Circuit Court for Montgomery County
Case No. 135492C

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 627

September Term, 2022

ANDY K. PANTON

v.

STATE OF MARYLAND

Arthur,
Ripken,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: March 20, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Appellant, Andy K. Panton ("Panton"), was tried by jury in the Circuit Court for Montgomery County in August of 2021 for the homicides of Jordan Radway ("Radway") and Christian Roberts ("Roberts"). During *voir dire*, the court asked the venire members the following question: "First, will the fact that a handgun was allegedly used in this offense affect any member's ability to be fair and impartial and does any member have strong feelings about gun control issues?" There was no objection from defense counsel. The jury found Panton guilty of two counts of first-degree felony murder and related offenses.[1] The court sentenced Panton to two consecutive terms of life imprisonment and an additional sixty years' incarceration. This timely appeal followed. For the following reasons, we shall affirm.

ISSUES PRESENTED FOR REVIEW

Panton presents the following issues for our review:[2]

I. Whether plain error review should be exercised as to a now-contested, but unpreserved, *voir dire* question.

II. Whether defense counsel provided ineffective assistance of counsel by not objecting to the question at issue.

[1] The counts included: first-degree felony murder of Radway (count 1), first-degree felony murder of Roberts (count 2), armed robbery of Radway (count 3), conspiracy to commit armed robbery (count 4), use of a firearm during the commission of a crime of violence against Radway (count 5), and use of a firearm during the commission of a crime of violence against Roberts (count 6).

[2] Rephrased from the following:

I. Did the trial court violate Mr. Panton's constitutional right to a fair trial by asking a voir dire question on handguns that required the venire to evaluate its impartiality?

II. Was trial counsel's assistance ineffective for not objecting to the voir dire question about handguns?

Additionally, the State contends Panton's appeal should be dismissed due to deficiencies in the record provided by Panton.

FACTUAL AND PROCEDURAL BACKGROUND

In January of 2019, Dontaye Hunt ("Hunt") expressed interest to Noah Barnett ("Barnett") in committing a robbery. With the belief that Radway would be an easy target, Barnett helped Hunt arrange to meet with Radway to, ostensibly, purchase marijuana.[3] Hunt, along with Panton,[4] met with Radway, who was accompanied by Roberts, in an apartment complex's parking lot. At the meeting spot, Hunt and Panton entered the car in which Radway and Roberts had arrived. Shortly thereafter, Hunt and Panton brandished guns and robbed Radway and Roberts. As they exited the car, Panton shot Radway and Roberts. Both died as a result.

At trial, during the *voir dire* process of jury selection, the court asked 32 questions to the venire as a group**.** The venire members were instructed to respond, by raising their juror number, if they believed, or were unsure, that they had an affirmative answer to a question. One of the questions the court posed to the venire was: "First, will the fact that a handgun was allegedly used in this offense affect any member's ability to be fair and impartial and does any member have strong feelings about gun control issues?" Defense counsel did not object to the question. 53 of the 82 venire members responded. The question's origin is unclear from the record provided to this Court. Though the State's

[3] Radway and Barnett were associates involved in illegal activities.

[4] Hunt testified to meeting Panton through Barnett, just "months" before the homicides in January. Hunt further explained that after meeting Panton, he saw him almost every day.

requested *voir dire* questions submitted to the trial court, which did not include the question posed, is part of the record, there is no record of requested questions submitted to the court by the defendant.

Following the initial questions put forth to the venire as a group, the court had each venire member approach the bench individually and inquired as to their affirmative responses. The court asked follow-up questions regarding the responses of the 53 members who had responded to the now-contested question. Although individual *voir dire* was conducted as to the other 29 members of the venire, who had not responded, they were not asked specifically to follow up on the now-contested question. As part of the individual *voir dire*, the court permitted counsel to ask questions, and, at the request of the parties, the court struck numerous venire members for cause. At no time during *voir dire,* did defense counsel express concern with or object to the court's questioning or process.[5] The jury found Panton guilty of two counts of first-degree felony murder and related offenses. This timely appeal followed.

DISCUSSION

We address, at the outset, the State's contention that this appeal should be dismissed as Panton failed to provide a sufficient record to review his claims of error and ineffective assistance of counsel. The State emphasizes that the omitted transcripts of the parties' use of peremptory challenges and contemporaneous seating of jurors preclude us from confirming whether defense counsel waived the *voir dire* claim for appeal. The State

[5] Notably, as we explain further *infra* in the Discussion section, the record does not appear to contain transcripts of all the *voir dire* proceedings.

asserts that Maryland Rule 8-411(a) required Panton to supply those transcripts necessary for the appeal. In response, Panton emphasizes that all available transcripts were provided, and that the record sufficiently supports his claims.

Maryland courts have consistently maintained that claimants bear the burden to produce a sufficient record for our evaluation. *See Mora v. State*, 355 Md. 639, 650 (1999) ("It is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed."); *Kovacs v. Kovacs*, 98 Md. App. 289, 303 (1993) ("The failure to provide the court with a transcript warrants summary rejection of the claim of error."); *Van Meter v. State*, 30 Md. App. 406, 410 (1976) ("The burden to provide such transcript is also appellant's if he intends to rely thereon [and in] the absence of any jury selection testimony in the transcript, he may not argue for reversal based thereon."). Maryland Rule 8-411(a) provides that "the appellant shall order . . . a transcript containing . . . (A) all the testimony or (B) that part of the testimony that the parties agree . . . is necessary of the appeal." Maryland Rule 8-413 further reinforces Rule 8-411(a), by specifying that "[t]he record on appeal shall include . . . the transcript required by Rule 8-411." *See* Md. Rule 8-602 (noting that if "the contents of the record do not comply with Rule 8-413[,]" this Court "may dismiss [the] appeal").

We agree with the State that Panton has not provided an adequate record to properly assess his claims. The record does not include a transcript of the peremptory challenges or seating of the jurors. Without a transcript of the entire *voir dire* proceedings, we are unable

to properly assess whether Panton waived his claim of error.[6] *Newton v. State*, 455 Md. 341, 364 (2017) ("Before we can exercise our discretion to find plain error . . . 'there must be an error . . . that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant.'" (quoting *State v. Rich*, 415 Md. 567, 578 (2010))). Additionally, as described *infra* in section II., the limited record prevents a fair assessment of Panton's ineffective assistance of counsel claim. Even so, despite gaps in the transcripts of *voir dire*, we shall address Panton's claims based on the record provided.

I. WE DECLINE TO ENGAGE IN PLAIN ERROR REVIEW OF THE QUESTION AT ISSUE.

"Ordinarily, 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[.]" Md. Rule 8-131(a). Limiting appellate review to preserved issues "is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice." *In re Kaleb K.*, 390 Md. 502, 513 (2006) (quoting *Medley v. State*, 52 Md. App. 225, 231 (1982)). "Without a contemporaneous objection or expression of disagreement, the trial court is unable to correct, and the opposing party is unable to respond to, any alleged error in the action of the court." *Lopez-Villa v. State*, 478 Md. 1,

[6] The State contends that Panton could have waived his claim of error by either accepting the jury as impaneled or submitting the relevant question to the court. The State emphasizes Panton's apparent admission in his Appellate Brief, that "trial counsel submitted the voir dire question at issue to the trial court." In reply, Panton claims that his brief's apparent admission was a typographical error, and that objecting to the ultimate seating or composition of the jury would not have cured the court's constitutional violation. The question is absent from the State's submitted question list. However, the record lacks any indication of whether the question was submitted by Panton or asked by the court without request from the State or the Defense.

13 (2022). Here, defense counsel did not object to the question at issue and, therefore, Panton's claim is not preserved for our review. Panton acknowledges that his claim is unpreserved, but requests that we still review the claim under the plain error doctrine.

Panton contends that the now-contested question violated his right to an impartial jury, pursuant to the United States Constitution and Maryland Declaration of Rights. U.S. Const. amend. VI; Md. Decl. of Rts. Art. 21. Panton emphasizes that the question resulted in more than one-third of the venire independently determining that they could serve impartially. As a result, Panton claims the parties could not challenge and the court could not determine those venire members' ability to be impartial. Panton describes decades of Maryland precedent prohibiting the question's burden-shifting effect. *See Zimmerman v. State*, 56 Md. 536 (1881); *Davis v. State*, 333 Md. 27 (1993); *Dingle v. State*, 361 Md. 1 (2000); *White v. State*, 374 Md. 232 (2003); *Wright v. State*, 411 Md. 503 (2009); *Pearson v. State*, 437 Md. 350 (2014); *Collins v. State*, 463 Md. 372 (2019). Panton contends that safeguarding the right to a fair and impartial jury compels a plain error review of the issue.

In response, the State asserts that a trial court must ask prospective jurors, on request, whether they have "strong feelings about [the crime with which the defendant is charged]?"[7] *Pearson*, 437 Md. at 363 (brackets in original). The State contends that, even if the relevant question was improper, Panton cannot demonstrate that the error affected the trial's outcome. Given the limited interests vindicated by plain error review, the State

[7] The Court in *Pearson* also noted that "strong feelings" *voir dire* questions should not be phrased "in a way that shift[s] responsibility to decide a prospective juror's bias from the trial court to the prospective juror." 437 Md. at 363.

emphasizes that the doctrine remains "a rare, rare phenomenon," *Morris v. State*, 153 Md. App. 480, 507 (2003), reserved only for "blockbuster errors." *Martin v. State*, 165 Md. App. 189, 196 (2005).[8] Per the State, Panton's claim is not such a blockbuster error.

As an infrequent exception to Rule 8-131(a)'s preservation requirement, the plain error doctrine grants this court discretion to review unpreserved "errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton*, 455 Md. at 364 (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). "[A]ppellate review under the plain error doctrine '1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *White v. State*, 223 Md. App. 353, 403 n.38 (2015) (quoting *Hammersla v. State*, 184 Md. App. 295, 306 (2009)).

Whether or not Panton's claim had been waived, we would still decline to engage

[8] The State also argues that Panton's appeal should be dismissed, for failing to provide a brief or appendix complying with, respectively, Maryland Rule 8-504(b) and Maryland Rule 8-504(b)(1). In reply, Panton contends that he provided the "brief statement of the case, . . . " required by Rule 8-504(b), and the appendix contains additional relevant information compliant with Rule 8-504(b)(1). We note, however, that both the State and Panton cite to an incorrect section of Rule 8-504 in addressing the sufficiency of Panton's brief. Maryland Rule 8-504(a)(2), not (b), provides that "[a] brief shall . . . include . . . [a] brief statement of the case . . . ". Panton also asserts that the State violated Rule 8-504(b)(1) by not including their own appendix of allegedly missing relevant information. Md. Rule 8-504(b)(1) ("If the appellee believes that the part reproduced by the appellant is inadequate, the appellee shall reproduce, as an appendix . . . any additional part . . . believed necessary."). It is within our discretion to compel compliance or order other consequences for failure to comply with Maryland Rules 8-502(a)(2) and (b)(1). *See* Md. Rule 1-201(a) ("When a rule, by the word 'shall' or otherwise, mandates or prohibits conduct, . . . [and] [i]f no consequences are prescribed, the court *may* compel compliance with the rule or may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule." (emphasis added)). However, in this case, neither party's contentions regarding the deficiencies in their respective briefs merit dismissal of this appeal or issue of a related order.

in plain error review. Defense counsel fully participated in the *voir dire* process by asking questions to individual venire members and striking several for cause. Moreover, the record does not suggest, nor has any party argued, that counsel was unable to exercise their peremptory challenges. We conclude that any purported error by the court in asking the question was not so compelling, extraordinary, exceptional, or fundamental as to warrant plain error review. Accordingly, we decline to review the question at issue for plain error.

II. WE DECLINE TO REVIEW PANTON'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Panton argues that defense counsel's failure to object to the now-contested question constitutes ineffective assistance of counsel. According to Panton, his counsel's performance violated prevailing professional standards, because any reasonable attorney would have objected to the question regardless of strategy. Panton claims that defense counsel's inaction was prejudicial because, in his view, it is more likely than not that he would have been acquitted had the question been objected to and biased members stricken. Alternatively, Panton contends that we may presume prejudice based on actual or constructive denial of counsel. Specifically, Panton argues that the court's question prevented counsel from being able to uncover venire members' potential biases. Moreover, Panton contends that seeking post-conviction relief would only waste resources, because of the existing record's sufficient description of *voir dire* and the impossibility of attaining testimony that could excuse defense counsel's failure.

In response, the State emphasizes that the record is silent as to whether defense counsel knew the relevant law, strategically chose not to object to the question at issue, or

was comfortable with the jurors ultimately selected to serve. Moreover, the State asserts that a trial court must ask, on request, "strong feelings" questions to uncover relevant biases. The State contends that speculation about the trial's outcome, had the venire been properly questioned, is unsupported, and the overwhelming evidence against Panton weighs against a finding of ineffective assistance of counsel.

To sustain a claim of ineffective assistance of counsel, appellant "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[W]e prefer post-conviction proceedings to address denial of effective assistance of counsel claims." *Mosley v. State*, 378 Md. 548, 562 (2003); *see Tetso v. State*, 205 Md. App. 334, 378 (2012) ("[T]he trial record does not ordinarily illuminate the basis for the challenged acts or omissions of counsel." (quoting *Johnson v. State*, 292 Md. 405, 434 (1982))). Post-conviction proceedings "presen[t] an opportunity for taking testimony, receiving evidence, and making factual findings concerning the allegations of counsel's incompetence." *Tetso*, 205 Md. App. at 378 (quoting *Johnson*, 292 Md. at 434). Even so, our preference for post-conviction proceedings is not absolute, and direct review may be appropriate where "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim." *In re Parris W.*, 363 Md. 717, 726 (2001); *see Mosley*, 378 Md. at 562 (2003) ("[T]here may be exceptional cases where the trial record reveals counsel's ineffectiveness to be 'so blatant and egregious' that review on appeal is appropriate." (quoting *Johnson*, 292 Md. at 435 n.15)).

Panton's ineffective assistance of counsel claim is better suited for a post-conviction

proceeding. Panton's assertion that he would have *more likely than not* been acquitted by a different jury, had defense counsel's ability to question the venire been unhampered, is speculation. Notably, a post-conviction proceeding would permit the court to investigate defense counsel's reasoning and objectives throughout *voir dire*. Though there is no dispute that defense counsel did not object to the question at issue, it is unclear as to the origination or reasoning behind the question posed or the reason for not objecting to the question. A description of the parties' peremptory challenges and discussions, if any, surrounding the final selection of jurors are also omitted from the record. We are thus largely limited to speculating about defense counsel's reasoning and strategic goals and are unable to properly apply *Strickland*. Post-conviction proceedings would permit testimony and evidence to be submitted and the court to make factual findings. Such testimony and findings are essential to a fair evaluation of Panton's claim. Hence, we decline to review Panton's claim of ineffective assistance of counsel on direct appeal.

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