UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0634

September Term, 2015

JAMES PATRICK LAW

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Berger, J.

Filed: July 19, 2016

A jury in the Circuit Court for Allegany County convicted Appellant, James Patrick Law ("Law"), of theft of property valued between $1,000 and $10,000, and acquitted him on related burglary charges. Law, who was sentenced to eight years with three years suspended, plus $2,000 restitution and four years probation, filed a timely appeal. In his appeal, Law presents the following question for our review:[1]

> Whether the circuit court committed plain error by failing to instruct the jury that the State must prove that the defendant did not act "with an honest belief that the defendant had a right to obtain or exert control over" stolen property.

For the reasons set forth below, we shall affirm the judgment of the Circuit Court for Allegany County.

FACTS AND PROCEEDINGS

On the morning of August 6, 2014, the Cumberland home of John and Wendy Hannon was burglarized. The thief or thieves took $1,200 in cash and several pieces of Ms. Hannon's jewelry.

At trial, James Weir, the owner of Awesome Gifts and Collectibles on Greene Street in Cumberland, testified that Law had brought precious metals and jewelry into his store and sold them "on numerous occasions." Two days after the Hannon burglary, Law sold him

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[1] The issue, as presented by Law, is:

> Did the trial court commit plain error, when it omitted from jury instructions that, where the honest belief defense is raised to a charge of theft, the State must prove that the defendant did not act "with an honest belief that the defendant had a right to obtain or exert control over the property"?

four pieces of Ms. Hannon's stolen jewelry. The Hannons testified that they recognized Law, who lived two blocks away, as a neighbor who "routinely" walked his dog in their neighborhood.

According to Frostburg State University Police Detective Roger Plummer ("Detective Plummer"), who investigated the crime as part of a task force formed by Allegany County law enforcement agencies, Law explained his possession and sale of the recently stolen property as follows:

> He advised that he was not involved in the burglary of Ms. Hannon's residence and that it was an individual by the name of Clayton Nair [("Nair")]. And that Clayton Nair brought these items to him and asked him to pawn them and that at that time he did not believe that these items were stolen.

Law told Detective Plummer that he met Nair's sister, Juanita Johnson ("Johnson"), at the end of July 2014. When Johnson moved in with him a few days later, Nair began staying on Law's couch. Both Nair and his sister had a heroin habit. Law noticed that Nair, who had no job, would "always leave and return with cash," and starting bringing jewelry for Law "to cash . . . for him" because Nair "was kicked out of" Awesome Gifts. On August 8, Nair asked Law to sell Ms. Hannon's jewelry, offering him some of the cash for providing him "a place to stay." Nair "said it was items from a marriage that went bad" and that "he would not get [Law] in any trouble."

Law presented alibi testimony and confirmed the account he gave to Detective Plummer. Law further explained that Nair approached him just after he made a purchase at

the store next door to Awesome Gifts, asking him to sell the jewelry because he "didn't have an ID" and "didn't get along with" the owner of Awesome Gifts. When Law questioned Nair about where the items came from, Nair told him there was no "criminal activity involved with this stuff" and "nothing . . . to worry about" because "something was from an aunt, something was from a marriage[.]" When asked whether he believed Nair, Law testified, "Yes, I did, well I really didn't know that man, 'cause like I said he's only been in my life for eight [days], and I didn't know him or anything about him." On cross-examination, Law elaborated: "I did it because you know, I think Juanita said it was valid and I believed her, but I don't know if I believed [Nair] or not."

At the close of evidence, the trial court gave the following instruction, which was based on, but not identical to, the pattern instruction for theft stemming from possession of stolen property:

> Last charge on the verdict sheet is the theft charge. In order to convict the Defendant of theft the State must prove that the Defendant possessed stolen property, that the Defendant knew that the property was stolen or believed that it probably was stolen, and that the Defendant had the purpose of depriving the owner of the property and that the property had value.

After finishing its instructions, the trial court called a bench conference and asked counsel, "Did I miss anything?" The State asked the court to instruct the jury on the value of the stolen property, then pointed out that "the second part of the theft, the possession of stolen property, there is a separate jury instruction for that." After the prosecutor showed the court something that was not identified for the record, the following ensued:

[Defense Counsel]: I thought he gave that one.

[Prosecutor]: Yea, but . . . .

[Defense Counsel]: Oh, he didn't give the other one.

BY THE COURT: Okay.

[Prosecutor]: Under the theory that if he committed the theft during the burglary.

[Defense Counsel]: Oh, no. We don't have that.

BY THE COURT: So let's just give this right here. (Pause) Okay?

[Defense Counsel]: That's the same as what you have.

[Prosecutor]: Yes.

BY THE COURT: Okay.

The trial court then gave supplemental instructions, as follows:

> All right, ladies and gentlemen. One element of the theft charge in this case would be that the property has to have a value between one thousand and ten thousand dollars. So the Defendant is charged with the crime of theft. In order to convict the Defendant of theft the State must prove that the Defendant took and carried away the property of another and that the Defendant did so without authorization and with the intent of depriving the owner of the property and that the property, the value of the property is between one thousand and ten thousand dollars. Uhm, the other aspect of the theft that I have already given you an instruction on was the possession of stolen property, so with that any additional requested instructions or exceptions?

After the prosecutor answered, "No, Your Honor," defense counsel stated, "No, sir."

In closing argument, both sides addressed what Law knew and believed about the source of the jewelry. The State acknowledged that to establish theft on the basis of Law's possession of the recently stolen property, the jury had to find beyond a reasonable doubt

> that the Defendant knew that the property was stolen or believed that it probably was stolen. So you heard Mr. Law, he said oh I took [Nair] at his word, in fact, I asked him. There is no criminal activity involved here, right. No, no, no, no, Jim, go ahead. Sell this stuff for me, I can't go in there myself and sell it because I don't have an I.D. and I am having a beef with the guy there. You go do it, it's good . . . . So that's the second thing, the Defendant possessed stolen property, the Defendant knew the property was stolen or believed it probably was stolen[.]

Defense counsel countered that Law honestly believed that the jewelry was not stolen:

> He met Juanita, a couple days later she moved into his house. Maybe . . . he's guilty of exercising bad judgment, but certainly not of the offenses here today. Then comes Clayton Nair. He didn't know Clayton Nair. [Law] wanted to be a good guy. [Nair] didn't have anywhere to stay, [Law] lets him stay on his couch. Clayton says to him, hey, can you pawn these things for me. You heard Mr. Law say are these things stolen. I am not going to pawn anything if it is stolen. Mr. Nair says no. It is not stolen, I assure you, you won't get in any trouble. [Nair] said it is from a relationship gone bad, so what's he do, pawns the items at Awesome Gifts, which he had done in the days prior as you heard.

In rebuttal, the State returned to the critical issue of what Law knew or believed, arguing:

> He wants you to believe that Mr. Nair and his sister moved into his house on August 1st and out of the goodness of his heart, I

> guess they fell in love so quickly, right? He's now, his feelings for Ms. Nair [sic], he is willing to go and pawn all this jewelry for her. And she is so willing to pawn her jewelry that her drug-addicted brother that has no job that's living on his couch, who comes and goes and leaves without money and comes back with money, apparently not working, but out of the goodness of his heart and taking that man at his word that he just took that jewelry and never believed for a second that it was stolen. . . .
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> And then most damning to Mr. Law is really his [written] statement [for Detective Plummer] because in his own words, in his own handwriting, by his own pen, . . . he says two weeks ago I met Juanita Johnson. . . . She and I started seeing each other and started, she started staying with me and her brother stayed here as well. I noticed they all had a dope habit. Clayton Nair would always leave and return with cash. When he started bringing jewelry, he asked me to cash it in for him because he had issues with the owner of Awesome Gifts and Collectibles. I agreed, although he said it was items from a marriage that went bad. He did it several times and insisted that he would not get in any trouble. He paid, he said he would give me some money for doing it because he needed a place to stay. I took these items to the pawn shop because I was not involved with this criminal activity. Common sense. I have a lot of faith in your common sense to see exactly what is going on here[.]

The jury acquitted Law of first, third, and fourth degree burglary but convicted him of theft of property valued between $1,000 and $10,000.

DISCUSSION

As the State acknowledged at sentencing, Law was convicted of theft based on "the theory that he . . . knowingly possessed stolen property." Under Md. Code (2002, 2012 Repl. Vol., 2015 Suppl.), § 7-104(c)(1) of the Criminal Law Article ("CL"), a theft conviction may be premised on proof that the accused "possess[ed] stolen property knowing

that it has been stolen, or believing that it probably has been stolen," either if he "intends to deprive the owner of the property" or if he "uses . . . the property knowing that the use . . . probably will deprive the owner of the property." "In a prosecution for theft by possession of stolen property under this subsection, it is not a defense that . . . the person who stole the property has not been . . . apprehended, or identified[.]" CL § 7-104(c)(3).

The pertinent part of the pattern jury instruction is as follows:

> The defendant is charged with the crime of theft. In order to convict the defendant of theft, the State must prove:
>
> (1) that the defendant possessed stolen property;
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> (2) that the defendant knew that the property was stolen or believed that it probably was stolen; [and]
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> (3) that the defendant [had the purpose of depriving the owner of the property] [willfully or knowingly abandoned, used, or concealed the property in such a manner as to deprive the owner of the property or knew that the abandonment, use, or concealment probably would deprive the owner of the property]; [and]
>
> [(4) the value of the property was [over $1,000] [over $10,000] [over $100,000]]; [and]
>
> **[(5) the defendant did not act under a good faith claim of right to the property or with an honest belief that the defendant had a right to obtain or exert control over the property.]**

MPJI-Cr. 4:32.2 (emphasis added).

Law argues that the trial court erred in failing to give paragraph (5) of the pattern instruction, which specifically covers the honest belief defense. As the State concedes, that

defense was generated by Law's trial testimony and his statements to Detective Plummer. *See generally Binnie v. State*, 321 Md. 572, 581-82 (1991) (uncorroborated testimony by the accused may be sufficient to generate an honest belief defense to a theft charge so that trial court "may not refuse the defendant's request to instruct the jury regarding it"). Although the court indicated that it intended to use the pattern instruction, it ultimately gave the essential elements from the pattern instruction, minus the "honest belief" defense in paragraph (5). Because his trial counsel did not object to that omission, Law seeks plain error relief.

Under Md. Rule 4-325(e),

> [n]o party may assign as error the . . . 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. . . . An appellate court . . . may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

In *State v. Rich*, 415 Md. 567 (2010), the Court of Appeals summarized the four-part test governing plain error review, as follows:

> First, there must be an error or defect--some sort of "[d]eviation 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 . . . proceedings*." Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error--*discretion which ought to be exercised only*

> *if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"* Meeting all four prongs is difficult, "as it should be."

Id. at 578 (citations omitted) (emphases added).

Applying this test, and in particular the elements we have italicized, we are not persuaded that plain error relief is warranted in this instance. The trial court expressly asked counsel if it had "missed anything." Although the prosecutor pointed out that the court had omitted the property value element in paragraph (4), defense counsel never complained that the court omitted the honest belief language in paragraph (5). If she had done so, the court easily could have remedied that omission, just as it did in correcting its inadvertent omission of paragraph (4). Instead, defense counsel stated that she had no objections or exceptions to the instructions, thereby affirmatively waiving Law's right to complain about the omission of the honest belief language. In these circumstances, granting plain error relief would undermine the preservation rule, the purpose of which is to allow the trial court to correct this type of instructional error. *See Robinson v. State*, 410 Md. 91, 104 (2009) ("The purpose of Md. Rule 8-131(a) is to ensure fairness for all parties in a case and to promote the orderly administration of law" (internal quotation omitted)); *DeLeon v. State*, 407 Md. 16, 26 (2007) (preservation exists to "(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a

piecemeal fashion, thus accelerating the termination of litigation." (internal quotation omitted).

Law also falls short on the third and fourth requirements for plain error relief. After the jury was instructed that the State had to prove Law "knew that the property was stolen or believed that it probably was stolen," closing arguments focused on that issue. As excerpted above, counsel vigorously debated the credibility of Law's claim that he believed Nair's story about legitimate sources of the jewelry. Consequently, even without hearing the honest belief instruction in paragraph (5), the jury almost certainly understood that the central issue was whether the State proved beyond a reasonable doubt that Law believed the items he sold were stolen or probably stolen.

> We know, of course, that the possibility of plain error is out there, and on a rare and extraordinary occasion we might even be willing to go there. One must remember, however, that a consideration of plain error is like a trip to Angkor Wat or Easter Island. It is not a casual stroll down the block to the drugstore or the 7–11. The exaggerated cry of alarm in this case evokes no echo of Angkor Wat or Easter Island.

Garner v. State, 183 Md. App. 122, 152 (2008).

In these circumstances, we cannot say that the omission of paragraph (5) affected either Law's substantial right to present an honest belief defense or the jury's verdict. Nor are we persuaded that the omission seriously compromised "the fairness, integrity or public reputation of judicial proceedings" to the point that plain error relief is warranted *See Rich*,

supra, 415 Md. at 578. We, therefore, hold that the circuit court did not commit plain error by failing to instruct the jury in accordance with paragraph (5) of MPJI-Cr. 4:32.2.

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