Circuit Court for Harford County
Case No. 12-K-16-000601

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 184

September Term, 2019

WILLIAM OGLESBY, IV

v.

STATE OF MARYLAND

Fader, C.J.,
Friedman,
Gould,

JJ.

Opinion by Fader, C.J.

Filed: March 6, 2020

A jury sitting in the Circuit Court for Harford County convicted the appellant, William Oglesby, IV, of several offenses arising out of a home invasion. Mr. Oglesby contends that the circuit court committed four errors in connection with his trial and sentence: (1) denying a motion to suppress evidence based on the State's failure to prove that the search warrant had been signed; (2) informing prospective jurors that Mr. Oglesby had been convicted previously of a felony and permitting the prosecutor to inform the jurors that Mr. Oglesby had been convicted of a crime of violence; (3) failing to merge convictions for first-degree burglary and home invasion for purposes of sentencing; and (4) imposing consecutive sentences on counts for use of a firearm and large-capacity magazine in the commission of a crime of violence, based on the erroneous belief that consecutive sentences were mandatory.

We conclude that Mr. Oglesby has not preserved his first two claims of error, and so we decline to reach those issues. We agree with Mr. Oglesby (as does the State) that the trial court erred in failing to merge his convictions for first-degree burglary and home invasion for purposes of sentencing. Pursuant to *Twigg v. State*, 447 Md. 1, 26-30 (2016), we will vacate all of Mr. Oglesby's sentences and remand for resentencing on his remaining convictions. We also agree with Mr. Oglesby that consecutive sentences were not required for one of his two convictions for use of a firearm in the commission of a crime of violence or for his conviction for use of a large-capacity magazine in the commission of a crime of violence. We are less certain, however, that the trial court was operating under a different understanding of the law. Regardless, we need not resolve that issue in light of our decision to vacate Mr. Oglesby's sentences and remand for resentencing.

BACKGROUND

The Underlying Incident

In the late evening hours of March 14, 2016, Careyann Rohrbaugh and her fiancé, Herbert Walls, were asleep in the bedroom of Ms. Rohrbaugh's home when they were awoken by a "loud bang." Ms. Rohrbaugh saw three individuals standing in her bedroom wearing masks and holding guns. The masked persons demanded money. Ms. Rohrbaugh recognized one of them as Mr. Oglesby, with whom she was acquainted. The three perpetrators eventually absconded with several items belonging to Ms. Rohrbaugh and Mr. Walls.

Not long after the robbery, the police obtained a search warrant for Mr. Oglesby's residence. Upon executing that warrant, the police recovered ammunition and a handgun that had an "extended magazine." Both Ms. Rohrbaugh and Mr. Walls later identified the handgun taken from Mr. Oglesby's residence as the same gun that was used by one of the intruders. Mr. Oglesby was arrested and charged.

Mr. Oglesby's Challenge to the Search Warrant

On the second day of trial, after jury selection but before opening statements, defense counsel informed the trial court that Mr. Oglesby was "of the opinion . . . that for a warrant to be valid it has to be signed and stamped by a magistrate, by a judge, otherwise it is an invalid warrant." Defense counsel stated that he had asked the State to "pull a copy of an actual signed warrant from the District Court," but that the State only produced a "stamped warrant," and that the court file he reviewed contained only the "stamped

warrant." After a recess taken to "look at the issue," defense counsel argued that both the Criminal Procedure Article and the Maryland Rules require that a search warrant be signed and dated by the issuing judge, and that the stamped signature on the warrant was insufficient.

In response, the prosecutor informed the court that he had researched the issue during the break and discovered that "it is the practice of the judges of Harford County District Court when presented with a warrant to take two copies, stamp one copy an[d] sign one copy." The prosecutor stated that those copies, both of which are executed by the issuing judge, are then "filed together and kept as required by the Clerk of the District Court." Upon receiving a request for a copy of a warrant, the clerk provides a stamped copy to the requesting party. According to the prosecutor, this is done "to prevent unnecessary copies of judges[']signatures being out and available to the public." Although the prosecutor believed that "a live signed copy [of the warrant] does exist," he had been unable to locate one during the brief recess. The prosecutor also proffered that one of its witnesses, a detective who had obtained the warrant, would testify that the judge had, in fact, signed it.

In response, defense counsel agreed that, in Mr. Oglesby's case, a signed warrant "does exist somewhere," but requested that the court order the district court to produce the signed copy. The court declined to issue such an order, stating that it was "satisfied that the stamped copy evidences the fact that [the issuing judge] reviewed the application," "made the appropriate findings and signed the warrant." The court credited the

prosecutor's representation that, based on the district court's standard practice, "there is a physically pen to paper signed document but [] it has not been . . . located given the short notice." The court concluded that the actual signed copy of the warrant was not required, observing that the stamped copy satisfied the "clear[] inten[t]" of the applicable statute and rules—to ensure "that a warrant is reviewed and approved by the appropriate judicial officer."

Notwithstanding the court's denial of the motion at that time, the court then informed the parties that "if either the State or the defense felt the need to ask for a court order to produce that warrant," the court "would be willing to sign that order." The court also stated a willingness to subpoena the issuing judge to "ask him if he signed this warrant." The court then asked the parties if there was "anything else." Although one of them responded that "there may be something from the defense on this issue momentarily,"[1] there was no further discussion on the topic.

During trial, Detective Andrew Skica of the Harford County Sheriff's Office testified that he applied for the warrant to search Mr. Oglesby's residence; that he was present when the warrant was presented to the judge; and that the judge signed the warrant. Mr. Oglesby did not object to that testimony. The State then introduced the items seized from Mr. Oglesby's residence, including the ammunition and the handgun with the

[1] Although the transcript identifies the prosecutor as the one who made the comment, the State attributes it to defense counsel. Regardless of who made the comment, defense counsel did not pursue the matter further.

extended magazine. Defense counsel stated that he had "no objection" to the introduction of each of those items.

Mr. Oglesby's Prior Conviction

Before the discovery of the handgun in his residence, Mr. Oglesby had been convicted in a separate case of felony possession of a controlled dangerous substance, a crime that disqualifies an individual from possessing a firearm under Maryland law. Based on that conviction, prosecutors charged Mr. Oglesby in this case with unlawful possession of a firearm with a disqualifying conviction. Before trial, the court denied a motion to sever that charge from the others.

During jury selection, the trial court told the prospective jurors that Mr. Oglesby was charged with, among other things, "possession of a regulated firearm after having been convicted of a felony." Mr. Oglesby did not object. At the conclusion of the State's case-in-chief, the prosecutor informed the court that the parties had agreed to stipulate that Mr. Oglesby "was convicted of a certain crime" in 2003, and that because of that conviction, he was prohibited from possessing a regulated firearm in Maryland. The prosecutor read that same stipulation to the jury. During its closing argument, however, the prosecutor stated that "it has been stipulated that [Mr. Oglesby] has already been convicted of a crime of violence that disqualifies him from possessing a regulated firearm." Once again, Mr. Oglesby did not object. After deliberations, the jury convicted Mr. Oglesby of home invasion, first-degree burglary, two counts of armed robbery, two counts

of first-degree assault, two counts of use of a firearm in the commission of a felony, use of a large-capacity magazine in the commission of a felony, and related offenses.

Mr. Oglesby's Sentencing

The court sentenced Mr. Oglesby to a total of 165 years' imprisonment, with all but 40 years suspended, and five years' probation. As relevant to this appeal, Mr. Oglesby's sentence included:

- Count 1 – Home invasion, based on breaking and entering the home with the intent to commit theft: 25 years' imprisonment, with all but 15 years suspended.

- Count 2 – First-degree burglary, based on breaking and entering the home with the intent to commit a crime of violence: a consecutive 20 years' imprisonment, with all but 5 years suspended.

- Count 10 – Use of a firearm in the commission of a felony or crime of violence: a consecutive 20 years' imprisonment, with all but five years suspended.

- Count 11 – Use of a firearm in the commission of a felony or crime of violence: a consecutive 20 years' imprisonment, with all but five years suspended.

- Count 15 – Use of a magazine with a capacity of more than ten rounds in the commission of a felony or crime of violence: a consecutive 20 years' imprisonment, with all but five years suspended.

At the sentencing hearing, the parties discussed whether the sentences on Counts 10, 11, and 15 should be merged. During that discussion, the court remarked that it believed the State's position to be "that none of the firearm related offenses [] merge with each other and that Counts 10 and 11 both carry a mandatory minimum of five years consecutive as well as Count 15." The State agreed. Defense counsel argued that the

sentences for those counts could be "consecutive to any one of the enumerated felonies, but they can be concurrent with [each] other in terms of sentencing." The prosecutor asserted that although it would not "be legally incorrect making them concurrent to one another[,] . . . it would be inappropriate in this case factually." The court made all three of the sentences consecutive. This appeal followed.

DISCUSSION

I. MR. OGLESBY'S CLAIM REGARDING THE VALIDITY OF THE SEARCH WARRANT WAS WAIVED.

Mr. Oglesby first contends that the trial court erred in denying what he characterizes as his "motion to suppress evidence seized from [his] residence."[2] (emphasis removed). Mr. Oglesby claims that the search warrant that provided the basis for the search was invalid because "the warrant produced by the State was stamped, but not signed, by [the issuing judge] as required by Criminal Procedure Art. § 1-203 and Rule 4-601." Mr. Oglesby further asserts that the extrinsic evidence provided by the State, namely, the stamped copy of the warrant and the State's various proffers as to the existence of a signed copy, did not establish that the issuing judge actually signed the search warrant.

[2] As the State correctly notes, Mr. Oglesby filed a pretrial motion to suppress, and the court held a hearing on that motion on March 13, 2017. Mr. Oglesby did not raise any challenge at that hearing to the validity of the search warrant, despite the fact that the stamped copy of the search warrant was admitted into evidence at the hearing. Thus, the State is correct that, ordinarily, Mr. Oglesby's challenge to the validity of the search warrant, which was first raised at trial and is the subject of the instant appeal, could be considered to have been waived under Rule 4-252(a). That same rule, however, permits a court to hear a belated suppression issue "for good cause shown." *Id.* Given that the trial court allowed defense counsel to raise and argue the issue at trial, it is reasonable to infer that the court determined that "good cause" was shown.

The State argues, and we agree, that Mr. Oglesby's claim was waived and thus is not properly before this Court. *Brice v. State*, 225 Md. App. 666, 679 (2015) ("[A] party who validly waives a right may not complain on appeal that the court erred in denying him the right he waived." (quoting *Brockington v. Grimstead*, 176 Md. App. 327, 355 (2007), *aff'd*, 417 Md. 332 (2010))). As an initial matter, although Mr. Oglesby styles his trial challenge to the validity of the search warrant as a "motion to suppress evidence," Mr. Oglesby never actually asked the court to suppress any evidence on that ground. Instead, he merely informed the court that a signed copy of the warrant had not been provided and asked the court to order the District Court clerk to produce the signed copy. The court initially denied that request, but then indicated a willingness to issue such an order later.

Moreover, notwithstanding the court's stated willingness at a later time to order the clerk to produce the signed copy or to subpoena the issuing judge to give testimony, Mr. Oglesby never asked the court to do either. Indeed, he never raised the issue again. As a result, to the extent his objection was raised properly in the first place, Mr. Oglesby's later conduct failed to preserve that objection. *See Owens v. State*, 399 Md. 388, 419 (2007) ("Generally, 'most rights, whether constitutional, statutory or common-law, may be waived by inaction[.]'" (quoting *State v. Rose*, 345 Md. 238, 248 (1997))); *see also Brice*, 225 Md. App. at 679 ("Generally, a waiver is the intentional relinquishment of a known right, or conduct that warrants such an inference." (quoting *Brockington*, 176 Md. App. at 355)).

Perhaps most fatal to Mr. Oglesby's position on appeal is that when the State sought to introduce into evidence the items seized pursuant to the challenged search warrant,

Mr. Oglesby not only failed to object, but defense counsel affirmatively stated that he had "[n]o objection" to their admission. Had he not waived his objection previously, his affirmative statement at that time did so. *See Brice*, 225 Md. App. at 679 (holding that by "affirmatively advis[ing] the court that there was no objection," defense counsel's "statement was an explicit waiver" (quoting *Booth v. State*, 327 Md. 142, 180 (1992))); *see also Jackson v. State*, 52 Md. App. 327, 332 (1982) ("[I]f a pretrial motion is denied and at trial appellant says he has no objection to the admission of the contested evidence, his statement effects a waiver."). We therefore conclude that Mr. Oglesby failed to preserve for appeal his contention that the court erred in not suppressing evidence on the ground that the State failed to produce a signed copy of the search warrant.

II. PLAIN ERROR REVIEW OF THE TRIAL COURT'S AND THE STATE'S COMMENTS REGARDING MR. OGLESBY'S PRIOR CONVICTION IS UNWARRANTED.

Mr. Oglesby contends that the trial court erred in (1) advising prospective jurors during *voir dire* that Mr. Oglesby had been charged with possession of a regulated firearm after having been convicted of "a felony"; and (2) permitting the State to argue during closing arguments that he had been convicted of "a crime of violence" that disqualified him from possessing a regulated firearm. Mr. Oglesby asserts that those two comments were improper invocations of his prior criminal history, and that the parties had stipulated that the jury should be told only that he had been "convicted of a certain crime." Mr. Oglesby further asserts that the comments "in all likelihood led the jury to believe that [he] had been previously convicted of a violent felony" and, as a result, were "highly prejudicial" and "made a fair trial impossible."

Mr. Oglesby acknowledges that he did not object to either of the comments about which he now complains and, therefore, asks that we undertake plain error review. The Court of Appeals has set forth the following four-prong test regarding plain error review:

> First, there must be an error or defect – some sort of deviation 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 [court] proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

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

Here, because Mr. Oglesby waived his claim when he affirmatively stated that he had no objection to the introduction of the evidence obtained pursuant to the search warrant, plain error review is not available. *See Rich*, 415 Md. at 580 (discussing the distinction between "forfeited rights," which "are reviewable for plain error," and "waived rights," which ordinarily "are not"); *Joyner v. State*, 208 Md. App. 500, 517 (2012) ("Waived objections cannot be reviewed on appeal (save for the rare case in which a reviewing court, as a matter solely of its discretion, forgives the waiver)."); *Carroll v. State*, 202 Md. App. 487, 513 (2011) (stating that "[p]lain error review generally is not applicable" to an "affirmative waiver of [an] issue"), *aff'd*, 428 Md. 679 (2012).

Moreover, even if Mr. Oglesby's claim merely had not been preserved, rather than waived, we would not choose to exercise plain error review here. Although we have

"plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court," *Danna v. State*, 91 Md. App. 443, 450 (1992), our exercise of that discretion is "a rare, rare phenomenon," *Morris v. State*, 153 Md. App. 480, 507 (2003); *see also Austin v. State*, 90 Md. App. 254, 268 (1992) (stating that "[t]he touchstone" of plain error review "remains, as it always has been, ultimate and unfettered discretion"). "[T]he plain error doctrine has been used sparingly," *Conyers v. State*, 354 Md. 132, 171 (1999), and only when the alleged "unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial," *Brown v. State*, 169 Md. App. 442, 457 (2006) (quoting *Smith v. State*, 64 Md. App. 625, 632 (1985)). Under the particular circumstances of this case, we do not believe the alleged error meets that standard.

III. MR. OGLESBY'S SENTENCE FOR FIRST-DEGREE BURGLARY SHOULD HAVE MERGED FOR SENTENCING PURPOSES INTO HIS CONVICTION FOR HOME INVASION.

Mr. Oglesby contends that the court erred in sentencing him for both his first-degree burglary conviction and his home invasion conviction. The State concedes the point, and we agree that Mr. Oglesby is correct.

"The merger doctrine derives from the Fifth Amendment protection against double jeopardy afforded by the U.S. Constitution and Maryland common law and prohibits multiple punishments for the same offense." *Jones v. State*, 240 Md. App. 26, 44 (2019). The rule of lenity "provides that two statutory offenses may not be separately punished if the Legislature intended for them to be punished in one sentence." *Id.* at 45. "When

evaluating a claim for lenity, 'we look first to whether the charges arose out of the same act or transaction, then to whether the crimes charged are the same offense, and then, if the offenses are separate, to whether the Legislature intended multiple punishments . . . .'" *Id.* (quoting *Clark v. State*, 218 Md. App. 230, 255 (2014)) (internal quotation marks in *Clark* omitted). If there is any ambiguity as to whether the Legislature intended multiple punishments, it must be construed "in favor of the accused, and against the State." *Handy v. State*, 175 Md. App. 538, 578 (2007) (quoting *Cantine v. State*, 160 Md. App. 391, 413 (2004)).

"We apply the 'normal rules of statutory construction in determining the legislative intent regarding the proper unit of prosecution and the appropriate unit of punishment in respect to violations of any criminal statute.'" *Handy*, 175 Md. App. at 576 (quoting *Melton v. State*, 379 Md. 471, 478 (2004)). Under those rules, we first look to the text of the statue, affording the words used "their ordinary and usual meaning." *Handy*, 175 Md. App. at 577. "If the statute is not ambiguous, we generally will not look beyond its language to determine legislative intent." *Id*.

Mr. Oglesby was charged with violations of both § 6-202(a) and (b) of the Criminal Law Article. Section 6-202(a) makes it a criminal offense to "break and enter the dwelling of another with the intent to commit theft." That crime, "the felony of burglary in the first degree," "is subject to imprisonment not exceeding 20 years." Crim. Law § 6-202(c). Section 6-202(b) makes it a criminal offense to "break and enter the dwelling of another

with the intent to commit a crime of violence." That crime, "the felony of home invasion," "is subject to imprisonment not exceeding 25 years." Crim. Law § 6-202(d).

Before 2014, § 6-202(a) defined "first-degree burglary" as the breaking and entering of the dwelling of another "with the intent to commit theft or a crime of violence." *Id.* (2012 Repl.; 2013 Supp.). In 2014, the General Assembly amended the statute to create the separate crime of "home invasion" and to add the lengthier maximum sentence associated with that crime. *See* 2014 Md. Laws, ch. 238 (effective October 1, 2014). Notably, an early version of the bill contained an "anti-merger" provision, *see* 2014 Md. House Bill No. 807 (introduced and read on February 3, 2014), but that provision did not make it into the bill as enacted. As a result, the statute contains no indication that the General Assembly intended to authorize separate sentences for conduct that constitutes both first-degree burglary and home invasion.

Here, Mr. Oglesby's convictions for home invasion and first-degree burglary arose out of the same act or transaction, the robbery at Ms. Rohrbaugh's home in March 2016. Accordingly, Mr. Oglesby's conviction for first-degree burglary should have merged for sentencing purposes into his conviction for home invasion. *See Clark*, 218 Md. App. at 253 (merging, for sentencing purposes, the conviction with the lesser sentence into the conviction with the greater sentence).

Because the record shows that Mr. Oglesby's sentence on the first-degree burglary conviction was part of a total sentencing "package," we shall vacate all of Mr. Oglesby's sentences and remand for resentencing. *Twigg*, 447 Md. at 26-30; *see also Scott v. State*,

454 Md. 146, 199 n.12 (2017) ("It is properly left to the discretion of the appellate court, based on the circumstances of the case, whether to vacate the deficient sentence alone or all sentences imposed."). In resentencing Mr. Oglesby, the sentencing court shall not exceed a total term of 165 years' imprisonment with all but 40 years suspended. *Twigg*, 447 Md. at 30.

IV. ON REMAND, THE CIRCUIT COURT MUST SENTENCE MR. OGLESBY TO A CONSECUTIVE TERM ON ONE OF HIS CONVICTIONS FOR USE OF A FIREARM IN CONNECTION WITH A CRIME OF VIOLENCE, BUT MAY MAKE OTHER SENTENCES CONSECUTIVE OR CONCURRENT.

Mr. Oglesby's final contention is that the sentencing court "erred in imposing consecutive sentences on Count 10, use of a firearm in the commission of a felony or crime of violence, and Count 15, use of a magazine with a capacity of more than ten rounds of ammunition in the commission of a felony or crime of violence, where the court mistakenly believed that the convictions for those offenses 'carry a mandatory minimum of five years consecutive.'" (emphasis removed). We agree with Mr. Oglesby (as does the State) that, pursuant to § 4-204(c) of the Criminal Law Article, the court was required to sentence Mr. Oglesby to a consecutive sentence for only one of the two convictions for use of a firearm in the commission of a felony or crime of violence (Counts 10 and 11). That is because § 4-204(c) requires a consecutive sentence only "[f]or each subsequent violation" of the statute, and there is nothing in the record to suggest that Mr. Oglesby had previously been convicted of that offense. Similarly, § 4-306(b) of the Criminal Law Article requires a consecutive sentence only "[f]or each subsequent" conviction for use of a large-capacity

magazine in the commission of a felony or crime of violence (Count 15), and there is nothing in the record to suggest a prior conviction of Mr. Oglesby for that offense.

Although we agree with Mr. Oglesby and the State regarding the law, we are much less certain than they are that the circuit court misunderstood that law at sentencing. Instead, it appears to us that the circuit court's statement on which the parties focus was merely a recitation of what the court believed to be the State's position. The court's other statements seem to reflect a correct understanding of the applicable law. We need not dwell on this issue because, in light of our resolution of Mr. Oglesby's merger claim, the court will have the opportunity to correct any misunderstanding that may have existed. On remand, the court must sentence Mr. Oglesby to a consecutive sentence on either Count 10 or 11, and may sentence him to a consecutive or concurrent sentence, at the court's discretion, on the other of Count 10 or 11 and on Count 15.

APPELLANT'S SENTENCES VACATED AND CASE REMANDED TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR RESENTENCING CONSISTENT WITH THIS OPINION; JUDGMENTS OTHERWISE AFFIRMED; COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY HARFORD COUNTY.