UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0248

September Term, 2015

TIMOTHY BROOKS WHITT

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A. III
(Retired, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 10, 2016

After a jury trial in the Circuit Court for Cecil County, Timothy Brooks Whitt, appellant, was found guilty of two counts of first-degree assault. He was sentenced to incarceration for concurrent terms of twenty-five years, with five years suspended. This timely appeal followed.

QUESTIONS PRESENTED

Whitt presents the following questions for our consideration:

I. Did the trial court err by refusing to reinstruct the jury on reasonable doubt, after misreading the instruction?

II. Did the trial court rely on impermissible considerations in imposing a sentence?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

On about June 2, 2014, Whitt and Jose Senquiz were arrested after a weapon was found in Whitt's vehicle. Whitt was angry with Senquiz for not taking responsibility for the weapons charge. He assaulted Senquiz at the sheriff's office and told Senquiz that he "wasn't done" with him.

On the evening of June 24, 2014, Dustin Burandt[1] was at a cookout in North East when he met Senquiz, who offered to pay him in exchange for help repairing a cracked windshield on Senquiz's Pontiac Grand Am. As they were working on the windshield, it started to get dark, so Senquiz and Burandt decided to drive to Senquiz's home, where

[1] In the record, Mr. Burandt's name is also spelled Burant, but we shall use "Burandt" for consistency.

they could use a spotlight to complete the task. The two got into the Grand Am and left the cookout, with Senquiz driving and Burandt in the front passenger's seat.

Senquiz was driving toward Elkton on Old Philadelphia Road, which is also known as Route 7. At the intersection of Cemetery and Mechanics Valley Roads, Whitt pulled in front of Senquiz's car in a white SUV, jumped out of his vehicle, and approached Senquiz's car, yelling, "I'm going to kill you, boy," and "You're on my paperwork. I'm going to make sure you pay[.]"

Senquiz drove away. As he did, Whitt kicked the side of the Grand Am and continued to rant that he was "going to kill" Senquiz. Whitt then got into the white SUV and chased after Senquiz's car as it traveled up Route 7 toward Elkton.

Initially, Senquiz drove between 60 and 70 miles per hour, but eventually he reached speeds of 85 to 90 miles per hour. Whitt rear-ended the Grand Am several times. Burandt put his hand out the car window and waved at Whitt to "tell him to slow down, to stop" and to let him know that there was another person in the vehicle. Burandt explained at trial that he believed his "life was in jeopardy," and he "didn't want to die."

Senquiz sped up, but Whitt rammed his SUV into the rear passenger's side of the Grand Am. This time, Senquiz lost control, and the Grand Am slid off the road, flipped six or seven times, and came to rest on its roof in a ditch, with Burandt and Senquiz suspended in their seat belts. Burandt could not feel his legs and had a head injury.

Joshua Murphy, who was walking in an easterly direction along Old Philadelphia Road, witnessed the car chase and the crash. He identified the second car as some kind of SUV, but could not see the driver. Murphy heard the SUV hit the car two to three

times. He observed the car lose control and flip end-over-end into a ditch while the SUV drove off. Murphy called 911 and helped to get Burandt out of the car by cutting the seat belt with a pocket knife.

Burandt was airlifted to Shock Trauma. He suffered a broken back and a severed spinal cord and was paralyzed from the waist down. Senquiz walked away from the collision.

On July 24, 2014, Maryland State Trooper Alan Flaugher arrested Whitt on charges arising out of this incident and interviewed him at the State Police barracks in North East. Whitt denied any involvement in the incident, but acknowledged that he knew Senquiz and had assaulted him while the two were in a detention center. Trooper Flaugher obtained a report from the detention center that stated that Whitt had kicked Senquiz in the face. Trooper Flaugher later confirmed with Senquiz that the assault had occurred.

According to Whitt, he and Senquiz had both been charged with illegal possession of a handgun, and Whitt believed that he was innocent of that charge. Whitt told Trooper Flaugher that he had not seen Senquiz since being released, but that he would "assault him any chance he gets next time he sees him."

In the course of his investigation, Trooper Flaugher looked for the white SUV but was unable to locate it.

Whitt's cousin, Christine Vivar, and her neighbor, Kimberly Baker, both testified on Whitt's behalf that, on the day of the accident, sometime between 4:00 and 4:30 p.m.,

Baker picked up Whitt and brought him to Vivar's home in North East, where he spent the night.

The jury acquitted Whitt of attempted murder, but convicted him of two counts of first-degree assault.

DISCUSSION

I.

Whitt contends that the trial court erred in refusing to reinstruct the jury on reasonable doubt after stumbling over some words in the initial instruction. We disagree.

At trial, the court instructed the jury using Maryland Criminal Pattern Jury Instruction ("("MPJI-Cr") 2:02 on reasonable doubt.[2] When instructing the jury, the judge misread the pattern instruction so as to include the three misplaced words, highlighted below, but then corrected the instruction:

> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such **belief without reservation** – requires such proof as would convince you of the truth of a fact to the extent you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.

After the jury was instructed, defense counsel objected and asked the court to reread the instruction. The judge denied defense counsel's request on the ground that,

[2] MPJI-Cr 2:02 provides, in relevant part:

> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.

although he had misread the three words, he had gone back and properly instructed the jury. The judge stated that rereading the instruction "would unfairly emphasize that one instruction over all the others," but agreed to give the jury a written copy of the instructions.

Whitt maintains that it "was error for the trial court to refuse to reinstruct the jury, after misreading the instruction on a critical concept." He asserts that in refusing to reread the instruction, "the trial court created the danger that there would be a misunderstanding on the part of the jurors" as to the essential concept of reasonable doubt, thereby "placing in jeopardy [his] right to a fair trial."

The reasonable doubt standard of proof "is an essential component in every criminal proceeding." *Ruffin v. State*, 394 Md. 355, 363 (2006). The trial court is required to instruct the jury that, to convict the defendant, "the State must prove the guilt of the defendant beyond a reasonable doubt, and that the jury has a duty to acquit in the absence of such proof." *Id.* at 356 (citing *Merzbacher v. State*, 346 Md. 391, 398 (1997)). In Maryland, the trial court "must closely adhere" to MPJI-Cr 2:02 on the presumption of innocence and reasonable doubt. *Ruffin*, 394 Md. at 357.

In the case at hand, these requirements were met. The trial judge corrected his misstatement and read the instruction as set forth in the pattern jury instruction. In addition, the court provided the jury with a written copy of the jury instructions, which, as the State points out, are considered in context with the oral instructions that were given. *Mack v. State*, 69 Md. App. 245, 252 (1986). Moreover, defense counsel reviewed the subject instruction with the jurors during closing argument, stating:

> [T]he hard job that you have is deciding what the evidence is, and then you have to apply the standard that Judge Whelan just told you. And that standard that he told you, and I believe you are going to get a printed copy of this, and the one jury instruction, I think it's 2.02, it talks about it and it will tell you that in order for you to convict Mr. Whitt of anything in this case, you have to be so convinced that you would be willing to act upon it without reservation . . . in an important matter in your business and personal life. And if you are not convinced by this evidence, it's your duty to find him not guilty.

Lastly, even if the judge's misreading of three words followed by a correct reading of the jury instruction could be considered an error, it would certainly be harmless. "If something of this feeble a magnitude were deemed to be reversible error, 95% of all hotly contested cases would never cross the finish line unscathed. One does not 'abandon ship' after striking a piece of driftwood, even if, ideally, one should have missed the driftwood." *Colkely v. State*, 204 Md. App. 593, 626 (2012), *rev'd on other grounds sub nom. Fields v. State*, 432 Md. 650 (2013).

The record before us makes it clear that the judge quickly corrected his slip of the tongue, that the jury received written instructions that contained the correct language, and that defense counsel reiterated the proper standard in closing argument. Reversal is not warranted.

II.

Whitt contends that the sentencing court impermissibly considered charges included in his pre-sentence investigation report ("PSI") that did not result in convictions. In support of this contention, Whitt directs our attention to the following comments made by the sentencing court prior to the imposition of the sentence:

> I am looking at your record and it is kind of – it's something that is a little bit extreme. These kinds of records I see a lot. I see people here who have reached 30 years of age, 32, late 20's, early 30's, and you look at their records and sometimes I go back there and I shake my head.
>
> It's like you've had, I don't know, ten, twelve years of chances to change your life, or change your reactions, or change your habits, or change how you react to things, and it never seems to happen, and then something bad happens.
>
> * * *
>
> I look at this record and I'm seeing all of these chances. I mean, a lot of these cases weren't even prosecuted for some reason. I don't know that and there is no assigning any issues to that but you've had many chances that you were actually in court, whether it was minor at the time or not. And I'm sure a lot of these were plea bargained to some extent. I don't know that exactly in your case, but looking from a sentencing, I'm saying they probably were.
>
> * * *
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> And I look at your record, it keeps creeping forward. You got a burglary, you know, two years ago. It was a minor burglary, it's a fourth degree, but there is also a concealed weapon. And you didn't get a big sentence for those. You got six months. That's why it makes me think that most of this stuff was as a result of negotiations, which we'll just leave that as it is. It's done and that is the history.

According to Whitt, the sentencing judge's statements indicate that the court based the sentence "not only on cases resulting in convictions . . . but also on cases where no charges against [a]ppellant resulted in conviction, as well as cases where [a]ppellant was convicted of and sentenced on a lesser charge or charges while greater charges fell away." Whitt maintains that "[w]ithout evidence either way, the court [impermissibly] assumed [his] guilt as to the greater charge or charges, ascribing any non-conviction disposition to savvy plea negotiating." This issue is not properly before us.

As Whitt acknowledges, he failed to lodge any objection to the statements of the sentencing judge or to the possibility that certain arrests or charges not resulting in conviction might be considered by the court. As a result, he has waived this issue. Md. Rule 8-131(a) (ordinarily, the appellate court will not decide any issue, other than personal or subject matter jurisdiction, "unless it plainly appears by the record to have been raised in or decided by the trial court"); *see Reiger v. State*, 170 Md. App. 693, 702 (2006) (holding that defendant waived appellate challenge based on impermissible sentencing considerations by failing to object at sentencing).

Whitt urges us to exercise our discretion to grant plain error review. This we decline to do.

The power to decide issues not raised below is "solely within [our] discretion and is in no way mandatory." *Conyers v. State*, 354 Md. 132, 148 (1999) (citing *State v. Bell*, 334 Md. 178, 187-88 (1994)). "Plain error is error that vitally affects a defendant's right to a fair and impartial trial." *Hammersla v. State*, 184 Md. App. 295, 306 (2009) (and cases cited therein). While we may invoke the plain error doctrine in support of our review of allegations of error to which a defendant failed to object, we reserve such exercises of discretion for those cases where 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)).

In the case at hand, there was no error, much less plain error. The sentencing judge recited information from the PSI, but commented that "a lot of these cases weren't

even prosecuted for some reason." Immediately thereafter, the judge indicated that he gave no weight to those charges, stating, "I don't know that and there is no assigning any issues to that[.]" Certainly, the sentencing court had access to information that should not have affected Whitt's sentence, but a judge is "'presumed to know the law, and is presumed to have performed his duties properly.'" *Comptroller of the Treasury v. Clise Coal, Inc.*, 173 Md. App. 689, 707 (2007) (quoting *Lapides v. Lapides*, 50 Md. App. 248, 252 (1981)); *see also State v. Chaney*, 375 Md. 163, 184 (2003) (holding that defendant failed to rebut "the presumption that the sentencing judge knew and properly applied the law"). In light of the judge's statement that "there is no assigning any issues" to the charges that were not prosecuted, we have no basis to conclude that he relied on impermissible considerations in imposing the sentence.

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