Circuit Court for Wicomico County
Case Nos. C-22-CR-18-000473, C-22-CR-19-000112

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1351 & 1354

September Term, 2019

JOHNATHON JAMES MEGEE

v.

STATE OF MARYLAND

Nazarian,
Wells,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: April 2, 2021

Johnathon James Megee, appellant, was convicted in the Circuit Court for Wicomico County, of second-degree murder, manslaughter, first and second-degree assault, reckless endangerment, two counts of possession of a regulated firearm in violation of the Public Safety Article, use of a firearm in the commission of a felony, and affray. He presents the following four questions for our review:

> "1. Did the trial court err when it prevented Mr. Megee from introducing into evidence a witness's prior inconsistent statement?
>
> 2. Did the trial court commit plain error when it instructed the jury on accomplice liability?
>
> 3. Did the trial court commit plain error when it instructed the jury on unlawful act involuntary manslaughter?
>
> 4. Was the evidence insufficient to prove that Mr. Megee committed the crimes with which he was charged?"

We shall affirm.

I.

Appellant was indicted by the Grand Jury for Wicomico County[1] of murder, manslaughter, assault, firearm offenses, and affray, and convicted as charged. The court imposed a term of incarceration of thirty years for second-degree murder, ten years incarceration for possession of a regulated firearm after conviction of crime of violence, consecutive, ten years incarceration for use of a firearm in the commission of a felony or crime of violence, concurrent, and two years incarceration for affray, concurrent.

[1] Appellant was charged in two separate cases which were joined for trial.

We glean the following facts from trial. On June 6, 2018, in the backyard of 606 Priscilla Street, Salisbury, Maryland, Shawn Johnson was shot and killed. Around 6:10 p.m. that evening, appellant called the victim's cell phone, the first of several calls between the two phones over the next hour. Soon thereafter, in the seven o'clock hour, appellant and several other men met with the victim in a field in Doverdale Park, which is adjacent to 606 Priscilla Street. During that meeting, a fight took place. Several guns fired multiple shots. Appellant and the other men fled the scene and one witness saw a man matching appellant's description holding and firing a gun as he ran.

A fourteen-year-old girl, E.A. (age fifteen at the time of trial), was watching from a porch across the street during the meeting in the park. She saw five males gathered there, and then watched them walk to the front of 606 Priscilla Street. She observed four Black males together with one White male; that White male was wearing a white tee-shirt, and he had short hair and tattoos on his arm. E.A. identified appellant as the White male whom she had seen from across the street on the day of the murder. E.A. left her house and went to the store on the next street. When she returned from the store, the police and an ambulance were present, and the shooting victim was on the ground.

Ms. Tyneshia Wallace was at Doverdale Park when she heard what first sounded like firecrackers. A minute or two later, she heard more gunfire and saw three individuals running away from 606 Priscilla Street, two Black men and one White. Ms. Wallace thought that the three men got into a truck and a car on a nearby road, Johnson Street; she witnessed those two vehicles leave the area.

A third witness, Mr. Darren Nelson, was playing basketball at Doverdale Park when he heard what he too initially thought might be firecrackers, and what he soon realized had been approximately eight gunshots. When the gunfire paused, he moved slightly closer and saw a White male with one or two Black males. The White male had a full-arm tattoo.[2] Mr. Nelson witnessed the same White male's arm extended and then heard a gunshot. There was another pause in fire, followed by four more shots. Mr. Nelson saw people running around cars at a nearby intersection. One of the cars he witnessed was a late model black Nissan, the same type of car owned by appellant. When Mr. Nelson first spoke to police, however, he mentioned the White male but did not tell police that he saw the White male with the gun, and he told police that he could not tell what kind of car the White male had gotten into.

The day of the murder, appellant called his girlfriend, Ms. Tylise Johnson (no relation to the victim), at 7:35 p.m. Around 7:30 p.m., 911 operators received calls from Ms. Wallace, Mr. Nelson, and Mr. Xavier Perez. (The first of these calls came through at 7:29 p.m.) In appellant's call of 7:35 p.m., he asked his girlfriend where she was, and, before she could answer, he told her that he needed her. When Ms. Johnson told appellant that she was in Dover, not Salisbury, he hung up.

Later that night, appellant picked Ms. Johnson up from her friend's house. At a stoplight, appellant told her, "I may have murdered someone." He also said, "It was self-defense." He further told her that, in her words, "his past caught up to him," that "he got

[2] Appellant was asked to show the jury his arms. Tattoos covered both of his arms.

fighting," and that he had been robbed. After appellant went to meet with a police officer at a gas station in the wee hours, he returned and told Ms. Johnson, "Everything is going to be fine, they don't have no evidence."

At trial, forensic testimony further demonstrated appellant's presence at the crime scene. A white tee-shirt recovered from the crime scene showed a stain that matched appellant's DNA. A swab from the victim's left hand and a separate swab from a fingernail on the victim's same hand showed composite DNA profiles with multiple contributors. The analyst testified that the sample from the hand had two contributors and that appellant was the minor contributor. The fingernail swab from the same hand showed at least three contributors, and the analyst testified to her assessment that two of them were the victim and appellant.

When appellant presented his case at trial, he called several witnesses. These included D.C., K.B., and Mr. Xavier Perez.

D.C., age nine (ten at the time of trial), testified that she lived near Doverdale Park and saw many people running after the shooting, some Black and some White.

K.B., age eleven (twelve at the time of trial), testified that he did not remember anything. The court found K.B.'s memory loss to be disingenuous, and permitted appellant to introduce a recording of K.B.'s interview with a social worker. K.B. told the social worker that he and his friends were walking on Dover Street when he heard gunfire. He told the social worker that he witnessed the victim shot three times in the back and once in the head, and that he witnessed four people run away after, including one man who was

"probably" Black and got into a blue car. On cross-examination, the prosecutor asked K.B. about an interview with Detective Hallman of the Wicomico County Police Department. K.B. denied any recollection of the interview, and the trial judge permitted the State to play a recording of that interview. In the interview, K.B. said that he saw a "silver car, a white car, a green car and like a black car." Asked what car he saw the shooter get into, K.B. replied, "I said the green one but I changed my mind. I think it was actually the silver one because that's what my friends told me." Later, K.B. said that he saw the shooter get into the silver car.

Mr. Perez, the third witness called by the defense, testified that he lived by an intersection near Doverdale Park, and that on the day of the shooting he was playing a video game in his bedroom when he heard what he thought were fireworks. Mr. Perez looked out his second-floor window and saw a "head fall to the ground."

Mr. Perez testified that he did not remember the race of the person who fell, and that he did not remember if he saw anyone near the person who fell. He also testified that he did not see anyone else and he did not see any person with a gun. The court, however, then allowed appellant to introduce a transcript of a pre-trial deposition into evidence.

The court had allowed the pre-trial deposition of Mr. Perez in response to a defense pre-trial motion for appropriate relief. The deposition took place before a senior judge of the Wicomico circuit court and was subject to State cross-examination. The pre-trial deposition occurred on June 6, 2019, exactly one year after the date of the shooting, and approximately three weeks before trial. In that deposition, Mr. Perez related that he was

in his upstairs bedroom playing a video game when he heard what he thought were firecrackers. Mr. Perez also related in the deposition that he looked out the window and saw "a body drop." Mr. Perez further related there that he looked outside again and saw an African-American "pacing."

The person who was pacing was wearing a white tee-shirt and had dreadlocks that Mr. Perez thought were "head length." Mr. Perez did not notice any tattoos or distinguishing features on the person. He did not see the person's face, and he did not recall the person's skin tone. Mr. Perez did not see a gun, but he remembered talking to police after the shooting and remembered telling police that he saw the person extend a right hand in what he believed was a shooting pose. Mr. Perez remembered a sound like a pistol. In the deposition, Mr. Perez said that what he told police was the truth. He said that he heard four gunshots, followed by a pause, followed by "the after shots[.]" Mr. Perez said that he did not see appellant outside that day.

The State's theory of the case was twofold. First, the State argued that appellant killed the victim and was guilty of murder as a principal in the first degree. The State argued also that appellant aided and abetted another in the assault of the victim and was guilty as an accomplice to murder.

The jury returned guilty verdicts on all charges, the court imposed sentence, and this timely appeal followed.

II.

Appellant argues first that the trial court erred in not admitting into evidence a prior statement pursuant to Rule 5-802.1 as an inconsistent statement made by Mr. Perez to police officers on June 13, 2018, a week after the shooting of Mr. Johnson. He argues the following inconsistent statements. At trial, Mr. Perez testified that he did not remember the race of the person he saw fall to the ground and that he did not remember if he saw anyone near the person who fell. He also testified that he did not see any individuals other than the person whose head dropped and that he did not see anyone with a gun. In his statement to the police, however, which had been audio and video recorded, he said that he saw "an African American male with dreads and white tee-shirt . . . holding out his right hand" and that he "believed [the man] to be firing a gun." The trial court ruled initially that the statements were inconsistent and the prior statement was admissible, but, after a recess, reversed the ruling, reasoning that the prior statement was not admissible because the witness was not feigning memory loss but rather was truthful about his memory problems.

This argument becomes more interesting, because, in this case, Mr. Perez sat for a pre-trial deposition (a rare occurrence in criminal cases) and the trial court admitted that deposition into evidence not for impeachment purposes but as substantive evidence. There, Mr. Perez had testified that he had told police the truth when he told them he saw a black man with dreadlocks shoot Mr. Johnson. Appellant argues that the introduction of the deposition did not cure the court's error for four reasons: (1) that the entire deposition was

admitted into evidence, thereby undermining the version of events Mr. Perez provided in his direct exam; (2) that the deposition was admitted in transcript form, and the statement to the police was on a DVD, which was a better vehicle to judge the witness's credibility; (3) that the statement to the police was closer in time to the shooting than the deposition; and (4) that Mr. Perez's statement to the police was more detailed than the deposition about the shooting.

Appellant's second and third issues raised in this appeal hinge on this Court exercising its discretion to consider unpreserved issues as plain error. Both alleged errors relate to jury instructions—that the trial court erred in instructing on accomplice liability and involuntary manslaughter based upon an unlawful act. As to the accomplice liability instruction, he argues that the court erred in allowing the jury to convict appellant of second-degree murder on a theory that was equivalent to second-degree felony murder which the Court of Appeals disavowed in *State v. Jones*, 451 Md. 680 (2017). As to involuntary murder, he argues that the trial court erred in instructing the jury that possession of a firearm by a prohibited person could serve as a predicate for involuntary manslaughter.

Appellant argues that the evidence was insufficient to support all the judgments of convictions because the State did not prove beyond a reasonable doubt that appellant was the criminal actor and that the State proved presence only.

The State argues that the evidence was sufficient to support all the judgments of convictions. As to the alleged errors based upon plain error review, the State argues non-preservation and that plain error is inappropriate here.

As to the inconsistent statement, the State argues that the argument appellant presents on appeal is different from his argument presented to the trial court. On the merits, the State asserts that the court did not err in excluding the statement, but that in any case the error, if any, is harmless because the court admitted the pre-trial deposition of Mr. Perez, the witness in question.

As to the accomplice instruction, the issue, according to the State, is not preserved because appellant objected below on the ground that the evidence did not generate an accomplice instruction, whereas before this Court he is arguing that the instruction runs afoul of *State v. Jones*, 451 Md. 680 (2017), an argument he never presented below. On the merits, the State argues that the instruction was proper and that *Jones* has nothing to do with this case.

As to the involuntary manslaughter instruction, aside from non-preservation, the State argues plain error review is inappropriate here because the alleged error is "not plain." Appellant is arguing that the possession of a firearm by a prohibited person is clearly *malum prohibitum,* and as such, cannot serve as a predicate for unlawful act involuntary manslaughter because the offense is not inherently evil or dangerous. The State responds that appellant fails to cite any case anywhere, in Maryland or elsewhere, to support that

proposition, and hence, even assuming he is correct in his legal argument, it is hardly "clear or obvious" error. Finally, the State argues any error, if there be error, is harmless.

III.

We turn first to appellant's argument that the trial court erred in excluding Mr. Perez's video-recorded statement to the police and we address the State's non-preservation argument. The general rule in Maryland is that, ordinarily, an appellate court will not decide any issue "unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Moreover, Rule 4-323(a) provides as follows: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Significantly, when specific grounds are given at trial for an objection, on appeal the objecting party will be limited to those grounds presented below, and ordinarily waives any new grounds. *Klauenberg v. State*, 355 Md. 528, 541 (1999). *See also DeLeon v. State*, 407 Md. 16, 25 (2008) (noting that appellant who specified one objection at trial is limited to that same objection on appeal).

We agree with the State that appellant's argument that the prior statement should have been admitted on grounds of inconsistency is not the same argument he presented to the trial judge. The argument below was that the witness was feigning memory loss and that he did not remember seeing anyone else at the scene. He never argued to the trial

judge that the two statements were inconsistent. We hold that this issue has been waived and is not preserved for our review.

Without considering the merits of appellant's argument, even assuming error *arguendo*, any error was harmless beyond a reasonable doubt. This witness's pre-trial deposition was admitted into evidence and the jury had the substance of the prior statement before it to consider. We reject appellant's distinctions and arguments that the prior recorded statement to the police would have had much more weight than the deposition in the jury's determination. The jurors were aware that Mr. Perez said he saw a Black man with dreadlocks in a "shooting pose."

Appellant's next two issues relate to alleged faulty jury instructions. On both, he asks us to review the jury instructions for plain error. We decline to do so. Plain error is "error which vitally affects a defendant's right to a fair and impartial trial." *State v. Daughton*, 321 Md. 206, 211 (1990). We have often iterated that we are cognizant of plain error as a rare, rare phenomenon, *Morris v. State*, 153 Md. App. 480, 507 (2003), and we have limited the instances in which an appellate court should take cognizance of an unpreserved error to those which are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *State v. Hutchinson,* 287 Md. 198, 203 (1980). 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." *Trimble v. State*, 300 Md. 387, 397 (1984), *cert. denied*, 469 U.S. 1230 (1985).

Under Md. Rule 4-325(e), "No party may assign as error the giving or failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection."

As to the instruction on accomplice liability, we agree with the State that appellant objected only on the grounds that it was not generated by the evidence. Appellant now argues that the instruction was improper because it putatively runs afoul of *State v. Jones*, 451 Md. 680 (2017). As to any plain error analysis, the State maintains that plain error is inappropriate here for two reasons: first, that the error is far from the "clear or obvious" type of alleged error required for plain error review, and, second, that *Jones* is inapposite.

The short answer is that we agree with the State. *Jones* dealt with the felony-murder rule, not accomplice liability. In fact, *Jones* had nothing to do with accomplice liability. Any analogy between the application of *Jones* to this case is a complicated analysis, never presented to the trial court below, and is hardly the type of alleged error susceptible of plain error review. We decline to exercise our discretion to do so.

As to the circuit court's jury instruction on unlawful act involuntary manslaughter, appellant did not object at trial on any grounds pertinent to the theory he now advances. At trial, appellant objected on the basis that there was not evidence of anyone working in concert with appellant. Appellant now urges the argument that "possession of a firearm by a prohibited person" is *malum prohibitum* rather than *malum in se*, and thus cannot be a predicate for the crime of unlawful act involuntary manslaughter. Under *Schlossman v.*

State, 105 Md. App. 277, 284-85, 288 (1995), *malum prohibitum* offenses generally cannot be the predicate for unlawful act involuntary manslaughter, and a *malum prohibitum* offense must be dangerous to human life to qualify as an unlawful act for purposes of involuntary manslaughter.

Appellant failed to object to the manslaughter instruction as he was required to do by Rule 4-325(e). Again, this alleged error is not so clear or obvious, or so compelling, extraordinary, exceptional or fundamental, so as to deprive the defendant of a fair trial. As the State notes, appellant has cited no case authority to support his position. In addition, even assuming error *arguendo*, any error would be harmless beyond a reasonable doubt. The jury convicted appellant of second-degree murder, affray and assault. The alleged faulty instruction describing the predicate three crimes for involuntary manslaughter were affray, assault and possession of a firearm by a prohibited person. Assault and battery crimes are considered *malum in se. Johnson v. State,* 223 Md. App. 128, 153 (2015). The jury convicted appellant of affray and assault. Any mention of possession of a firearm, if error, was harmless.

Appellant's final question presented is whether the evidence was sufficient to prove the crimes with which he was charged. In short, the answer is yes.

Appellant argues that even when viewing the evidence in the light most favorable to the State, the evidence entered would prove only appellant's presence at the scene of the crime. The eyewitness testimony, the DNA evidence, the phone records and chronology, plus the testimony of appellant's former girlfriend, if found credible by the trier of fact, all

support the conviction. A rational trier of fact could have found beyond a reasonable doubt the essential elements of each crime charged.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.