UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1918

September Term, 2014

COREY WALLS

v.

STATE OF MARYLAND

Woodward,
*Zarnoch,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: November 10, 2015

* Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

After a jury trial in the Circuit Court for Baltimore City, Corey Walls, appellant, was convicted of reckless endangerment. He was sentenced to incarceration for a term of five years, with all but nine months suspended. This timely appeal followed.

ISSUE PRESENTED

The sole issue presented for our consideration is whether the trial court erred in its response to a jury note concerning the charge of reckless endangerment. For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

A lengthy recitation of the facts is not necessary to our resolution of the issue presented on appeal. This case arises out of an altercation between Walls and Deja Rogers. It is undisputed that Walls and Rogers had a relationship involving sex in exchange for money. On the afternoon and evening of July 10, 2013, Walls was at Rogers's apartment at 3805 Fairhaven Avenue in Baltimore City and both of them were drinking alcohol. At one point, Walls drove Rogers to a restaurant and later they walked to a nearby store. Thereafter, they returned to Rogers's apartment. At about midnight, Walls and Rogers became involved in an altercation. Walls claimed that Rogers pulled out a knife and lunged at him and, in self-defense, he struck her "hard" in the head with a piece of metal he found in the grass. Subsequently, Walls ran to his vehicle, drove away, and called 911.

A recording of Walls's call to 911 was played for the jury. He reported that Rogers attacked him with a knife, that he was not injured, and that he was leaving because Rogers was "unbelievably unstable." At no time did he mention that he had struck Rogers in the head, that she was bleeding, or that she was in need of assistance. It is undisputed that

Walls, who was employed by Montgomery County as an emergency medical technician, did not render any aid to Rogers.

A second 911 call was also played for the jury. In that call, a neighbor reported that there was a woman bleeding from her head and lying on the ground outside 3805 Fairhaven Avenue. Rogers was taken by ambulance to Shock Trauma where she was treated for a serious head injury.

DISCUSSION

Walls was charged with a number of crimes arising out of the altercation with Rogers including reckless endangerment. The fourth count of the indictment alleged that on or about July 11, 2013, Walls "did recklessly engage in conduct that created a substantial risk of death and serious physical injury" to Rogers in violation of §3-204 of the Criminal Law Article.[1] Walls contends that the trial court erred in its response to a jury note

[1] Reckless endangerment is prohibited by §3-204 of the Criminal Law Article, which provides:

> (a) *Prohibited*. – A person may not recklessly:
> (1) engage in conduct that creates a substantial risk of death or serious physical injury to another; or
> (2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.
> (b) *Penalty*. – A person who violates this section is guilty of the misdemeanor of reckless endangerment and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both.
> (c) *Exceptions*. – (1) Subsection (a)(1) of this section does not apply to conduct involving:
> (i) the use of a motor vehicle, as defined in §11-135 of the Transportation Article; or
> (ii) the manufacture, production, or sale of a product or commodity.
> (2) Subsection (a)(2) of this section does not apply to:

(continued…)

concerning the reckless endangerment charge. During deliberations, the jury sent a note to the judge asking:

> Does reckless endangerment apply to the head injury only or can other actions throughout the day be included? For example would driving while impaired count? In other words if we feel the Defendant is not guilty of striking the victim due to self-defense can we still . . . convict for reckless endangerment on other actions throughout the day?

Initially, defense counsel requested that the court respond "no" to the jury's question. The State agreed that the indictment addressed only events that occurred on or about July 11th and, as a result, the jury could not convict Walls of reckless endangerment based on actions that occurred before midnight. The Court rejected defense counsel's suggested response of "no" on the ground that there was "nothing in the jury instructions nor in the arguments that simply [says] that this jury must only determine reckless endangerment as it applies to the head injury." After some discussion about how to respond to the note, the court recessed to consider an appropriate response and asked counsel to "brain storm as well[.]"

Thereafter, defense counsel advised the court that the State and defense had reached "an agreement of what to send back" to the jury. The following colloquy occurred:

> [Defense Counsel]: What the State and I have agreed is and once again for the record, I would answer, no. You can only consider actions that happened once Corey Walls and Deja Rogers returned to 3805 Fairhaven Avenue. We have agreed on that note.

> (i) a law enforcement officer or security guard in the performance of an official duty; or
>
> (ii) an individual acting in defense of a crime of violence as defined in §5-101 of the Public Safety Article.

Md. Code (2012 Repl. Vol.) §3-204 of the Criminal Law Article ("CL").

[Prosecutor]: When they get back from the bar or McDonalds or wherever they—

THE COURT: Okay. I disagree with you when you say, no because I don't think it's the law that the jury must apply only the head injury to reckless endangerment in their evaluation and I think we get into big trouble if we pick out and give them incorrect direction, okay. In terms of – can I read that?

* * *

THE COURT: Okay. You can only consider actions that happened once Corey Walls and Deja Rogers returned to 3805 Fairhaven Avenue.

[Prosecutor]: What did the Court, what did Your Honor suggest?

THE COURT: The safest route. In response to your question, the Court advises you that you must base your verdict upon the evidence as it has been submitted to you for the event on or about July 11, 2013 including the testimony and exhibits that have been introduced into evidence.

[Prosecutor]: I don't object to that either.

[Defense Counsel]: I object to that because by us answering that instead of giving them a firm responsive answer –

THE COURT: See, this I think is so – you're telling them, see the indictment is pretty general and so is the jury instruction and the indictment reads on or about July 11, 2013. This interaction starts July 10th and goes into July 11th. By you, both of you saying this, you can only consider actions that happen once Corey Walls and Deja Rogers returned to 3805 Fairhaven Avenue, you're giving them direction to not consider anything except for probably July 11th. Those twenty minutes. I think, I think we get into some, when you give them such, when you give the jury – I never try to give them, I never give them the answer because it's reversible, but they find their way eventually. I just, if you two want to agree to this, but this is, it's not –

[Defense Counsel]: I understand what the Court is saying.

THE COURT: – safe and yeah.

> [Prosecutor]: I would say, Your Honor, I have never found myself in this situation before with this kind of a question. There is part of me that agrees with the Court and the Court's response and also hear [defense counsel]. I was just trying to come up with something that we could both agree upon.
>
> THE COURT: ... Um, okay. Since the two of you agreed, yes.
>
> * * *
>
> [Prosecutor]: Your Honor, I believe that what's in that is what the heart of the indictment is.
>
> THE COURT: Okay. So we're going to type that up and then you both agree that that is what we're going to send.
>
> [Defense Counsel]: If I may be excused.
>
> THE COURT: Yes and go, yes.

Ultimately, the trial judge responded to the jury note by stating, "[i]n response to your question, the court advises you that you can only consider actions that happened once Corey Walls and Deja Rogers returned to 3805 Fairhaven Avenue."

Walls contends that the trial court's response to the jury note was "clearly a wrong statement of the law." He maintains that the court's response wrongly allowed the jury to consider whether he committed reckless endangerment by failing to advise the 911 operator of Rogers's condition, specifically, that he had struck her in the head with an object and that she was lying on the ground holding her head. Walls asserts that consideration of his failure to advise the 911 operator was erroneous because "a failure to act and/or call 911 on behalf of an injured person is only reckless endangerment criminally condemnable *when the accused has a duty of care to the individual*, like that of a parent, a social worker or a prison guard." (emphasis in original) Because he was not Rogers's parent, caregiver, or

jailer, and did not otherwise owe her a duty of care, Walls maintains he did not have any duty to call 911 or seek medical assistance for her. As a result, he argues that he could not be found guilty of reckless endangerment for failing to inform the 911 operator of Rogers's medical condition or her need for assistance.[2]

Recognizing, as he must, that this issue was not preserved for our consideration, Walls argues that his failure to raise this issue at trial should be excused because the trial court "took it upon itself" to fashion the response to the jury question and any input or objection by defense counsel would have been futile. This contention is without merit. The record clearly reveals that the response to the jury note was drafted by defense counsel and the prosecutor, not the trial judge. Moreover, defense counsel did not argue that Walls's failure to seek help for Rogers could not form the basis of a reckless endangerment conviction.

Walls requests that we exercise our discretion to grant plain error review. This we decline to do. Walls did not just fail to object to the response to the jury note, but affirmatively acted to draft it. Notwithstanding his original request that the court respond "no," Walls represented to the court that the response he helped draft was one that both parties agreed upon. This act constituted an affirmative waiver. The Court of Appeals has explained the difference between a waiver and a forfeiture, stating that "[f]orfeiture is the failure to make a timely assertion of a right, whereas waiver is the 'intentional

[2] The law on this is not nearly so clear as Walls contends. *State v. Kanavy*, 416 Md. 1, 9-13 (2010) stands for the proposition that reckless endangerment arises only from a legal duty to act but does not purport to limit or define the sources of these legal duties.

relinquishment or abandonment of a known right.'" *State v. Rich*, 415 Md. 567, 580 (2010)(quoting *U.S. v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)(further citations omitted)). The distinction is important because forfeited rights are reviewable for plain error, while waived rights are not. *Id.* *See also Carroll v. State*, 202 Md. App. 487, 509-10 (2011)(issues that a party affirmatively waives are not subject to plain error review). Because Walls drafted and agreed with the response given to the jury note, his unpreserved appellate claim is not subject to plain error review.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.