UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0708

September Term, 2015

DAZMON JONES

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: July 29, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, Dazmon Tavon Jones, was convicted in the Circuit Court for Baltimore City of possession of a regulated firearm by a prohibited person. Appellant presents two questions for review, which we have rephrased slightly as follows:

> 1. Did the trial court commit plain error in permitting Officer Victor Villafane to testify as an expert witness in drug distribution that the term "joint" is a slang term for a handgun?
>
> 2. Was the evidence sufficient to support the guilty verdict of possession of a regulated firearm by a prohibited person?

We shall decline to engage in plain error review of the trial court's admission of Officer Villafane's testimony and hold that the evidence was sufficient to support the guilty verdict for possession of a regulated firearm by a prohibited person.

I.

Appellant was indicted in the Circuit Court for Baltimore City with three counts of possession of a regulated firearm by a prohibited person, possession of a firearm in violation of § 5-622 of the Criminal Law Article, and possession with intent to use drug paraphernalia. The jury convicted appellant of one count of possession of a regulated firearm by a prohibited person. The court sentenced appellant to a term of incarceration of five years.

The following evidence was presented at trial. On December 13, 2013, Police Officer Victor Villafane and other officers of the Baltimore Police Department executed a search warrant for 2502 North Longwood Street in Baltimore. Davon Langston, appellant's brother,

was present at the house with two other individuals—appellant was not present during the search. The search revealed a loaded .45 caliber handgun, loaded handgun magazines, marijuana, cocaine and other drugs. The officers arrested Langston, and while Langston was in custody, Officer Villafane listened to the recordings of his telephone calls from the jail. Officer Villafane listened to one conversation between Langston and an individual named "China," a moniker for a person Officer Villafane identified as appellant. Langston informed China of the search and China asked Langston, "[D]id they find both of those joints?" China further stated that he "might just try to sell the other joint . . . ."

After reviewing the recorded jail call, Officer Villafane considered that the December 13, 2013 search may have failed to find all of the guns in the house. Officer Villafane then applied for a second search warrant, which was granted. The second search of 2502 North Longwood Street, conducted on January 7, 2014, revealed a valid Maryland identification in appellant's name and more drug paraphernalia. Officers also found an unloaded .45 caliber Rock Island handgun in the ceiling of the boiler room in the basement. A search of the second floor bedroom, where Langston told police that appellant occasionally slept, revealed mail addressed to appellant and a .45 caliber round in a dresser drawer. Appellant, who had been convicted previously of Possession With Intent to Distribute on April 18, 2013, arrived at the house shortly after the commencement of the second search.

Appellant was indicted with three counts of possession of a regulated firearm by a prohibited person, one count of possession of a firearm in violation of § 5-622 of the Criminal Law Article, and one count of possession with intent to use drug paraphernalia as a result of the second search. Appellant was tried by a jury in the Circuit Court for Baltimore City. The State offered Officer Villafane as an expert witness in drug distribution activities in Baltimore as follows:

> "THE STATE: And what sort of cases do you investigate?
>
> OFFICER VILLAFANE: We investigate drug cases, handgun cases, all types of cases.
>
> THE STATE: Okay. Now, approximately how many drug-related investigations have you been—well, how long have you been a police officer?
>
> OFFICER VILLAFANE: For approximately four years.
>
> THE STATE: Four years. Okay. And before you went out on the street did you ever receive any special training in drug enforcement?
>
> OFFICER VILLAFANE: Yes, sir.
>
> THE STATE: What sort of training did you receive?
>
> OFFICER VILLAFANE: I have over 80 hours of controlled dangerous substance and narcotics training, including armed person and handgun trainings.
>
> THE STATE: Okay. And when you say, 'armed person,' like characteristics of an armed person. Is that—

OFFICER VILLAFANE: Yes, sir.

THE STATE: Okay. And was a majority of that training at the academy?

OFFICER VILLAFANE: I would say half of it.

THE STATE: Okay, and half of it you've received since leaving the academy while you've been working on the street.

OFFICER VILLAFANE: Yes, sir.

THE STATE: Okay. Now, how many drug-related investigations have you been a part of?

OFFICER VILLAFANE: I would say over 300.

THE STATE: Over 300. And if you're able to estimate, how many hours have you spent observing, investigating, apprehending drug-related offenses?

OFFICER VILLAFANE: Hundreds of hours.

THE STATE: Okay. Now, have you ever been qualified as an expert before when testifying in court?

OFFICER VILLAFANE: Yes.

THE STATE: Okay. And have you ever been qualified an expert in the Baltimore City Circuit Court?

OFFICER VILLAFANE: Yes.

THE STATE: Okay. And, Your Honor, at this time the State would offer Officer—

> [APPELLANT'S COUNSEL]: I would stipulate, Judge, to his expertise.
>
> THE COURT: Well, you don't know what the subject matter is. What's the subject—
>
> THE STATE: As an expert in drug distribution activities in Baltimore.
>
> THE COURT: And you're stipulating?
>
> [APPELLANT'S COUNSEL]: Uh-huh.
>
> THE COURT: Okay. I'll accept him as an expert, then."

The State played the recordings of the phone calls between Langston and appellant before the jury. Transcripts of the recordings were provided to the jury. Officer Villafane testified to his interpretation of the first phone call as follows:

> "THE STATE: Now, Officer Villafane, the most recent part that we heard there was a question, 'Yeah, they find both—did they find both of those joints,' question mark? Based on your training and experience and expertise, what did that mean to you?
>
> OFFICER VILLAFANE: That meant that Mr. Davon Langston—Dazmon Jones was asking if they found both of them guns in the house.
>
> * * *
>
> THE STATE: Now, Officer Villafane, in your expertise, what's the connection you find between drugs and guns? How, if at all, are they generally connected?

> OFFICER VILLAFANE They go hand in hand.
>
> THE STATE: Okay. And—
>
> OFFICER VILLAFANE: Usually. Within the drug dealers. They use the guns to protect themselves. To protect their drugs.
>
> THE STATE: And is it the case that when you normally find a substantial amount of drugs there is often a gun close by?
>
> OFFICER VILLAFANE: Yes."

Counsel for appellant did not object to this statement by Officer Villafane. Officer Villafane's testimony continued as follows:

> "THE STATE: Officer Villafane, if I can direct your attention to what I believe is on page 2 of the transcript? There's a discussion about, 'I might probably have to sell that other joint.' Do you see that portion?
>
> OFFICER VILLAFANE: Yes, I do.
>
> THE STATE: Okay. And do you remember listening to that portion?
>
> OFFICER VILLAFANE: Yes, I do.
>
> THE STATE: In your experience, what does that—what did that mean?
>
> OFFICER VILLAFANE: To me it meant that Dazmon Jones was trying to get some money for the other gun that we missed at the house.
>
> THE STATE: Okay. And can you walk us through—you had indicated based on your training and experience and expertise

> joint oftentimes means gun in this context. Can you walk us through a little bit about why that is or—
>
> OFFICER VILLAFANE: Well—
>
> THE STATE: —Or how you've heard joint referred to a gun before?
>
> OFFICER VILLAFANE: Yes. I've—they use code words on the street, commonly used, as joint, burners, other type of words that they use on the streets for guns.
>
> THE STATE: Okay.
>
> OFFICER VILLAFANE: Why? Because they're not going to be saying, hey, you got that gun, on the streets. They use code words.
>
> THE STATE: Okay.
>
> OFFICER VILLAFANE: So that's commonly used by them on the streets.
>
> THE STATE: And joints is one of the most common ones that you've heard?
>
> OFFICER VILLAFANE: Yes."

Counsel for appellant did not object to any of this testimony.

The jury convicted appellant of one count of possession of a regulated firearm by a prohibited person and acquitted appellant of the drug paraphernalia offense and other weapons charges. Appellant was sentenced to a five-year term of incarceration without

parole for possession of a regulated firearm by a prohibited person. This timely appeal followed.

II.

Appellant recognizes, as he must, that the issue of Officer Villafane's testimony interpreting "joint" to mean a handgun is not preserved for our review. Instead, appellant argues before this Court that the trial court committed plain error in admitting the testimony of Officer Villafane that the term "joint," as used in a recorded telephone call, referred to a handgun. He maintains that this opinion required expertise that Officer Villafane did not possess and Officer Villafane's opinions were not within his stated expertise in drug distribution activities. Appellant further argues that the term "joint" is not accepted in general parlance as a term for a weapon and offers multiple alterative uses of the word "joint" in slang. He requests that this Court exercise our discretion under Maryland Rule 8-131 to notice plain error. Appellant asserts that the wrongful admission of Officer Villafane's opinion testimony was far from a harmless error and requires reversal.

Appellant further asserts that the evidence was insufficient to support the conviction of possession of a regulated firearm by a prohibited person. He concedes that direct control of the handgun was not necessary to prove possession, but asserts that constructive possession requires evidence of one of the following: proximity between the defendant and

the contraband, that the contraband was within the view or otherwise within the knowledge of the defendant, ownership or some possessory right in the premises where the contraband is found, or the presence of a circumstance from which a reasonable inference could be drawn that the defendant was participating in mutual use and enjoyment of the contraband. Appellant argues that without the telephone call and the expert opinion by Officer Villafane, there is no evidence that he was aware of the presence of the weapon to constitute dominion and control over it and no circumstance from which a reasonable inference could be drawn that appellant was participating in mutual use and enjoyment of the handgun.

The State argues that this Court should decline to invoke plain error to consider whether the trial court erred in permitting a witness, qualified as an expert in drug distribution, to testify that "joint" is a slang term for handgun. The State argues that because of the close nexus between drugs and guns, Officer Villafane's opinion on the meaning of the word "joint" falls within his drug distribution expertise.

The State argues also that the evidence was sufficient to support the jury's verdict of guilty of possession of a regulated firearm by a prohibited person. The State maintains that where there is an absence of an explicit connection between the defendant and the contraband, possession is proven where a rational trier of fact could conclude beyond a reasonable doubt that appellant had constructive possession of the firearm.

III.

We begin with the review of appellant's contention that the admission of Officer Villafane's testimony constituted plain error. As a threshold matter, an objection to the admission of testimony must be made at the time the testimony is offered; otherwise it is waived. Md. Rule 4-323. To preserve an issue for appeal, a party must lodge an objection or a party will be deemed to have waived an objection. *See Conyers v. State*, 354 Md. 132, 149-50 (1999). Because it is clear from the record that appellant did not object to Officer Villafane's testimony when it was offered, the issue is waived and is not preserved for our review.

An appellant's failure to object to the testimony of an expert witness in a trial court generally precludes appellate review. *See id.* at 180-83. The scope of this Court's review is set out in Rule 8-131(a), where "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." *See also Robinson v. State*, 410 Md. 91, 103 (2009); *Ware v. State*, 170 Md. App. 1, 18-19 (2006); *Martin v. State*, 165 Md. App. 189, 195 (2005). However, this court may "decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). Such review is discretionary and is predicated upon proper application of the "plain error" doctrine. *See Robinson*, 410 Md. at 111 ("We will intervene 'in those circumstances only when the error complained of was so

material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.'" (quoting *Rubin v. State*, 325 Md. 552, 588 (1992))).

Plain error is "error which vitally affects a defendant's right to a fair and impartial trial." *Martin v. State*, 165 Md. App. 189, 197 (2005) (quoting *Miller v. State*, 380 Md. 1, 29 (2004)); *State v. Daughton*, 321 Md. 206, 210-11 (1990). The Court of Appeals has adopted the Supreme Court's four-pronged analysis for determining whether to exercise appellate review of plain error:

> "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 [trial] 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.'" (Internal citations omitted).

State v. Rich, 415 Md. 567, 578-79 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

In requests for plain error review, we exercise our discretion only when the "unobjected to error [is] compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial." *Smith v. State*, 64 Md. App. 625, 632 (1985) (quoting *State v.*

Hutchinson, 287 Md. 198, 203 (1980)). The exercise of plain error review discretion is one that we exercise rarely, as explained below:

> "[A]ppellate courts should rarely exercise [plain error review], 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."

Chaney v. State, 397 Md. 460, 468 (2007). Appellate review of unpreserved claims under the plain error doctrine "1) always has been, 2) still is, and 3) always will be a rare, rare phenomenon." *In re Matthew S.*, 199 Md. App. 436, 463 (2011) (quoting *Kelly v. State*, 195 Md. App. 403, 431-32 (2010)).

We decline to exercise our discretion to conduct plain error review. Appellant falls decidedly short of meeting the four prongs of the plain error analysis. First, appellant's failure to object to Officer Villafane's testimony constituted an affirmative waiver under Rule 4-321 and this failure "intentionally relinquish[ed]" the right to object. Second, the admission of Officer Villafane's testimony is not a clear or obvious issue and, if there had been an objection, it would be an issue subject to a reasonable dispute. Furthermore, appellant's contention that Officer Villafane does not have the qualifications necessary to conclude that "joint" means gun is groundless because there is a clear, recognizable

connection between drugs and guns. *See Banks v. State*, 84 Md. App. 582, 591 (1990) ("Possession and, indeed, use, of weapons, most notably, firearms, is commonly associated with the drug culture; one who is involved in distribution of narcotics, it is thought, *a fortiori*, would be more prone to possess, and/or use, firearms, or other weapons, than a person not so involved."). An expert in drug distribution in Baltimore is qualified to offer an opinion as to the meaning of a slang term for a handgun, an item that is commonplace to drug distribution. *See Whiting v. State*, 125 Md. App. 404, 417 (1999) ("[W]e have acknowledged a nexus between drug distribution and guns, observing that a person involved in drug distribution is more prone to possess firearms . . . ."). Because the first two prongs are not satisfied, and this case does not present an error that seriously affects the fairness, integrity, or public reputation of judicial proceedings, the issue of the admission of Officer Villafane's testimony that the word "joints" means handguns does not cause us to exercise our discretion and consider the issue under plain error. We hold that the issue is not preserved for our review.

IV.

We next address appellant's contention that the evidence was insufficient to support the conviction of possession of a regulated firearm by a prohibited person. Appellant was

convicted under Maryland Public Safety Article, Section 5-133(c), the relevant section stating as follows:

> "(c) *Penalty for possession by person convicted of crime of violence.* — (1) A person may not possess a regulated firearm if the person was previously convicted of:
>
> > (i) a crime of violence; or
> >
> > (ii) a violation of § 5-602, § 5-603, § 5-604, § 5-605, § 5-612, § 5-613, or § 5-614 of the Criminal Law Article.
>
> (2) (i) Subject to paragraph (3) of this subsection, a person who violates this subsection is guilty of a felony and on conviction is subject to imprisonment for not less than 5 years and not exceeding 15 years."

Appellant was convicted previously under § 5-602 of the Criminal Law Article of Possession with Intent to Distribute and is disqualified from possessing any form of handgun.[1] He argues that the evidence was insufficient to prove that he possessed the .45 caliber Rock Island handgun that the policed seized during the second search.

The standard of review of the sufficiency of the evidence for a criminal conviction is adopted from the Supreme Court as follows:

> "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the

[1]Section 5-101(r) of the Public Safety Article defines a "regulated firearm" as a handgun or assault rifle.

> prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Smith v. State, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Ultimately, "[i]n order for the evidence supporting the handgun possession conviction to be sufficient, it must demonstrate either directly or inferentially that [the defendant] exercised 'some dominion or control over the prohibited [item] . . . .'" *Parker v. State*, 402 Md. 372, 407 (2007) (quoting *Moye v. State*, 369 Md. 2, 13 (2002)). Knowledge of the presence of the object is generally required for a possession charge as the prerequisite to the exercise of dominion and control. *Id.*

Although it is clear from the record that appellant was not in actual possession of the handgun at the time it was discovered, he was in constructive possession of the handgun which sufficed to support the conviction beyond a reasonable doubt. This Court, in *McDonald v. State*, 141 Md. App. 371 (2001), acknowledged the theory of constructive possession when it is applied to firearm possession as follows:

> "In a possessory crime or one in which control or dominion over contraband . . . constitutes, or is an element of, the *actus reus*, the law engages in the legal fiction of constructive possession to impute inferentially criminal responsibility . . . ."

Id. at 379-80 (quoting *Price v. State*, 111 Md. App. 487, 498 (1996)). As we stated in *Price*, "[i]n permitting the inference of control or dominion over an instrumentality of crime, examples of factors that we have recognized to establish the nexus are the proximity between

the defendant and the contraband and the fact that the contraband was within the view or otherwise within the knowledge of the defendant." 111 Md. App. at 498-99; *see also McDonald*, 141 Md. App. at 380 (adopting the nexus factors from *Price*). When reviewing a jury conviction, "[w]here it is reasonable for a trier of fact to make an inference, we must let them do so, as the question 'is not whether [the trier of fact] could have made other inferences from the evidence or even refused to draw any inference, but whether the inference [it] did make was supported by the evidence.'" *State v. Suddith*, 379 Md. 425, 447 (2004) (quoting *State v. Smith*, 374 Md. 527, 557 (2003)).

In the present case, the evidence is sufficient to support the guilty verdict when viewed in the light most favorable to the prosecution—any rational trier of fact would find the essential elements of possession beyond a reasonable doubt. The phone call between Langston and appellant indicated that appellant knew that the officers failed to locate a handgun, supporting the inference that appellant had knowledge of the presence of the handgun in the house. The phone call further supports the inference that appellant exerted dominion over the handgun because of his intention to sell it, which signifies a proprietary interest and allows for the inference that he had significant control over the handgun. Even absent Officer Villafane's testimony concerning the meaning and interpretation of the phone call, the recording and transcript of the phone call was provided to the jury. A rational trier of fact could find appellant guilty based on the content and context of the calls paired with

the inferences capable of being drawn from the additional facts elicited at trial. Langston acknowledged the location of appellant's bedroom during the first search and mail addressed to appellant was found on a mattress in that room during the second search, supporting the inference that appellant did reside at 2502 North Longwood Street. Although the gun was found hidden in the basement of the shared house, it was unloaded and matching ammunition was found in appellant's room, further connecting appellant to the firearm. With all of the evidence connecting appellant to the house and the handgun viewed in the light most favorable to the prosecution, any rational trier of fact could have found the requisite elements of knowledge and dominion beyond a reasonable doubt to sustain the firearm possession charge.

The evidence was sufficient to support a guilty verdict for possession of a regulated firearm by a prohibited person.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.