Circuit Court for Prince George's County
Case No. CT121814X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2659

September Term, 2016

WILFREDO ROSALES

v.

STATE OF MARYLAND

Graeff,
Leahy,
Beachley,

JJ.

Opinion by Graeff, J.

Filed: December 11, 2017

In 2013, Wilfredo Rosales, appellant, was convicted by a jury in the Circuit Court for Prince George's County of retaliation against a witness and participation in a criminal gang. The court sentenced appellant to twelve years imprisonment, six years suspended, on the conviction for retaliation against a witness, and it imposed a consecutive sentence of ten years, five years suspended, on the conviction for participation in a criminal gang.

On appeal,[1] appellant presents the following questions for this Court's review:

1. Did the trial court err in excluding the victim-witness' prior convictions for crimes of violence in aid of racketeering activity?

2. Did the trial court commit plain error in failing to instruct the jury on the elements of participation in a criminal gang?

3. Was the evidence insufficient to sustain the conviction for participation in a criminal gang, and was the appellant denied his constitutional right to the effective assistance of counsel because his trial attorney failed to preserve the sufficiency issue for appellate review?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Hector Hernandez-Melendez, a.k.a., "Scrappy," is a former member of the Mara Salvatrucha ("MS-13") gang. He testified that, on September 26, 2012, at approximately 7:00 p.m., he was at Langley Park watching a soccer game. When the game ended, all of the soccer players, along with appellant, who had been sitting on the side talking to the soccer players, approached Mr. Hernandez-Melendez and asked him if he was "Scrappy."

[1] Appellant's initial appeal was voluntarily dismissed as untimely filed. Appellant subsequently filed a Petition for Post-Conviction Relief based on his counsel's failure to note a timely appeal, and he was given the right to file a belated notice of appeal.

He said no. He was then asked to lift up his shirt. When he refused, he was thrown to the ground and stabbed by an individual he did not know. Appellant did not touch him, but he took Mr. Hernandez-Melendez' wallet. Mr. Hernandez-Melendez ran and flagged down a police officer, who called for assistance.

Mr. Hernandez-Melendez did not recognize any of the individuals involved in his stabbing except for appellant, who Mr. Hernandez-Melendez had tried to recruit into MS-13 in 2006 when he was "very active" in the gang. Mr. Hernandez-Melendez had not had any contact with appellant in the seven years leading up to the stabbing incident.

Mr. Hernandez-Melendez testified that the individuals who attacked him did not have visible tattoos, nor did they scream out "MS-13" as they attacked him. He did not know if the individuals were MS-13 members. He believed, however, that the attack occurred because, in 2009, he testified in the District of Columbia as a government witness in a case against three MS-13 gang members. At the hospital, Detective Jose Chinchilla showed Mr. Hernandez-Melendez a picture of appellant, and Mr. Hernandez-Melendez identified appellant as someone he "did know from the past and who was there that night of the incident."

Detective Chinchilla interviewed appellant, and the State played a recording of the interview at trial. Appellant admitted that he was in the area at the time of the stabbing, but he denied any involvement in the incident. He had not seen Mr. Hernandez-Melendez in many years, although he recognized Mr. Hernandez-Melendez from "back in the day." Appellant walked over to Mr. Hernandez-Melendez and asked him where he had been, and

Mr. Hernandez-Melendez advised that he had been "locked up." Appellant then saw Mr. Hernandez-Melendez get hit by three or four guys, who asked him if he was "Scrappy" and asked him to lift up his shirt. Appellant knew that "Scrappy" had tattoos. Immediately after he was hit, Mr. Hernandez-Melendez got up and ran. Appellant did not see anyone with a knife. Appellant had heard rumors that Mr. Hernandez-Melendez "snitched" on gang members.

Detective Eliseo Medina, a member of the District of Columbia Metropolitan Police Department assigned to the Intelligence and Gang Division, testified that Mr. Hernandez-Melendez had been identified as a full-fledged gang member of MS-13 between 2005 and 2006. Mr. Hernandez-Melendez had been a witness in a criminal case in the District of Columbia, and he was "very crucial and important in prosecuting those" cases.

Detective Medina had participated in investigating "crimes committed by or involving MS-13 members." Between 2008 and 2009, he observed appellant with individuals identified as gang members associated with MS-13. Detective Medina explained:

> As part of our investigation [into gangs], we stopped subjects that are suspected of committing crimes, we responded to calls from citizens that a crime was being committed, fights, chasing some other subjects on the street. And that's how I responded – me and my coworkers responded to certain areas in the District of Columbia in which we have stopped these subjects, arrested some of them, and [appellant] was present at the time that these guys were committing crimes on the streets.

He stopped appellant "[m]ore than 50 times" for associating with "known and documented MS-13 gang members." Detective Medina had never arrested appellant, but based on

investigations, pictures, and interviews, appellant was classified as a MS-13 gang member on the police department's "validation form, which classifies the membership."

Sergeant George Norris, a member of the Prince George's County Police Department assigned to the Special Investigative Section, Gang Intelligence Unit, was admitted as an expert on MS-13. He described the gang as "an international criminal organization street gang that derived from the early '80's in Los Angeles." He testified to the structure of MS-13, as follows:

> On the bottom level you're going to have paisa, people that associate with a gang. They dress like the gang, they assist the gang, they participate in activities with the gang but aren't necessarily trying to become a gang member.
>
> Above that you have chequeos or someone that has put in check. That's somebody that's on probation, someone that's trying to work their way up and become an actual gang member.
>
> Then you have homeboys. Homeboys are actual members of MS-13.
>
> Within the structure you're going to have it separated in cliques. So each clique is like a squad. Each clique will have its own leadership. They'll have the first word, the second word or first person in charge or second person in charge.

To become a MS-13 gang member, a chequeo shows interest and "put[s] in work or doing stuff for the gang, showing your loyalty and support for the gang." The chequeo is then required to "commit acts of violence against rivals," "get jumped in," i.e., submit to a beating, or both. Sergeant Norris testified that MS-13 has rules, including committing acts of violence against rivals, not cooperating with law enforcement, and following directions from the bosses. There are penalties for infractions of the rules, including the "ultimate

penalty," which is "a green light, which is basically a hit put out on you. It's a death order to everybody else that you're green lit or they have the green light to kill you." The number one rule violation leading to a green light is "associating with rivals or associating with law enforcement."

Sergeant Norris testified that the attack on Mr. Hernandez-Melendez was "directly related to the actions of the victim testifying against MS-13," and the "way that it happened is consistent with the way MS-13 attacks people on a daily basis almost." He noted that the attackers tried to identify Mr. Hernandez-Melendez by asking if he was "Scrappy," the name he identified with when he was a gang member, and asking Mr. Hernandez-Melendez to lift his shirt so that they could confirm his identity through tattoos.

With respect to appellant's "association with or membership in MS-13," Sergeant Norris testified:

> My opinion is he's at least a chequeo or someone that is trying to become a member, if not an actual member. I haven't heard or seen testimony that he's an actual member that I recall, but he's somebody that was trying to become a member.
>
> I believe the victim said – the victim said it was, like, six years ago. That being the case, if you're trying to become a member six years ago, and this assault happens last year, if you're not associated with a gang, why would you attack an MS-13 member that you know is an MS-13 member from the past? It doesn't make sense to me that someone that's not still associated with the gang and not still actively involved in the gang would care whether someone is an MS-13 member from the past or not.

Appellant called two character witnesses to testify on his behalf. His sister, Nancy Rosales, testified that appellant is "calm at home," and she "rarely saw him fight."

Appellant's father, Jose Rosales, testified that, at no time was appellant engaged in "acts of violence," and appellant had a good reputation for peacefulness in the community.

During jury deliberations, a note was received from the jury asking: "Question one: Based on the testimony, what was the defendant's documented level of involvement with MS-13?" and "Question two: Can an individual of the level verified above act on a known green-lighted member without retaliation?" The jurors were instructed to rely on their recollection of the evidence. Ultimately, the jury acquitted appellant of first and second degree assault, armed robbery, robbery, theft, and carrying a weapon, but it convicted him of retaliation against a witness and participation in a criminal gang.

Additional facts will be discussed, as necessary, in the discussion that follows.

DISCUSSION

I.

Prior Convictions

Appellant contends that the circuit court erred in precluding him from impeaching Mr. Hernandez-Menendez with prior criminal convictions for committing violent crimes in aid of racketeering activity. He asserts that the prior convictions were impeachable offenses because they were relevant to the witness' credibility.

The State contends that the court properly granted its motion in limine to exclude Mr. Hernandez-Melendez' prior convictions on the ground that they "were categorically non-impeachable offenses" because they were "simply crimes of violence," which are "not relevant to credibility as a matter of law." Moreover, it asserts, "even if the offenses are

not categorically non-impeachable, the trial court's exclusion of them on that basis was harmless error because ample evidence was admitted that allowed the jury to evaluate [Mr. Hernandez-Melendez'] credibility."

A.

Proceedings Below

The State moved in limine to preclude appellant from asking Mr. Hernandez-Melendez about his 2011 federal court convictions for conspiracy to commit assault with a dangerous weapon in aid of racketeering activity and threatening to commit a crime of violence in aid of racketeering activity. The State argued that these were not impeachable offenses because they were not "an infamous crime or a crime relevant to the witness's credibility." It asserted that "the courts have made clear in Maryland that a conspiracy or an attempt, any inchoate offense, is not admissible for impeachment of credibility, even if the object of the conspiracy or attempt or solicitation might be an offense that would be able to be used to be impeachable." Additionally, the State argued:

> [T]he underlying substantive offense, the assault with a dangerous weapon and just a vague and general crime of violence, are not offenses in Maryland that have been deemed to cut at the truthfulness or lack thereof of a witness.
>
> The courts have held, specifically with respect to assault, that that is not a crime that tends to show a witness's veracity or ability to tell the truth. It's not a crime like theft. It's not even a crime like possession with intent to distribute, which has been deemed a crime that does cut at somebody's truthfulness.

Appellant's counsel argued that the crimes involved were not "just a crime of violence" or "just an assault," but rather, "an assault in aid of racketeering, which means

that he committed these crimes in aid of a criminal enterprise, which involves a lot of deceit . . . working in the shadows." Counsel stated that there was no case addressing the issue, but "the presumption is that it is admissible to impeach unless it can be shown otherwise." Counsel continued:

> Perhaps just an instance of battery, but that's not what this is, that's not what his conviction is, Your Honor. His conviction involved threats, intimidation and racketeering, very serious federal crimes. So if racketeering cannot be used to impeach a witness as far as a felony conviction, I don't really know what really could at that point. The statute is clear, so –

The court then asked counsel where in the statute it was clear that the offenses were impeachable, and counsel stated that felonies were involved. The State responded:

> [W]e're dealing with an offense that is not a common law felony. We're dealing with a statutory offense, 18 USC, section 1959.
>
> ***
>
> . . . We're not dealing with Mr. Hernandez being convicted of racketeering; we're dealing with Mr. Hernandez being convicted of the inchoate crimes of conspiring to commit an assault and threatening to commit a crime of violence and that he did so to maintain membership in an organization that engages in racketeering. There's nothing about Mr. Hernandez's conviction that says he engaged in racketeering.
>
> Again, these are inchoate crimes, plainly not crimes that are allowed in Maryland to be used as impeachable offenses. I believe that counsel might be confused with the federal rule which does allow for any crime that is a felony or carries more than a possibility of a year imprisonment to be used as an impeachable offense.
>
> That is not the case in Maryland. Maryland has a more extensive codification and a more extensive case law relating to the limitations on impeachment. The case law has specifically said, in addition to inchoate crimes not being able to be used, that even assault in the first degree, which, obviously, is a felony offense in Maryland – it carries a possibility of 25 years imprisonment – is not an offense that may be used to impeach a witness because it doesn't bear on credibility. And even if these were not inchoate

> offenses, that's the nature of the offense that we're talking about here, an assault.
>
> Even if it rose to the level of a first degree assault, which it's not clear – I mean, possibly, it's a crime of violence but, again, in Maryland, sometimes a second degree assault is a crime of violence. So even at the level of first degree assault, Maryland says you can't use that. Sure, it's a felony, but you cannot use that to impeach a witness because it doesn't bear upon credibility.

Defense counsel then stated: "Racketeering, in and of itself, is a dishonest act."

The court ultimately granted the State's motion. It stated: "Based upon the arguments made by the State, we are going to exclude any reference to his conviction, and we're going to exclude any questions as to what he was in jail for."

B.

Analysis

Maryland Rule 5-609 governs the admissibility, for impeachment purposes, of a witness' prior conviction. It provides, in part, as follows:

> (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.
>
> (b) **Time Limit.** Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.

Rule 5-609 creates a three-part test for determining the admissibility of prior convictions for impeachment purposes:

> First, subsection (a) sets forth the "eligible universe" for what convictions may be used to impeach a witness=s credibility. This universe consists of two categories: (1) "infamous crimes" and (2) "other crimes relevant to the witness's credibility." Infamous crimes include treason, common law felonies, and other offenses classified generally as *crimen falsi*. If a crime does not fall within one of the two categories, then it is inadmissible and the analysis ends. This threshold question of whether or not a crime bears upon credibility is a matter of law. If a crime falls within one of the two categories in the eligible universe, then the second step is for the proponent to establish that the conviction was not more than 15 years old, that it was not reversed on appeal, and that it was not the subject of a pardon or a pending appeal. Finally, in order to admit a prior conviction for impeachment purposes, the trial court must determine that the probative value of the prior conviction outweighs the danger of unfair prejudice to the witness or objecting party. This third step is clearly a matter of trial court discretion.

Cure v. State, 421 Md. 300, 324 (2011) (quoting *State v. Westpoint*, 404 Md. 455, 477-78 (2008)).

Here, the circuit court excluded the evidence based on the first factor, finding that the crimes of which Mr. Hernandez-Melendez were convicted were not within the "eligible universe" of impeachable crimes. *Cure*, 421 Md. at 324. We review that finding *de novo*.

Appellant contends that the convictions were impeachable offenses because they were "relevant to the witness's credibility."[2] As indicated, the State disagrees.

The crimes of which Mr. Hernandez-Melendez was convicted were violations of 18 U.S.C. § 1959, entitled "Violent Crimes in Aid of Racketeering Activity." This statute provides, in relevant part, as follows:

[2] At trial, appellant also argued that Mr. Hernandez-Melendez' convictions were impeachable as infamous crimes because they are felonies. On appeal, perhaps recognizing that infamous crimes includes only "common law felonies," not statutory felonies, he does not make this argument.

> (a) Whoever, . . . for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, . . . assaults with a dangerous weapon, . . . or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or . . . conspires so to do, shall be punished –
>
> ***
>
> (3) for assault with a dangerous weapon . . . by imprisonment for not more than twenty years or a fine under this title, or both;
> (4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;
>
> ***
>
> (6) for attempting or conspiring to commit a crime involving . . . assault with a dangerous weapon, . . . by imprisonment for not more than three years or a fine . . . under this title, or both.

Section 1959(b)(1) provides that "'racketeering activity' has the meaning set forth in section 1961," the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Section 1961 defines "racketeering activity" as: "(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year"; and "(B) any act which is indictable under" several provisions of the title, including, but not limited to, crimes related to bribery, counterfeiting, embezzlement from pension and welfare funds, fraud, tampering with a witness, and forgery. These acts are "commonly referred to as 'predicate acts.'" *Beck v. Prupis*, 529 U.S. 494, 497 n.2 (2000). Thus, § 1959 prohibits certain kinds of violent crime "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise" that is engaged in at least one crime that constitutes a RICO predicate act.

As the State notes, the substantive acts involved, assault with a dangerous weapon or threats to commit a crime of violence, involve acts of violence, which the Court of Appeals has said "generally have little, if any, bearing on honesty and veracity." *Prout v. State*, 311 Md. 348, 364 (1988). This Court similarly has held that violent offenses are non-impeachable offenses. *See Anderson v. State*, 227 Md. App. 329, 340 (2016) (carrying concealed weapon); *Jones v. State*, 217 Md. App. 676, 708-09 (attempted second-degree murder), *cert. denied*, 440 Md. 227 (2014); *Banks v. State*, 213 Md. App. 195, 202-07 (2013) (resisting arrest); *Thurman v. State*, 211 Md. App. 455, 465-66 (2013) (assault on a law enforcement officer); *Fulp v. State*, 130 Md. App. 157, 167 (2000) (assault with intent to murder).

Appellant contends that the violent crimes at issue here are different because they are done in aid of racketeering activity, i.e., for the purpose of promoting the person's position in a RICO enterprise. He points to this Court's opinion in *In re Gary T.*, 222 Md. App. 374, 377 (2015), where we stated that, "in a prior-conviction analysis . . . the court must look only at the elements of the crime essential to a conviction," as opposed to "the particular facts that led to the conviction."

In *Gary T.*, this Court considered whether a prior conviction for conspiracy to distribute a controlled dangerous substance could be used as impeachment evidence. In addressing that issue, we explained:

> The only information allowed are the name and date of the conviction and the sentence imposed. *State v. Giddens*, 335 Md. 205, 222 (1994). The name of the crime itself must identify the conduct of the witness that tends to show that he or she is unworthy of belief. *See Ricketts v. State*, 291 Md.

> 701 (1981); *State v. Westpoint*, 404 Md. 455, 480 (2008). In many, perhaps most, cases, the name of the crime suffices, by judicial construction, to allow such a determination, but whether conspiracy falls within that category necessarily depends on the objective of the conspiracy.
>
> If what is proffered is that the witness was convicted of conspiracy—an agreement to achieve some unlawful purpose or some lawful purpose in an unlawful manner—without any indication of what the witness conspired to do, the crime is so amorphous and diverse as to make it impossible for the trier of fact to determine whether the conviction has any relation to the witness's credibility, unless the Court is willing to assume that a person who enters into *any* agreement to do *anything* unlawful would likely commit perjury in *any* case in which he or she was called to testify. That is an assumption we are unwilling to make.

Id. at 381-82 (parallel citations omitted).

This Court noted that a "person may not be charged in Maryland simply with 'conspiracy,'" but rather "the charge must include the objective of the conspiracy, and, in order for there to be a valid conviction, the evidence must establish that objective." *Id.* at 383. The Court continued:

> That provides the missing link and, with that link, provides a clear and rational standard for determining whether the conspiracy of which the witness was convicted suffices as an impeachable offense. If, for purposes of Rule 5-609, the crime that the witness had agreed to commit is an infamous one or one that is relevant to the witness's credibility and thus would qualify as an impeachable offense, the conspiracy to commit that crime should as well. Indeed, a conscious agreement to commit that crime, if anything, may have a greater bearing on credibility than the actual commission of the crime, as it ordinarily would indicate some evil forethought and planning.

Id. at 385. Accordingly, "whether a conviction for conspiracy falls within the category of convictions usable for impeachment purposes (subject to balancing of probative value against unfair prejudice) depends on the objective of the conspiracy." *Id.* at 386. In that

case, where the conviction was for conspiracy to distribute CDS, and the Court of Appeals in *State v. Giddens*, 335 Md. 205 (1994), had "accepted the assumption that most people who distribute cocaine would be willing to lie under oath, including about matters having nothing to do with the conviction," we held that the circuit court erred in preventing impeachment with that offense. *Id.* at 381, 386.

Appellant contends that, as in the case of conspiracy, we should look to the purpose of the criminal act. Here, he asserts, the "name of the crime itself – *i.e.*, violent crimes in aid of racketeering activity – identifies one connected under the statute as unworthy of belief." In support, he cites several cases holding that various drug offenses are relevant to credibility. *See Giddens*, 335 Md. at 217 ("'[A] narcotics trafficker lives a life of secrecy, . . . being prepared to say whatever is required by the demands of the moment, whether the truth or a lie.'") (quoting *United States v. Ortiz*, 553 F.2d 782, 784 (2d Cir. 1977)); *Anderson*, 227 Md. App. at 329 ("[A] crime tends to show that the offender is unworthy of belief, if the perpetrator 'lives a life of secrecy' and engages in 'dissembling in the course of [the crime], . . . being prepared to say whatever is required by the demands of the moment, whether the truth or a lie.'") (quoting *Washington v. State*, 191 Md. App. 48, 82 (2010)); *Carter v. State*, 80 Md. App. 686, 693-94 (1989) (drug manufacturing is an impeachable offense as it is "carried on furtively" and requires the defendant "to take great pains to conceal his conduct," indicating a willingness "to conceal[] the truth").

Appellant asserts that the same can be said for an individual who commits violent crimes in aid of racketeering activity. As discussed, however, "racketeering activity"

merely means a crime that qualifies as a RICO predicate act. *See* 18 U.S.C. § 1959(b)(1) and § 1961(1). Although some of the crimes under the statute may be relevant to credibility, such as fraud-related crimes and narcotics trafficking offenses, there are other predicate acts that clearly are not impeachable as relating to credibility, such as an act involving murder or kidnapping. 18 U.S.C. § 1961(1)(A).

Contrary to appellant's contention, the "name of the crime," violent crimes in aid of racketeering activity, does not "identify the conduct of the witness that tends to show that he or she is unworthy of belief." *In re Gary T.*, 222 Md. App. at 382. And looking at the elements of the crime, 18 U.S.C. § 1959(a) makes it a crime to commit, attempt to commit, conspire to commit, or threaten to commit, a violent crime, with the purpose of "gaining entrance to or maintaining or increasing position in" a RICO enterprise. Thus, the actual conduct involved is a crime of violence, which is not impeachable, and the purpose of committing the crime is not to deceive, but to advance in an enterprise that might, or might not, be engaged in deceitful acts. Accordingly, the trial court properly concluded that Mr. Hernandez-Melendez' prior convictions involve violent crimes that are not relevant to credibility, and therefore, they are non-impeachable crimes under Rule 5-609.

II.

Failure to Instruct the Jury

Appellant next contends that his conviction for participation in a criminal gang should be reversed "because the trial court failed to instruct the jury on an element of the offense – *i.e.*, that the MS-13 gang 'engage[d] in a pattern of criminal gang activity.'" He

asserts that the Court failed to instruct the jury regarding the definition of "pattern of criminal activity," i.e., that members of the gang committed, or attempted to commit, two or more acts of specified criminal conduct. Appellant recognizes that his claim of error is unpreserved, but he asserts that "this case is the rare situation for which plain error review is appropriate."

The State disagrees. It argues that appellant's claim "cannot satisfy the predicates of plain error review" because the error "was not plain, given the lack of supporting case law at the time of trial," and it "was not material because even if the jury had been instructed on the statutory definitions, given the admission of State's Exhibit 8 and the other evidence against [appellant], there is no chance that he would have been acquitted."[3] Moreover, the State asserts that, even if appellant "could make a threshold showing of material plain error sufficient to invoke plain error review, there is no reason for this Court to exercise its plenary discretion to notice plain error in this case."

[3] State's Exhibit 8, admitted into evidence without objection, included certified copies of the convictions of three MS-13 members against whom Mr. Hernandez-Melendez had testified: Melvin Sorto, Jose Gutierrez, and William Cordova. Each individual was convicted of murder for an offense in April 2007, and of conspiracy to commit violent crimes in aid of racketeering activity, including assault with intent to kill, for an offense in June 2007.

A.

Elements of the Offense

The crime of participating in a criminal gang is set forth in Maryland Code (2012 Repl. Vol.) § 9-804 of the Criminal Law Article ("CR"). It provides, in relevant part, as follows:

> (a) A person may not:
> (1) participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity; and
> (2) knowingly and willfully direct or participate in an underlying crime, or act by a juvenile that would be an underlying crime if committed by an adult, committed for the benefit of, at the direction of, or in association with a criminal gang.

Section 9-801(c) provides, in relevant part, as follows:

> (c) "Criminal gang" means a group or association of three or more persons whose members:
> (1) individually or collectively engage in a pattern of criminal gang activity;
> (2) have as one of their primary objectives or activities the commission of one or more underlying crimes, including acts by juveniles that would be underlying crimes if committed by adults; and
> (3) have in common an overt or covert organizational or command structure.

CR § 9-801(d) defines "pattern of criminal gang activity" as the "commission of, attempted commission of, conspiracy to commit, or solicitation of two or more underlying crimes . . . provided the crimes or acts were not part of the same incident." CR § 9-801(f) lists the "underlying crimes," as follows:

> (f) "Underlying crime" means:
> (1) a crime of violence as defined under § 14-101 of this article;
> (2) a violation of § 3-203 (second degree assault), § 4-203 (wearing, carrying, or transporting a handgun), § 9-302 (inducing false testimony or

avoidance of subpoena), § 9-303 (retaliation for testimony), § 9-305 (intimidating or corrupting juror), § 11-303 (human trafficking), § 11-304 (receiving earnings of prostitute), or § 11-306 (a)(2), (3), or (4) (house of prostitution) of this article;

(3) a felony violation of § 3-701 (extortion), § 4-503 (manufacture or possession of destructive device), § 5-602 (distribution of CDS), § 5-603 (manufacturing CDS or equipment), § 6-103 (second degree arson), § 6-202 (first degree burglary), § 6-203 (second degree burglary), § 6-204 (third degree burglary), § 7-104 (theft), or § 7-105(unauthorized use of a motor vehicle) of this article; or

(4) a felony violation of § 5-133 of the Public Safety Article.

B.

Instructions

During jury instructions, the court instructed the jury regarding participation in a gang with the knowledge of the gang's engagement in criminal activity:

> A person may not participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity and knowingly and willfully direct or participate in an underlying crime, or act by a juvenile that would be an underlying crime if committed by an adult, committed for the benefit of, at the direction of or in association with a criminal gang.

Defense counsel indicated that he was satisfied with the court's jury instructions.

C.

Plain Error Review

Maryland Rule 4-325(e) provides that "[n]o 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." Acknowledging that no objection was lodged below, appellant asks us to exercise our discretion to engage in plain error review.

In *Kelly v. State*, 195 Md. App. 403 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 563 U.S. 947 (2011), we noted that, although we have discretion under Md. Rule 8-131(a) to address an unpreserved issue:

> 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.

Id. at 431 (citations and quotations omitted). We further stated:

> Plain error is "error which vitally affects a defendant's right to a fair and impartial trial." Appellate courts will exercise their discretion to 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.'" "[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.'"

Id. at 431-32 (citations omitted).

The Court of Appeals has set forth the process involved for an appellate court to grant the extraordinary remedy of reversal for plain error. In *State v. Rich*, 415 Md. 567, 578-79 (2010), the Court explained:

> "[P]lain-error review"B involves four steps, or prongs. First, there must be an error or defect--some sort of "[d]eviation from a legal rule"--that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant=s substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error--discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Meeting all four prongs is difficult, "as it should be."

(citations omitted). *Accord Steward v. State*, 218 Md. App. 550, 566-67, *cert. denied*, 441 Md. 63 (2014).

Here, the State does not dispute that the first requirement was satisfied. It acknowledges that, if appellant had requested that the court instruct the jury on the definitions of "criminal gang" and "pattern of criminal gang activity," the court would have been required to give those instructions. It further acknowledges that appellant's statement that he was satisfied with the instructions "may not have qualified as an affirmative waiver that would preclude the possibility of harmless error review." *See Yates v. State*, 202 Md. App. 700, 722 (2011) (holding that counsel's statement that he had no objections to jury instructions was not "an affirmative waiver of his right to challenge the jury instruction" and "did not preclude this court from deciding whether to exercise its discretion to engage in plain error review"), *aff'd*, 429 Md. 112 (2012).

The States argues, however, that appellant cannot satisfy the remaining requirements. It contends that the failure to instruct the jury regarding the element of the offense that the MS-13 gang "engage[d] in a pattern of criminal gang activity," as defined in CR § 9-801(d), was not "plain" because "no reported appellate decision at the time of [appellant's] trial had held that the State must prove the underlying crimes to establish an offense under C[R] § 9-804(a)."

Moreover, the State argues that the court's omission was not material, i.e., it did not affect the outcome of the court proceedings. We agree.

The State introduced into evidence as Exhibit 8 certified copies of the convictions of three MS-13 members against whom Mr. Hernandez-Melendez had testified: Melvin Sorto, Jose Gutierrez, and William Cordova. Each individual was convicted of murder for an offense in April 2007, and of conspiracy to commit violent crimes in aid of racketeering activity, including assault with intent to kill, for an offense in June 2007. This evidence showed that members of MS-13 engaged in a pattern of criminal gang activity, i.e., two or more underlying crimes not part of the same incident. Thus, as the State argues, the failure to give the instruction did not prejudice appellant because he "cannot show any likelihood that he would have been acquitted by a properly instructed jury."

Moreover, even if we were to conclude that there was a material error, plain error review remains reserved for our discretion, to be reviewed only where the unpreserved error is "'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Kelly,* 195 Md. App. at 432 (quoting *Turner v. State*, 181 Md. App. 477, 483 (2008)). This is not such a case.

As indicated, the error here did not have a "crucial bearing upon the verdict." *See Austin v. State*, 90 Md. App. 254, 269-271 (1992) (noting as factors to consider in exercising discretion whether the error had a "crucial bearing upon the verdict" and whether the error presents an opportunity to "illuminate some murky recess of the law"). Nor does this case present an opportunity to "illuminate some murky recess of the law." *Id.* at 271. After appellant's trial, this Court held, in *In re Kevin T.*, 222 Md. App. 671, 679 (2015), that "[i]n order to prove a violation of § 9-804, the State was required to show that

the MS-13 gang engaged in a pattern of criminal activity as defined in § 9-801(d)," and given this decision, there is no need for us to address this issue to clarify it. Accordingly, we will not overlook appellant's failure to object to the court's instructions. We decline to exercise our discretion to recognize plain error.

III.

Ineffective Assistance of Counsel

Appellant's final contention is that the evidence was insufficient to sustain his conviction for participation in a criminal gang "because the State failed to prove that MS-13 engaged in a 'pattern of criminal gang activity,' i.e., that members of the gang actually committed (or attempted to commit) 'two or more underlying crimes,' as defined in [CR] § 9-801(d)." He acknowledges that his counsel failed to make this argument in his motion for judgment of acquittal, as required by Maryland Rule 4-324(a), and therefore, the issue is not preserved for this Court's review.[4] He argues, however, that this Court should reverse his conviction for this offense because counsel's failure to preserve the issue for appeal amounts to ineffective assistance of counsel.

The State contends that there is no justification for this Court to review appellant's ineffective assistance claim on direct review, "without a developed post-conviction factual

[4] Maryland Rule 4-324(a) provides, in relevant part:

> A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. . . .

record." In any event, the State argues, to the extent appellant's ineffective assistance claim can be undertaken on the trial record, appellant "cannot show that his trial attorney's performance was objectively unreasonable, nor can he establish prejudice."

At the conclusion of the State's case, defense counsel made a motion for judgment of acquittal, and the following transpired:

> [APPELLANT'S COUNSEL]: Counsel would make a motion for judgment of acquittal on all counts. Counsel will submit but make that motion for judgment of acquittal on all counts.
>
> THE COURT: Do you want to argue any specifically?
>
> [APPELLANT'S COUNSEL]: Well, lack of sufficiency of evidence that – on all counts; that there's only sufficient evidence to permit the jury to speculate as to the defendant's guilt at this point.

After the defense rested, no other motions were made, and there was no further proffer regarding the insufficiency of the evidence.

A defendant in a criminal case must prove the following elements to establish that his or her attorney provided ineffective assistance of counsel at trial:

> (1) that counsel's performance was deficient, *i.e.*, that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel=s unprofessional errors, the result of the proceedings would have been different, *i.e.*, a probability sufficient to undermine confidence in the outcome.

State v. Adams, 406 Md. 240, 293 (2008) (quoting *State v. Borchardt*, 396 Md. 586, 602 (2007)), *cert. denied*, 556 U.S. 1133 (2009). *Accord Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defense must show both deficient performance and prejudice as a

result of counsel's deficient performance. *See In re Parris W.*, 363 Md. 717, 725 (2001) (both prongs of the test must be shown to establish ineffective assistance of counsel).

"Generally, the appropriate avenue for the resolution of a claim of ineffective assistance of counsel is a post-conviction proceeding." *Washington v. State*, 191 Md. App. 48, 71, *cert. denied*, 415 Md. 43 (2010). *Accord Robinson v. State*, 404 Md. 208, 219 (2008). The rationale for this general rule is that "the trial record rarely reveals why counsel acted or omitted to act, and [post-conviction] proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel=s ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). In the absence of a trial record clearly illuminating why counsel took particular actions, "the Maryland appellate courts would be entangled in 'the perilous process of second-guessing' without the benefit of potentially essential information.'" *Id*. at 561 (quoting *Johnson v. State*, 292 Md. 405, 435 (1982)).

Here, counsel's reasons for not making the argument made on appeal in his motion for judgment of acquittal "are best left for exploration in post-conviction and collateral fact-finding proceedings." *Robinson*, 404 Md. at 219. This is particularly the case here where, as discussed *supra*, State's Exhibit 8 indicated that members of the gang had committed two underlying crimes, and therefore, counsel may have decided not to make the argument raised on appeal because he believed it was not warranted.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.