his knowledge of the common practices in the drug trade and the facts of the case and not on some "special familiarity with the workings of [appellant's] mind." *Gauvin*, 411 Md. at 711. Accordingly, we are persuaded that the trial court did not err in admitting Detective King's opinion testimony.

II.

Appellant argues that the trial court gave an incomplete and confusing jury instruction on possession of a firearm by a disqualified person. Appellant concedes that he did not object to the instruction but argues that his argument is preserved for our review because defense counsel "substantially complied" with the objection requirement. In the alternative, he argues that even if the issue is not preserved, we should exercise plain error and reverse. The State responds that defense counsel did not "substantially comply" with the objection requirement and that plain error review is not appropriate. We agree with the State.

At the end of the first day of trial, the court asked the parties if they had any comment about any jury instructions the court should give. The State asked the trial court to add to its instruction on the charge of possession of a firearm by a disqualified person the following sentence: "Possession means having control over a thing whether actual or indirect." The prosecutor wrongly believed that the pattern jury instruction relating to firearm possession contained no description about what possession meant and urged the court to add the sentence because it would "be helpful to the jury" and give "them a little guidance" on what possession means. The following colloquy occurred:

> [STATE'S ATTORNEY]: And the State would be satisfied with that. [Defense counsel]?
>
> [DEFENSE COUNSEL]: Oh, I'm sorry.
>
> THE COURT: Did you have any comment on that?
>
> [DEFENSE COUNSEL]: I'd just stick with the standard pattern, Judge. That's all I'll ask you to do. I apologize.
>
> [THE COURT]: All right. Page 20 is a special instruction with respect to possession by a disqualified person, and I'll add at the bottom the possession sentence which appears in criminal pattern jury instruction 4.24 on possession of controlled dangerous substance, where it states possession means having control over a thing, whether actual or indirect, and I'll just insert that after number 3 on that page.
>
> [THE STATE]: Thank you.
>
> [DEFENSE COUNSEL]: Just that one sentence?
>
> [THE COURT]: Yes.
>
> [DEFENSE COUNSEL]: I'll stick to my standard jury instructions.

The proceedings then concluded for the day.

When the trial reconvened the following day, the court proceeded to instruct the jury. On the charge of possession of a handgun by a disqualified individual, the court instructed the jury that to convict: "the State must prove number 1, that the defendant possessed a handgun; and number 2, that the defendant is a disqualified person. It has been stipulated between the parties that the defendant is a disqualified person. Possession means having control over a thing, whether actual or indirect." When it finished instructing the jury, the trial court asked the parties whether they had "anything further at this time?" Both the State and defense counsel responded in the negative.

Appellant recognizes that he did not object after the court instructed the jury, but argues, citing *Gore v. State*, 309 Md. 203, 209 (1987), that any objection was futile and that he "substantially complied" with the preservation requirements, pointing out that he twice requested the court to stick to the pattern instruction and the court was "clear and definitive" in its ruling that it would add the sentence that possession can be actual or indirect. We disagree.

Md. Rule 4-325(e), governing objections to jury instructions, provides:

> (e) **Objection.** No party may assign as error the giving or the failure to give an instruction *unless the party objects on the record promptly after the court instructs the jury*, stating distinctly the matter to which the party objects and the grounds of the objection. . . . An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(Emphasis added). Appellant is correct that "substantial compliance" with Rule 4-325(e) will adequately preserve an issue on appeal. *See Gore*, 309 Md. at 208-09 (citing *Bennett v. State*, 230 Md. 562 (1962)). There are, however, several conditions one must meet to show substantial compliance: 1) there must be an objection to the instruction; 2) the objection must appear on the record; 3) the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record; and 4) the circumstances must show that re-objecting after the court instructs the jury would be futile or useless. *Id*. at 209. A finding of substantial compliance is rare. The Court of Appeals has explained:

> We make clear, however, that these occasions [of substantial compliance] represent the rare exceptions, and that the requirements of the Rule should be followed closely. Many issues and possible instructions are discussed in

> the usual conference that takes place between counsel and the trial judge before instructions are given. Often, after discussion, defense counsel will be persuaded that the instruction under consideration is not warranted, and will abandon the request. Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost.

Sims v. State, 319 Md. 540, 549 (1990) (citation omitted).

Here, appellant has failed to show that he substantially complied with the preservation requirement of Rule 4-325(e) for two reasons. Defense counsel's request that he would "stick to [the] standard jury instructions" did not rise to the level of a "definite statement" of the ground for objection to meet the "substantial compliance" requirements because defense counsel never explained *why* the trial court should "stick" to the pattern instruction. Moreover, we disagree with appellant that any renewal of his request after the jury was instructed would have been futile. *Cf. Gore*, 309 Md. at 206 (stating that the futility requirement was met where defense counsel indicated that he would object if the court were to give a certain instruction, and the trial court replied: "You can object all you want, but I'm going to do it."). Unlike the facts in *Gore*, there is no evidence that re-objecting after the court's instructions would have been futile.

In the event that we hold that appellant failed to preserve his question for our review, appellant asks us to nevertheless exercise plain error review and reverse. We decline to do so. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003)(the five words, "We decline to do so[,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis and footnote omitted), *cert. denied*, 380 Md. 618 (2004).

The trial court's instruction on possession of a firearm by a person with a disqualifying conviction was almost identical to the Maryland Criminal Pattern Jury Instruction (MPJI-Cr) 4:35.6, as far as it went. The pattern jury instruction, contrary to the State's and the trial court's understanding at trial, does contain language about possession. The pattern jury instruction begins with the sentence the court added to its instructions but goes further. Specifically, the pattern jury instruction provides:

> Possession means having control over the firearm, whether actual or indirect. More than one person can be in possession of the same firearm at the same time. A person not in actual possession, who knowingly has both the power and the intention to exercise control over a firearm, has indirect possession of that firearm. In determining whether the defendant has indirect possession of a firearm, you should consider all of the surrounding circumstances. These circumstances include the distance between the defendant and the firearm, and whether the defendant has some ownership or possessory interest in the location where the firearm was found.

MPJI-Cr 4:35.6. Appellant argues that by failing to give the full instruction on possession, specifically the expanded definition of indirect possession, the trial court erred. Appellant argues that without the full instruction the trial court's instruction was confusing and incomplete and allowed the jury to speculate about what constituted indirect possession.

We have said that plain error review "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris*, 153 Md. App. at 507. Nonetheless, an appellate court should recognize unobjected to error when "compelling, extraordinary, exceptional or fundamental to assure the defendant of fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992) (quotation marks and citations omitted). The standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002), *cert. denied*, 376 Md. 545

(2003). In determining whether the error is "compelling" or "extraordinary" we will consider, "the opportunity to use an unpreserved contention as a vehicle for illuminating an area of law; the egregiousness of the trial court's error; the impact of the error on the defendant; and the degree of lawyerly diligence or dereliction." *Steward v. State*, 218 Md. App. 550, 566 (2014) (citing *Morris*, 153 Md. App. at 518–524).

Here, the error was neither "compelling" nor "extraordinary." As such, we are persuaded that the alleged error does not fall within the limited and exceptional circumstances triggering plain error review.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.