Circuit Court for Montgomery County
Case No. 126313C
Hon. Joseph M. Quirk

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2890

September Term, 2015

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CARLOS A. GREENE

v.

STATE OF MARYLAND

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Meredith,
Arthur,
Friedman,

JJ.

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Opinion by Friedman, J.

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Filed: March 15, 2017

Appellant seeks to have us assign three new duties to trial judges in criminal cases—duties that heretofore have been handled by defense counsel. We decline to do so. And, in his fourth allegation of error, the appellant attempts to turn an innocuous, background question posed to a witness into something it is not. We affirm, therefore, the judgment of the lower court.

## FACTUAL AND PROCEDURAL BACKGROUND

When the front desk person at the EconoLodge in Takoma Park received complaints about smoke coming from one of the hotel rooms, he went to ask the occupants to stop and to tell them that they would be fined for smoking in the room. Before he could finish, however, the occupants fled. Several got into a car and were chased by Sergeant Charles Hoetzel of the City of Takoma Park Police Department, who happened to be nearby. After they crashed the get-away car, the occupants fled on foot. Sergeant Hoetzel apprehended one, but then returned to search the abandoned vehicle. In the vehicle, Sergeant Hoetzel found a driver's license belonging to Carlos A. Greene. He also found drugs and a gun. The next day, Greene was called into the police station, ostensibly to recover his driver's license. But, after Sergeant Hoetzel recognized him from the car, he was arrested and charged with possession of a firearm in a drug trafficking crime, possession with intent to distribute heroin, transporting a firearm in a drug trafficking crime, and possession of a firearm by a prohibited person.

When the case came on for trial, the trial judge explained how the jury selection process was going to work to the venire panel. Then, before beginning voir dire, the trial

judge brought the State and defense counsel to the bench. After asking if there were any challenges to the array of potential jurors, the trial judge inquired if Greene was going to come to the bench during voir dire:

> THE COURT: … The other [question] is, does the defendant waive his presence or is he going to want to be present up here for the voir dire?
>
> [DEFENSE COUNSEL]: I usually have my client waive his presence because it makes the jurors uncomfortable if he's up here.
>
> THE COURT: Right. Okay. Well, if it's different than that, let me know, okay, but I'll anticipate that the defendant has waived his --
>
> [DEFENSE COUNSEL]: Yes. I find that if I recall my client here, he – immediately the juror feels a little uncomfortable. I think that's appropriate [for Greene to remain at trial table].

The trial judge then began voir dire and, after empaneling a jury, the trial began.

At the end of trial, during a discussion of jury instructions, the trial judge brought up the crime of drug possession:

> THE COURT: Now, the State asked for [an instruction on] simple possession. Is that a request that you still want?
>
> [THE STATE]: Not for the lesser included, Your Honor. I was looking for the definition of possession. I couldn't recall if it was included in possession with intent to distribute... .
>
> THE COURT: Well, possession is not defined in the [instruction for] possession with intent to distribute.

[THE STATE]: So, that's why I think I asked for it, so that the jury is instructed on what possession means under the legal terms.

THE COURT: Okay.

And, [Defense Counsel], as far as the possession instruction which was proposed, it's listed as amended, have you had an opportunity to review that?

[DEFENSE COUNSEL]: I reviewed it. I like the wording. I think it's favorable in both ways, so --

THE COURT: Okay. All right. Then we'll --

[DEFENSE COUNSEL]: -- I have no objection.

THE COURT: -- utilize that as amended.

A discussion of the crime of simple possession also arose when the trial judge was reviewing the proposed verdict sheet with the State and defense counsel:

THE COURT: But in terms of this verdict sheet, the State is not asking for a lesser included [offense] of possession?

[THE STATE]: No.

THE COURT: You just want to go with what's listed. Does the State find the verdict sheet that we have composed to be accurate, or do you have any objection to it?

[THE STATE]: No objection, Your Honor. I think it would prevent inconsistent verdicts.

THE COURT: Okay. Defense?

[DEFENSE COUNSEL]: Basically, what you've done is you've narrowed it. I'm satisfied.

Immediately after that discussion, the State realized Greene was asleep at the trial table:

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|---|---|
| [THE STATE]: | And, Your Honor, just so the record's clear, is [Greene] awake? |
| [DEFENSE COUNSEL]: | No. Are you awake? |
| THE COURT: | No. It doesn't matter. |
| [THE STATE]: | Okay. |
| [DEFENSE COUNSEL]: | It doesn't matter. |

The trial judge then brought the jury into the courtroom and instructed them on the law. In the instructions, the trial judge defined the terms "possession," "actual possession," and "indirect possession." The trial judge did not, however, instruct the jury on the elements of the uncharged crime of drug possession. Greene was convicted of all charges.

**DISCUSSION**

The first three assignments of error share a common theme: Greene argues that, despite his counsel's inaction or affirmative waiver, the trial judge should, nevertheless, have intervened to protect Greene's rights. *First*, Greene argues that the trial judge should have demanded that Greene personally respond, rather than accept his attorney's response (in the negative), when asked whether Greene wished to be present at the bench during the questioning of potential jurors. *Second*, Greene argues that the trial judge should have affirmatively asked defense counsel if Greene wished to have a jury instruction on the uncharged offense of simple drug possession rather than just give the instructions requested. And *third*, Greene argues that the trial judge should have *sua sponte* conducted

a competency evaluation after Greene fell asleep at the trial table. We will address these three claims before turning to Greene's final contention that the trial judge improperly allowed testimony regarding "other crimes" evidence.

## I. Who Protects the Defendant's Rights?

### *A. "Right" to be Present at the Bench During Juror Questioning*

Some rights can be waived by counsel. Other rights may only be waived by the defendant himself. Greene argues that the right to be present at the bench during the questioning of potential jurors is so fundamentally important that only a defendant, himself, can waive it. The State argues that a lawyer may waive on his client's behalf.

We don't have to decide the question because the Court of Appeals has already decided it:

> Today, with the complexity of many criminal trials and the absolute right of counsel if there is a danger of incarceration, our system proceeds upon the assumption that it is primarily counsel's function to assert or waive most "rights" of the defendant. Unless a defendant speaks out, normally he must be bound by the trial decisions, actions[,] and inactions of counsel. Otherwise, the system simply would not work.
>
> The right of the defendant to be present at bench conferences involving examination of jurors or prospective jurors, or during communications on a point of law between the court and jury, or during certain other stages of the trial, is no more "fundamental" than many other "rights" which can be waived by counsel's action or inaction. We know of no reason why this right should be set apart from other matters which are left to counsel.

*Williams v. State*, 292 Md. 201, 218 (1981) (internal citations omitted). The right to be present during the questioning of prospective jurors, therefore, is one of the situations in which trial counsel may waive the right of the defendant to be present. *Id.*

Here, Greene's trial counsel waived his presence at the bench and that was sufficient. There is no requirement that Greene make the waiver himself.

***B. "Right" to a Jury Instruction on Simple Possession***

Greene's second argument is that the trial judge should have asked Greene if he wished to have a jury instruction on the uncharged count of drug possession. Greene argues that the trial judge had this duty because the trial judge had already asked the State if it wanted an instruction on possession. We won't reach the merits of this claim, however, because Greene's trial counsel did not preserve it for our review and we are unwilling to use the plain error doctrine to reach it.

Maryland Rule 4-325 governs jury instructions and the requirement to object to the failure to give an instruction. Under that Rule: "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 for the objection." Md. Rule 4-325(e) (emphasis added). Thus, unless a party objects to the failure to give a jury instruction, that issue is not preserved for our review.

Here, Greene's counsel did not object to the failure to give an instruction on simple drug possession. The trial judge first asked the State if it wanted an instruction on simple possession, and the State declined. Defense counsel then indicated that he had read the

instruction on the general definition of possession, had no objection to the jury being instructed on the general definition of possession, and did not request a jury instruction on the crime of drug possession. Greene did not object to the lack of an instruction on simple drug possession before the instructions were given to the jury, nor did he object to the lack after the instructions were given. This allegation of error, therefore, is not preserved for our review. Although we are permitted to forgive the failure of preservation through plain error review, that doctrine is reserved only for situations that are "compelling, extraordinary, exceptional[,] or fundamental to assure the defendant a fair trial." *Conyers v. State*, 354 Md. 132, 171 (1999). This case, where simple drug possession was not a charged offence, is just not one of those situations.

### *C. "Right" to a Competency Review of a Sleeping Defendant*

Greene's third claim is that the trial judge should have *sua sponte* conducted a competency evaluation of Greene when Greene fell asleep at the trial table. As described above, Greene slept through discussions of jury instructions, which occurred while the jury was absent from the courtroom. If Greene was found to be incompetent, of course, he would not be able to stand trial. *See Sibug v. State*, 445 Md. 265, 297 (2015) (discussing the differences between insanity and incompetency to stand trial). Greene argues that the trial judge should have *sua sponte* inquired into Greene's competence to stand trial. The State responds that Greene waived this argument.

A trial court's duty to determine competence may be triggered in three ways: "(1) upon motion of the accused; (2) upon motion of the defense counsel; or (3) upon a *sua*

*sponte* determination by the court that the defendant may not be competent to stand trial." *Kennedy v. State*, 436 Md. 686, 694 (2014) (internal citation omitted). Neither party contends that Greene himself made a motion, so the first trigger didn't happen here. The State focuses on the second trigger, arguing that Greene's trial counsel affirmatively waived any review of this issue. While true, this doesn't respond.[1] Rather, the question presented here is whether the third trigger applies.

Our analysis, therefore, focuses on whether Greene sleeping at trial table was sufficient to compel the trial court to inquire into Greene's competency. We conclude that a defendant sleeping at trial table does not automatically compel a trial court to evaluate the defendant's competency on its own initiative. Although no Maryland authority has addressed whether a defendant sleeping at the trial table should be considered incompetent to stand trial, other jurisdictions have universally concluded that sleeping is not the same thing as incompetence. *See*, *e.g.*, *Watts v. Singleton*, 87 F.3d 1282, 1287 (11th Cir. 1996) (holding that there was no doubt that a defendant who "conspicuously" slept through 70% of his murder trial was competent); *Bisnett v. Kelly*, 221 F. Supp. 2d 373, 385 (E.D.N.Y. 2002) (holding that a physical problem, "such as sleep apnea," does not pertain to the "inability to understand the proceedings or assist in [a] defense."). We think it likely that

[1] Greene's counsel affirmatively waived any inquiry into Greene sleeping. Rather than request a competence evaluation, when asked if Greene was awake, defense counsel responded, "It doesn't matter" and the discussion between the trial judge, the State, and defense counsel continued. This is a waiver and, as stated above, "it is primarily counsel's function to assert or waive most 'rights' of the defendant." *Williams*, 292 Md. at 218.

Maryland law would come to the same conclusion. If sleeping is not comparable to incompetence, sleeping wouldn't trigger the trial court's obligation to conduct a competency evaluation. In this case, therefore, the trial court did not err by not *sua sponte* conducting a competency evaluation of Greene.

## II. Photo Array

Greene's final assignment of error is that the trial court erred when it allowed testimony regarding how officers create photo arrays. The State asked Sergeant Hoetzel, "how do you pull pictures to put in a photographic array?" Sergeant Hoetzel responded:

> We normally use two sources[:] either a prior booking photo, which is a photo taken after someone's arrest, or a picture from … the Department of Motor Vehicles from a driver's license.

Greene believes that this testimony—that photos for an array are drawn from booking photos and from driver's license photos—constituted impermissible "other crimes" evidence. According to Greene, before allowing this kind of testimony, the trial court was required to determine first if the other crimes evidence was admissible. The State argues that the trial court did not abuse its discretion in allowing the testimony because the testimony involved no prior bad act. We conclude that because the testimony was merely background information on how a photographic array is made and included no testimony regarding any prior bad acts by Greene, that the trial court did not abuse its discretion by allowing the testimony.

Under the Maryland Rules, subject to some exceptions, evidence of other crimes, wrongs, or acts is not admissible to prove that the defendant acted in the same way during

a later event. Md. Rule 5-404(b). This type of evidence is not usually admissible "because a jury could decide to convict on the basis of an alleged criminal disposition and might infer that because the defendant has acted badly in the past that he is more likely to have committed the crime charged." *State v. Westpoint,* 404 Md. 455, 488 (2008). When attempting to describe the definition of "other crimes, wrongs, or acts," the Court of Appeals determined that although what impugns a defendant's character may vary from case to case, there must be *an activity or conduct* by the defendant. *Klauenberg v. State*, 355 Md. 528, 549 (1999) (The Court defined "other crimes, wrongs, or acts" generally as "bad acts" and surveyed cases from across the country in which a defendants activities or conduct were found to meet, or fall short of, the threshold for "bad acts."); *see also Brice v. State*, 225 Md. App. 666, 692 (2015) (holding that "a mere reference to a 'domestic disturbance,' without more detail, does not come within the definition of other 'crimes, wrongs, or acts.'").

Here, we reject Greene's contentions for three reasons: (1) Greene's photo was available from other sources; (2) the question by the State did not seek to elicit other crimes evidence nor did Sergeant Hoetzel respond with other crimes evidence; and (3) this is *not* other crimes evidence. We explain. *First*, Sergeant Hoetzel had already testified that he had found Greene's driver's license when searching the vehicle. Thus, the jury already could believe Hoetzel's testimony to refer to Greene's driver's license, which was a potential source of photos for the photographic array. In addition, Sergeant Hoetzel did not create the photographic array until after was Greene arrested and indicted. As a result,

Greene's booking photo *from this case* was also a logical potential source. Thus, either a driver's license or a booking photo, both of the two sources identified, were available for Sergeant Hoetzel to create the photo array. The testimony, therefore, did not necessarily suggest that Greene had prior involvement with the criminal justice system. *Second,* the question posed to Sergeant Hoetzel was "how do you pull pictures to put in a photographic array?" This general question does not ask where Greene's photo came from for the array made in this case. Sergeant Hoetzel's response, likewise, did not indicate where the photo used in the array in this case came from. Sergeant Hoetzel merely stated generally that, for all arrays, officers pull photos from prior booking photos and from driver's licenses. A careful parsing of the language of both the question and the response shows that neither did the question seek, nor did the answer provide, other crimes evidence. And *finally*, even if Sergeant Hoetzel was referring to Greene's booking photo from a prior case, the complained of testimony is still not in the realm of other crimes evidence. The prohibition on other crimes evidence, as explained above, is designed to keep prosecutors from using evidence of prior crimes, wrongs, or acts by the defendant to show that he must have acted in the same way in this case. *Westpoint*, 404 Md. at 488. Here, there was no bad act—nothing at all to impugn Green's character—and there was no attempt to show that Greene must have acted in the same way in this case. This is simply not other crimes evidence. For all three of these reasons, therefore, the trial court did not abuse its discretion by allowing the testimony.

In conclusion, we affirm the judgment of the circuit court.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**