UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0357

September Term, 2015

JERMAINE LEE BROWN

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 7, 2016

In 1993, Jermaine Lee Brown was involved in the armed robbery of drugs and money from a unit in an Oxon Hill apartment complex. Bernardo Lloyd, who lived in the apartment, escaped with non-fatal gunshot wounds, but Denia Whren, a visitor at the time of the robbery, died from a gunshot wound to the head. After a four-day trial in the Circuit Court for Prince George's County in August 1994 (not a typo), Mr. Brown was convicted of first-degree felony murder, attempted second-degree murder, the use of a handgun in both of those crimes, and robbery. The court sentenced him to life in prison on the felony murder charge and fifteen years to be served concurrently for use of a handgun in that crime; an additional ten years on the attempted murder charge, to be served consecutively with his life sentence; and another ten years on the robbery charge, to be served concurrently with his life sentence. Mr. Brown contends that the circuit court committed an instructional error and an evidentiary error, and that his sentence for robbery should have been merged into the sentence for felony murder. We agree with Mr. Brown on the sentencing issue and vacate his sentence for robbery, but otherwise affirm.

I. BACKGROUND

The robbery at issue occurred on May 13, 1993, and Mr. Brown would later testify that he participated only under duress from an acquaintance he knew as Wayne. According to Mr. Brown, Wayne approached him with the plan to rob Mr. Lloyd and coerced him at gunpoint to accompany him to Mr. Lloyd's apartment complex. When they arrived, Mr. Brown testified that Wayne instructed him, still at gunpoint, to go inside first. Three or four men sat in the apartment smoking marijuana and drinking, along with Ms. Whren and her cousin, Domonique Saunders.

By Mr. Brown's account, Wayne followed him into the apartment a few minutes later, brandishing his gun and ordering everyone to get on the ground. People started running to get out of the apartment and Wayne started shooting; there was conflicting testimony as to whether Mr. Brown was shooting at this point as well. Ms. Whren sustained, and died from, a gunshot wound to her head. Wayne ordered Mr. Brown to collect Mr. Lloyd's money, then handed Mr. Brown his gun and told him to shoot Mr. Lloyd. Mr. Brown shot in Mr. Lloyd's direction, but contends he intentionally aimed wide. Mr. Lloyd escaped with a gunshot wound to his shoulder and a grazed nose and wrist.

Ms. Saunders was the only eyewitness to testify for the State. She explained that she was sitting on the couch when two men dressed in black came into the apartment and told everyone to get on the ground. She looked over at Mr. Brown and saw him with a gun in his hand; she watched him shoot twice, and Ms. Whren fell to the ground after the second shot. However, this account diverged from the statement Ms. Saunders gave to police the night of the robbery, in which she said that she saw Mr. Brown shoot only once. The interview was documented by a written statement executed by Ms. Saunders and by a written transcript of the questions and answers executed by a detective.

During cross-examination, defense counsel asked Ms. Saunders a series of questions meant to reveal the inconsistencies between the written statement and her trial testimony. Then defense counsel showed Ms. Saunders the entire written statement, and Ms. Saunders verified that it was the statement that she gave and signed. Defense counsel moved to have the written statement admitted, but the court sustained the State's objection on the ground that the written statement was cumulative.

At the close of Mr. Brown's trial, the circuit court instructed the jury on attempt, first- and second-degree murder, and duress, in that order. When summarizing second-degree murder, the court instructed the jury that it must find "[t]hat the defendant engaged in the deadly conduct, either with the intent to kill, *or with the intent to inflict such serious bodily harm that death would be the likely result*." (Emphasis added.) When asked if he had any objections to the jury instructions, defense counsel responded that he did because "it was not clear that there were attempts in the instructions." The court declined to change the instructions and the jury, rejecting Mr. Brown's duress argument, convicted him of the first-degree felony murder of Ms. Whren, the second-degree attempted murder of Mr. Lloyd, and robbery.

Mr. Brown filed his notice of appeal on December 5, 1995, but the State moved to dismiss it for failure to provide transcripts. *See* Md. Rule 8-413. This Court granted that motion in an order dated March 16, 1995. Mr. Brown filed a petition for post-conviction relief in May 2013, and the circuit court granted him permission to file a belated notice of appeal on April 13, 2015. Mr. Brown filed a new, and timely, despite the passage of almost twenty years, notice of appeal a few days later.

II. DISCUSSION

On appeal, Mr. Brown attacks the circuit court's instruction on attempted murder and its refusal to admit Ms. Saunders's written statement.[1] He also contends that his ten-

[1] His brief stated the issues as follows:

(continued…)

year sentence for robbery should have been merged into his life sentence for the murder of Ms. Whren because the (felony) murder occurred in the course of the robbery. The State concedes that the sentences should merge, and we agree. Separate sentences for robbery and murder committed in the perpetration of the robbery "constitute, under the required evidence test, double punishment for the same offense in violation of the Fifth Amendment's double jeopardy clause." *Newton v. State*, 280 Md. 260, 273-74 (1977); *see also Lovelace v. State*, 214 Md. App. 512, 543 (2013). As such, Mr. Brown's sentence for robbery should be vacated, and the conviction merged into his conviction for first-degree felony murder. We affirm the circuit court's decision in all other respects.

A. Counsel's Objection To The Attempted Murder Instruction Failed To Preserve The Issue For Appellate Review.

Mr. Brown argues *first* that the circuit court improperly instructed the jury that intent to kill *or* intent to inflict grievous bodily harm was sufficient to support an attempted second degree murder conviction, and that this error was prejudicial because the circumstances demonstrated intent to cause bodily harm, but not to kill. We need not reach

1. Did the circuit court err, or commit plain error, in its instruction to the jury defining attempted second degree murder?

2. Did the circuit court abuse its discretion in refusing to admit the written statement of witness Domonique Saunders?

3. Must the ten-year concurrent sentence for robbery merge into the life sentence for felony murder which occurred in the course of that robbery?

the issue, however, because counsel failed to object properly at trial, leaving the issue unpreserved.

The court gave separate instructions for attempt and for second-degree murder:

> Ladies and gentlemen, the defendant is also charged in this case with the attempted murder of Mr. Bernardo Lloyd. First I'm going to talk to you about what an attempt is and then I'm going to talk to you about both first and second degree murder in that regard, and then also duress in regards to this one count of attempted murder.
>
> The defendant is charged with the crime of attempted murder. Attempt is a substantial step beyond mere preparations towards the commission of a crime. In order to convict the defendant of attempted murder, the State must prove that the defendant took a substantial step beyond mere preparations toward the commission of the crime of murder. Number two, that the defendant intended to commit the crime of murder. And, number three, that the defendant had the apparent ability at that time to commit the crime of murder.
>
> * * *
>
> Second degree murder does not require premeditation or deliberation. In order to convict the defendant of attempted second degree murder, the State must prove that the conduct of the defendant would have caused the death of Bernardo Lloyd. That the defendant engaged in the deadly conduct, either with the intent to kill, *or with the intent to inflict such serious bodily harm that death would be the likely result*."

(Emphasis added.) When the court asked whether defense counsel objected to the instruction, however, counsel only stated only that "it was not clear that the[r]e were attempts in the instructions."

To preserve an issue for appellate review, an objection must "stat[e] distinctly the matter to which the party objects and the grounds of the objection." Md. Rule 4-325(e). Indeed, "appellate courts do not range forth, like knights errant, seeking flaws in trials.

Their quest is far more modest. They monitor a trial for the limited purpose of seeing if the trial judge committed error." *Austin v. State*, 90 Md. App. 254, 265 (1992) (citation omitted). Rule 4-325(e) requires, therefore, that counsel "[bring] the alleged error to [the court's] attention and give[the judge] the opportunity to reconsider it and to correct it." *Id.*; *see also Stabb v. State*, 423 Md. 454, 465 (2011) (explaining that in order to preserve the error, counsel "should give the trial court an opportunity to correct the instruction in light of a well-founded objection."); *Leatherwood v. State*, 49 Md. App. 683, 694-95 (1981) (counsel's objection must "afford the trial judge an opportunity to correct any misstatement of law, clarify an ambiguity, or correct inaccuracies"). An objection that does not give the court an opportunity to evaluate the alleged error will not preserve the issue for appeal.

Mr. Brown points out that the court's instruction on attempted second-degree murder was incorrect because it described the *mens rea* for a completed murder (either the intent to kill *or* the intent to inflict such serious bodily harm that death would be likely to result), instead of an attempted murder, which requires the intent to kill.[2] He contends that the objection at trial—"it was not clear that the[r]e were attempts in the instructions"—communicated to the court that the instruction on attempted second-degree murder described the wrong *mens rea*. We disagree. As stated, the objection suggests that the

[2] On this point, he's right: "One may only be convicted of attempted murder when there is the specific and actual intent to kill," and an intent to inflict serious bodily harm will not suffice. *Austin v. State*, 90 Md. App. 254, 260-61 (1992) (citing and declaring wrong the trial court's instruction that second-degree murder "involves an attempted killing with the intent to kill *or inflict such bodily harm that would be likely to cause death*" (emphasis supplied by the *Austin* trial court)).

court's instructions on attempt were unclear or perhaps not present at all. It makes no mention of *mens rea*, nor does it point to the specific part of the instruction that Mr. Brown now asks us to evaluate on appeal. This objection did not allow the trial court an opportunity to correct the alleged error, and so the issue is not preserved.

Nor will we conduct plain error review, as Mr. Brown requests. Such a review of an unpreserved issue is reserved for errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011) (internal quotations and citation omitted). As such, it is rare for a court to decide to engage in plain error review, *Yates v. State*, 429 Md. 112, 131 (2012), including errors in jury instructions. "Even if an error in jury instructions is plain, its consideration on appeal is not a matter of right; the rule is couched in permissive terms and necessarily leaves its exercise to the discretion of the appellate court." *Austin*, 90 Md. App. at 264 (quoting *Squire v. State*, 32 Md. App. 307, 309 (1976), *rev'd on other grounds*, 280 Md. 132 (1977)).

Although there is no fixed formula to determine whether to exercise plain error review, *Yates*, 429 Md. at 131, four factors might influence us to do so: the egregiousness of the error; the impact upon the defendant; any lawyerly diligence or dereliction; and finally, "the opportunity which the notice of 'plain error' might afford to illuminate some murky recess of the law." *Austin*, 90 Md. App. at 267-71. This case does not meet any of those four conditions. We already have held that a misstatement of the *mens rea* requirement for an attempted murder conviction is not an egregious error requiring plain error review. In *Austin*, the trial court gave the same erroneous instruction that occurred here, describing the *mens rea* required on an attempted murder charge as the intent to kill

or the intent to inflict serious bodily harm. *Id.* at 260. On appeal, we found that "[a]s an error, it was garden-variety, not extraordinary[,]" and did not warrant plain error review. *Id.* at 269. Nor did the erroneous instruction have "a crucial bearing upon the verdict," *id.*, because "an intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the human body," *State v. Raines*, 326 Md. 582, 591 (1992) (citation omitted). Mr. Lloyd's testimony that Mr. Brown fired a shot toward his head supports a finding of intent to kill, not just intent to inflict grievous bodily harm.

Ultimately, though, plain error review is available only if we decide to exercise our discretion to undertake it, and we decline do so here because the law is settled on the requirement for attempted murder. "[T]he legal issue involved lies in a field which has already been thoroughly ploughed," *Austin*, 90 Md. App. at 272, and we feel comfortable holding counsel to "the same standard for knowing the law as counsel, in turn, would hold the trial judge," *id.* at 271.

B. Ms. Saunders's Written Statement Was Properly Excluded.

Mr. Brown contends *next* that the trial court abused its discretion when it refused to admit into evidence Ms. Saunders's written statement to the police on the night of the robbery. Defense counsel sought to introduce the statement after teasing out the inconsistencies between the statement and her testimony in court. The State promptly objected to its admission, and the court sustained the State's objection:

> THE COURT: Why should the whole statement be admissible?
>
> I'm assuming by your examination you've pointed out already the inconsistencies in her testimony today with the statement itself. Why should the document be admitted?

> [DEFENSE COUNSEL]: Well, Your Honor, because of material omissions in her testimony. The statement does not contain, and I asked her on cross-examine whether or not she had been urged to give a complete story of what her observations were. She testified yes.
>
> THE COURT: Uh-huh.
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> [DEFENSE COUNSEL]: And there are material omissions from the statement when compared to her direct testimony, and I think that's also a valid basis for impeachment and of any material omissions or observations.
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> THE COURT: I don't have any problem with your use of the statement for the purpose you indicate. What I have a problem with is having it used for such. It then—the statement itself then being received into evidence.
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> [DEFENSE COUNSEL]: Well, I would think the jury, as the finder of fact, should be able to compare her direct testimony and the scope of that, and the detail of that testimony with the lack of detail contained in this statement with regard to—specifically with her allegations that my client stepped over the victim, stepped over her, and was in close proximity to them and that type of thing.
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> THE COURT: I'm going to sustain the objection. I find that the statement can be used for impeachment, but that the admissibility of it is cumulative to the purpose that counsel wishes to use it.

Judgments regarding the admissibility of evidence fall within the discretion of the trial court, and we will not disturb the court's ruling absent a clear abuse of discretion, "'where no reasonable person would take th[at] view' . . . or when the court acts 'without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)).

Both Mr. Brown and the State concentrate on the applicability of Rule 5-613(b), which governs procedures for examining a witness concerning his or her prior statement, and precludes the admission of extrinsic evidence of a prior inconsistent statement when the witness admits to making the prior statement.[3] The State argues that Ms. Saunders's written statement constitutes extrinsic evidence, and thus is not admissible under Rule 5-613(b) because Ms. Saunders admitted to having made it. Mr. Brown, for his part, argues that Rule 5-613(b) does not prohibit the written statement's admission because it is not extrinsic evidence of a prior inconsistent statement, but *is the prior inconsistent statement itself*. Therefore, the argument goes, Rule 5-613(b) does not apply at all because it only governs the admission of extrinsic evidence. It's a creative argument, but not one that

[3] Rule 5-613 provides:

> **(a) Examining witness concerning prior statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> **(b) Extrinsic evidence of prior inconsistent statement of witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

defense counsel argued at trial, so we will not address it on appeal. *See, e.g.*, *Jones v. State*, 379 Md. 704, 713 (2004) (an appellate court ordinarily will not address an issue that was not raised or decided by the trial court).

Counsel actually argued at trial that the written statement should come in for the purposes of impeaching the account of the robbery that Ms. Saunders gave in court. During cross-examination, defense counsel led Ms. Saunders to admit that the written statement was hers and highlighted the discrepancies between her statement and her testimony. And the defense sought to admit the written statement for the very same purpose—to allow the jury to "compare" and recognize the differences between her testimony and written statement. We see no abuse of discretion in the trial court's conclusion that the statement was cumulative in this context, and was properly excluded under Md. Rule 5-403 (permitting the court to refuse the "needless presentation of cumulative evidence").

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED AS TO SENTENCE FOR ROBBERY AND AFFIRMED IN ALL OTHER RESPECTS. COSTS TO BE PAID BY APPELLANT.