Circuit Court for Prince George's County
Case No.: 17-0271X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3399

September Term, 2018

PAULA MEDLEY

v.

STATE OF MARYLAND

Graeff,
Friedman,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, J.

Filed: June 23, 2020

A jury in the Circuit Court for Prince George's County convicted appellant, Paula Medley, of obtaining from a vulnerable adult property having a value between $10,000 and $100,000, theft scheme involving property between $10,000 and $100,000, and identity theft. As to each count, the court sentenced appellant to concurrent ten-year sentences, with all but five years of each sentence suspended, to be followed by five years of supervised probation.

Appellant presents the following questions for our review, which we have rephrased slightly:

1. Did the circuit court err by instructing the jury, in response to a jury note, that the jurors had "all of the evidence in which you will consider" in deciding appellant's guilt or innocence?

2. Did the circuit court abuse its discretion in limiting the redirect examination of a State's witness?

3. Did the circuit court commit plain error by failing to intervene during the State's cross-examination of appellant?

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

BACKGROUND

Beginning in 2009, Geraldine Jackson employed appellant as a home health care worker, providing Ms. Jackson, who required the use of a wheelchair, with 24-hour assistance and support. Ms. Jackson and appellant had agreed that appellant would live in Ms. Jackson's home and assist her with cooking, cleaning, bathing, buying groceries, taking her to doctor's appointments and picking up her prescriptions.

At trial, appellant and Ms. Jackson provided conflicting accounts of the terms of appellant's employment and compensation. Appellant testified that Ms. Jackson had

agreed to pay her $1,500 per week. Ms. Jackson testified that she agreed to pay appellant $1,250 per week.

According to appellant, in 2013, Ms. Jackson's income became insufficient to cover appellant's salary. She testified that she and Ms. Jackson agreed upon an alternative payment arrangement, whereby Ms. Jackson paid appellant a portion of her compensation by check and, in lieu of payment for the remainder owed to appellant, Ms. Jackson allowed appellant to use her credit cards to pay personal bills. Ms. Jackson denied that she had authorized appellant to use her credit cards and checking account to pay personal bills. Ms. Jackson testified that appellant's decrease in salary was attributable to appellant's decreased availability.

The State introduced evidence indicating that appellant had made the following unauthorized charges on Ms. Jackson's accounts: $25,916.29 on her Bank of America bank account, $22,935.68 on her Tower Federal Credit Union account, and $4,116.24 on her American Express card. Ms. Jackson specifically denied authorizing the use of her Bank of America credit card for multiple payments to appellant's apartment complex totaling $9,836.81, a payment to the law firm of Decaro and Howell in the amount of $2,500, and a trip to Jamaica for appellant and her daughter in the amount of $1,871.98. Ms. Jackson also denied giving appellant permission to use her Tower Federal Credit Union account to pay in excess of $1,000 for repairs to appellant's BMW. Ms. Jackson identified over a dozen checks, totaling several thousands of dollars, which she claimed did not bear her handwriting.

Appellant testified that her employment with Ms. Jackson ended in 2015, after she notified Ms. Jackson that Ms. Jackson's credit limit had been reached on her credit cards and that she could not continue being underpaid for her full-time employment. Ms. Jackson testified that she fired appellant in 2015 after she went to the bank, discovered that she was in debt, and suspected that appellant had stolen from her. At trial, the State introduced copies of checks Ms. Jackson had signed as well as copies of checks she claimed had been forged by appellant. One week prior to trial, Ms. Jackson realized that $13,000 worth of checks that she had initially identified as forged were payments that she had, in fact, authorized.

Ruth Person, Ms. Jackson's goddaughter, assisted Ms. Jackson with closing her accounts following appellant's departure. Ms. Person testified that she reviewed Ms. Jackson's account statements and identified charges that were not authorized by Ms. Jackson, as well as forty check stubs that were missing from Ms. Jackson's checkbook. Ms. Person filed a report with the Prince George's County State's Attorney's Office regarding the discrepancies.

DISCUSSION

I.

Appellant contends that the circuit court "committed reversible error by issuing an instruction in response to a jury note that impermissibly influenced the jury's understanding of what evidence it could consider." Prior to closing arguments, the court informed counsel that it had received a note from the jury asking for appellant's signature to compare to the samples of Ms. Jackson's handwriting introduced into evidence by the

State. The parties agreed that no further evidence would be introduced, and the court would address the issue in its instructions to the jury. The court instructed the jury regarding the note as follows:

> Now, I do know that prior to even beginning there was a question regarding handwriting. The Court shared that with both counsel and you have all of the evidence. So all of the evidence that you have will be back in the jury room with you. If there is any evidence that you wish you had or you wanted or was discussed but did not get admitted that is not evidence for you to consider. Anything that you need to consider to make your determination and your decision will be in the jury room.

Defense counsel objected to the court's instruction and asked for a modified instruction, arguing that the court mistakenly told the jury that they had all of the evidence they needed to decide the case. In response, the court provided the following modified instruction to the jury:

> I said you have all of the evidence you need to consider. I should have said, you have all of the evidence in which you will consider to make your determination. You determine the evidence that you have back there, whether [appellant] would be guilty or not guilty beyond a reasonable doubt, that's for you to decide.

Defense counsel again objected to the court's modified instruction, and asked the court to further modify its instruction:

> [DEFENSE COUNSEL]: I think they should be told that in considering the evidence they can consider what they have and may also evaluate what other things they don't have and they have to decide in the mix how that goes.
>
> THE COURT: I'm not going to do that. That's not part of the instruction. I'm not getting into – they have been advised how to weigh the evidence and assess the evidence and the instructions they have at this stage is that they have all of the evidence. I did feel the correction, the need versus what you have is important and necessary. But at this point, I'm not going into what evidence they don't have.

[DEFENSE COUNSEL]: Note my objection.

Appellant contends that the trial court's modified instruction was legally incorrect because it suggested that the jury could only consider the evidence introduced at trial, and not the absence of certain evidence, specifically the lack of a sample of appellant's handwriting. She argues that the court's instruction impermissibly invaded the province of the jury by implicitly resolving the significance, or lack thereof, of the absence of evidence of appellant's handwriting sample.

Maryland Rule 4-325(a) provides that the court shall instruct the jury at the close of the evidence and may supplement those instructions "when appropriate." The trial court's decision to give a supplemental jury instruction is within the discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion. *Appraicio v. State*, 431 Md. 42, 51 (2013) (citations omitted). *Accord Lindsey v. State*, 235 Md. App. 299, 314, *cert. denied*, 458 Md. 593 (2018). "[T]rial courts have a duty to answer, as directly as possible, the questions posed by jurors." *Appracio*, 431 Md. at 53. In responding to juror questions, the court must "walk a fine line," because "[a]ny answer given must accurately state the law and be responsive to jurors' questions without invading the province of the jury to decide the case." *Id.* at 44.

Appellant relies on the case of *Gore v. State*, 309 Md. 203 (1987), in support of her contention that the trial court's instruction constituted reversible error. In *Gore*, defense counsel commented in closing argument that the evidence was insufficient to support a guilty finding. 309 Md. at 205. The trial court instructed the jury that sufficiency of the evidence was a matter of law decided by the court, not the jury, and that the jury was to

decide whether the evidence was sufficient to support a guilty finding beyond a reasonable doubt. *Id*. at 204-05. The Court of Appeals held that the court's instruction may have improperly influenced the jury's verdict. *Id*. at 212. The Court explained that the comment was "an indirect comment on the weight of the evidence as to each count and outside the permissible scope of comment." *Id*. at 214.

The State contends that *Appracio, supra*, is analogous to the present case. In *Appracio*, the jury sent a note to the court asking whether, and to what extent, they could consider the fact that no police report and no police testimony was introduced into evidence. 431 Md. at 49. Defense counsel requested the court instruct the jury that "it may consider the evidence or the lack of evidence in reaching its verdict." *Id*. The trial court declined to give the instruction requested by the defense. *Id*. at 49-50. The court instructed the jury that they had to "decide this case based on what is in evidence in this case," and "consider [the evidence] in light of [their] own commonsense and [their] experiences," including, "draw[ing] any reasonable inferences or conclusion from the evidence that [the jurors] believe[d] to be justified by [their] own experiences." *Id*. at 50.

On appeal, this Court held that the trial court did not abuse its discretion in responding to the jury's question. *Id*. at 50-51. The Court of Appeals affirmed, noting that the trial court "did not instruct the jurors affirmatively to disregard evidence that was not in the case." *Id*. at 56. The Court explained that though "the trial court did not refer explicitly to the ability of the jury to consider the lack of evidence … the answer given allowed the jury to draw what inferences it might from the evidence without the court impermissibly suggesting what inferences to draw." *Id*. at 57. The Court explained that

"[t]here is a difference … between arguments made by counsel and a trial judge's statement commenting on the evidence, or lack thereof," recognizing that "a statement from the bench can take on greater importance than one made by counsel, particularly when it concerns the law to be applied in a case." *Id*. at 54-55.

Here, the court informed the jurors that they had "all of the evidence in which you will consider to make your determination." Unlike the facts of *Gore, supra*, the trial court's modified instruction did not reference a ruling by the trial court as to argument or evidence in the case; nor did it signal that the court was expressing a belief or opinion as to the evidence. The modified instruction in this case, like the instruction given by the trial court in *Appracio,* did not impermissibly suggest that the jury could not consider evidence that was lacking from the case. Rather, the trial court accurately advised the jurors that they had all of the evidence submitted in the case, while avoiding any further comment on the presence or absence of evidence. We perceive no error in the court's modified jury instruction.

II.

Appellant contends that the trial court erred in permitting Ruth Person, a lay witness, to provide opinion testimony about whether appellant committed financial fraud, the ultimate issue in the case. She argues that the trial court committed reversible error by failing to intervene to preclude the State from asking questions designed to elicit improper opinion testimony from Ms. Person.

The State argues that, because the trial court consistently sustained appellant's objections to the questions appellant challenges on appeal as improper, the trial court did

not commit error and appellant has no grounds for appeal. The State further asserts that Ms. Person did not provide opinion testimony, and even if her response qualified as opinion testimony, any error in admitting that testimony was harmless.

Ms. Person testified that she met with Ms. Jackson at Bank of America in July of 2015 to close her accounts. Ms. Person stated that she reviewed Ms. Jackson's bank statement with her and helped her to identify suspicious transactions by creating a spreadsheet that she then shared with the authorities. Ms. Person testified to her personal background, explaining that her "entire professional career has been in fiscal or financial," including working as a bank teller, bank supervisor, accounting clerk and "financial specialist."

During re-direct examination, the State questioned Ms. Person regarding her testimony that certain charges on Ms. Jackson's Bank of America account had been "written off":

> [PROSECUTOR]: In filing with the institutions like Bank of America that there was suspected fraud, what happened with Bank of America? What did they do?
>
> MS. PERSON: Bank of America – and I found this out through IRS sending us a letter – Bank of America charged it off as income to Ms. Jackson. IRS contacted Ms. Jackson, saying that she has underreported her income for the year 2012 and that she owed them money.
>
> [PROSECUTOR]: Given your background in writing things off, does that say that a theft didn't occur?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: I'm sorry, I didn't hear the question.

[PROSECUTOR]: Given your background in writing things off, does it say that a theft didn't occur?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: You're still here today though to testify; isn't that correct?

[DEFENSE COUNSEL]: Objection.

MS. PERSON: I'm not sure where you're going with that.

[PROSECUTOR]: I'm just asking her, you're here to testify today.

THE COURT: Overruled. You're here testifying today?

MS. PERSON: Yes.

[PROSECUTOR]: Thank you. And on Ms. Jackson's behalf?

MS. PERSON: Yes.

[PROSECUTOR]: And given what you have knowledge of that happened between July – April of 2012 and July of 2012; is that correct?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

MS. PERSON: Yes.

[PROSECUTOR]: And given all that you've seen with looking at the statements and all that you know, you had told us that you saw at least 21 checks that were forged; is that correct?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: But you went through that earlier with me, right?

MS. PERSON: Yes.

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

[PROSECUTOR]: Do you have any doubt that [appellant] stole from her?

[DEFENSE COUNSEL]: Oh, come on, judge.

THE COURT: Yes. Sustained and stricken. That is what you are here for. You are the sole judges of the facts in this case.

[PROSECUTOR]: I have nothing further. Thank you.

Appellant's argument that the trial court erred by allowing the State to ask questions designed to elicit improper lay opinion testimony from Ms. Person is without merit. Here, the defense objected to each of the State's attempts to elicit opinion testimony from Ms. Person and the court sustained those objections. Moreover, in response to the prosecutor's question, "Do you have any doubt that [appellant] stole from [Ms. Jackson]?" the court sustained appellant's objection, and, *sua sponte*, struck the question and provided a curative instruction, explaining to the jurors, "That is what you are here for. You are the sole judges of the facts in this case."

At no point during the State's redirect examination did appellant move to strike Ms. Person's testimony, move for a mistrial or request any other relief. *See Morales v. State*, 219 Md. App. 1, 12-13 (2014) (holding that there was no error where the trial court sustained defense counsel's objection and struck a witness's testimony, despite the absence of a request to strike or request for a mistrial and the defendant received all the relief that he sought with respect to the inadmissible testimony); *See also Ball v. State*, 57 Md. App. 338, 358-59 (1984), *aff'd in part and rev'd in part on other grounds by Wright v. State*,

307 Md. 552 (1986) (observing that after receiving the remedy he requested and asking for no other relief, "[i]n a nutshell, the appellant Ball got everything he asked for. This is not error."). Because appellant received the relief she requested from the trial court, there is no error before us to review. *Klauenberg v. State*, 355 Md. 528, 545-46 (1999) (holding that "appellant has no grounds for appeal" where the court had sustained appellant's objection and stricken the inadmissible testimony, and "he received the remedy for which he asked"); *Hyman v. State*, 158 Md. App. 618, 631 (2004) (explaining that, where the trial court sustained appellant's objection, and "appellant did not request further relief at trial; he did not ask the court to strike the statement, that a curative instruction be given, or that a mistrial be granted," he "effectively waived all other potential review on appeal").

Appellant further contends that Ms. Person's response to the prosecutor's question on redirect examination, that she was testifying on behalf of Ms. Jackson, constituted an improper lay opinion. The decision to admit lay opinion testimony, like all evidentiary rulings, rests within the sound discretion of the trial court and will not be overturned on appeal unless it is shown that the trial court abused its discretion. *Moreland v. State*, 207 Md. App. 563, 568-69 (2012) (citations omitted). Ms. Person's response that she was testifying on Ms. Jackson's behalf was a fact, however, not an opinion implicating Md. Rule 5-701.[1] Accordingly, the trial court did not abuse its discretion by permitting Ms. Person to respond to the prosecutor's question.

[1] Maryland Rule 5-701 provides that lay opinion testimony is admissible when the testimony consists of "opinions or references which are (1) rationally based on the (continued)

III.

Appellant argues that the trial court committed plain error by allowing the prosecutor to question her about the credibility of Ms. Jackson and Mayanna Wilson,[2] appellant's daughter, "thirteen separate times" about whether they were "mistaken," "wrong" or "dead wrong" about the checks and payments that appellant had denied authorizing. Appellant asks us to overlook the defense's repeated lack of objections to this line of questioning because, she contends, the cumulative effect of the trial court's failure to cure the prejudice caused by the prosecutor's improper questions denied her a fair trial.

The State responds that plain error review is not warranted in this case because appellant cannot establish that the trial court's failure to intervene in the prosecutor's cross-examination of appellant constituted error. The State argues that the absence of thirteen evidentiary objections was likely the result of a tactical decision on the part of the defense, rather than a cumulative error. The State contends that, even if appellant could demonstrate that the trial court committed error, any such error was not so material or prejudicial as to affect the outcome of appellant's trial.

perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue."

[2] The State argues that because appellant raises on appeal a different basis for her objection to Ms. Wilson's testimony than she raised at trial, that issue is not preserved for review and cannot now be the subject of a plain error. *Hall v. State*, 225 Md. App. 72, 88 (2015) (explaining that where specific grounds for an objection are raised at trial, all others are waived). We agree and decline to review appellant's claim for plain error as to the prosecutor's question to appellant regarding Ms. Wilson's testimony.

Appellate courts generally will not consider an issue on appeal that an appellant failed to preserve at trial. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears . . . to have been raised in or decided by the trial court[.]"). Our review of an unpreserved evidentiary issue is discretionary. *Kelly v. State*, 195 Md. App. 403, 431 (2010). We undertake plain error review only if the mistake "'vitally affect[ed] a defendant's right to a fair and impartial trial,'" *Diggs v. State*, 409 Md. 260, 286 (2009) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)), which we reserve for those circumstances that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011) (citation omitted). "[P]lain error review is a 'rare, rare phenomenon,' undertaken only when the un-objected-to error is extraordinary." *Perry v. State*, 229 Md. App. 687, 710 (2016) (quoting *Pickett v. State*, 222 Md. App. 322, 342 (2015)).

We recognize that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth. Testimony from a witness relating to the credibility of another witness is to be rejected as a matter of law." *Bohnert v. State*, 312 Md. 266, 278 (1988) (holding that the trial court erred in permitting the jury to hear a social worker's expert testimony that a child victim's account of sexual abuse was truthful, and, by implication, that the defendant was lying); *accord Hunter v. State*, 397 Md. 580, 595-96 (2007) (holding that it was error for the trial court to permit the prosecutor to ask the defendant repeatedly whether the detectives who had testified in the case were lying).

In this case, as argued by the State, the prosecutor's questions to appellant were distinguishable from the inquiries at issue in *Bonhert* and *Hunter*, as the questions here did

not call for appellant's opinion as to whether Ms. Jackson had testified truthfully, but whether she was mistaken. There was evidence that Ms. Jackson was, in fact, mistaken about certain checks that she had initially identified as forged and later determined to be legitimate. Ms. Jackson could therefore be "wrong" or "mistaken" because she was incorrect. The prosecutor's questions focused on the disputed factual issues between appellant's and Ms. Jackson's respective version of events, but did not require appellant to comment on Ms. Jackson's credibility. Accordingly, the prosecutor's questioning of appellant was not improper.

This is also a case in which the absence of defense objections may have been a matter of trial strategy. The defense may have wanted the jury to hear the prosecutor's repeated questioning as to whether Ms. Jackson was "wrong" and appellant's responses that Ms. Jackson was "wrong" and "dead wrong" in her accusations of appellant's theft. *See Robinson v. State*, 410 Md. 91, 104 (2009) (explaining that in a case where "the failure to object is, or might even be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship"). Plain error review is particularly inappropriate in cases such as this, where it is possible that the absence of an evidentiary objection was a tactical decision. *Brown v. State*, 169 Md. App. 442, 460 (2006) ("When defense counsel's trial tactics may have been the reason that defense counsel failed to correct an error by the trial judge, we are reluctant to recognize 'plain error' because, absent such reluctance, defendants would be in a 'heads I win, tails you lose' position and would benefit by intentionally failing to object. This would create judicial inefficiency and reward lawyerly non-diligence.").

We are unpersuaded by appellant's argument that the cumulative nature of the prosecutor's alleged improper questions and the court's failure to intervene affected the outcome of the trial. We recognize that "[w]hen … there are multiple inappropriate statements and the trial court fails to cure the prejudice created by the cumulative effect of those statements, the admissibility of such statements may amount to more than harmless error." *Lawson v. State*, 389 Md. 579, 608 (2005). Based on our review of the record, we conclude that the trial court's failure to intervene *sua sponte* and restrict the prosecutor's cross-examination of appellant was not error, nor was it so compelling or extraordinary so as to affect the outcome of the proceedings or deny appellant a fair trial. Accordingly, we decline appellant's request to engage in plain error review.

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