UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1159

September Term, 2014

MARK KENNETH FLOYD

v.

STATE OF MARYLAND

Wright,
Graeff,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: March 24, 2016

This appeal arises out of the killings and robberies of Allisha Royster and Lydia Steed. After a jury trial in the Circuit Court for Baltimore City from July 14-16, 2011, Mark Kenneth Floyd, appellant, was convicted of the robberies of Royster and Steed. Floyd was acquitted of first-degree murder and robbery with a deadly weapon as to both victims and carrying a weapon openly with intent to injure. The jury was deadlocked with respect to the charges of second-degree murder.

After a retrial on the second-degree murder charges, the jury was again deadlocked, and a mistrial was declared. On June 30, 2014, the circuit court imposed consecutive ten-year sentences for each robbery count. This timely appeal followed.

QUESTIONS PRESENTED

Floyd presents the following questions for our consideration:

> I. Did the trial court commit plain error in propounding a "CSI" jury instruction?
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> II. Did the trial court err in failing to instruct the jury upon the offense of theft?
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> III. Did the trial court err, and in some instances commit plain error, in admitting evidence of misconduct and bad character of Floyd for which he was not on trial?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

On June 11, 2009, Latoya Carter found the partially decomposed bodies of her neighbors, Lydia Steed, whom she knew as Buffy, and Allisha Royster, whom she knew as Prada, in their apartment on Biddison Lane in Baltimore City. Steed and Royster's cell phone, laptop computer, television, video games, and car were missing. Dr. Carol

Allan, a medical examiner, testified that both Royster and Steed had suffered sharp force trauma to their heads, skull fractures, and bleeding in their brains, and that the manner of death was homicide.

In 2009, Teyonna Williams was Floyd's girlfriend. In about March of that year, Williams met Steed and Royster and, the following month, Williams and her two young children moved into their home. Steed and Royster slept in the living room and allowed Williams and her children to stay in their bedroom. At some point, Floyd was released "from jail" and returned "home" to live with his mother, Paula Holt, in East Baltimore. Eventually, Floyd began spending about six nights a week with Williams at Steed and Royster's home.

On or about May 25, 2009, Floyd and Williams got into an argument while at the Biddison Lane house. Williams said something hurtful to Floyd and he responded by trying to choke her. When Steed and Royston attempted to break up the incident, Floyd pulled out a gun. As the incident subsided, Steed and Royston told Floyd he could no longer come to their home.

Two days later, at about 2 a.m., Williams got off work and headed to the Biddison Lane home. On her way there, she spoke with Floyd by phone. He asked her to come to his mother's house as he "could no longer come to [the Biddison Lane] house." Williams refused, stating that she had to care for her children and another child who was visiting, all of whom were at the Biddison Lane house. At approximately 5 a.m., Williams awoke to find Floyd standing over her holding a knife and a gun. Floyd pointed the gun to Williams's head and cut her throat with the knife. He told Williams that if she screamed

he would kill everyone in the house. Floyd picked up Williams's son and "rubbed the knife across" his arm. Eventually, Floyd made Williams and all of the children get into a hired car and go to his mother's house "where he proceeded to verbally and physically abuse [Williams] until 1:00 o'clock the next day when he finally let [everyone] go." According to Williams, Floyd told her to tell Steed and Royston that if they "didn't get off his block we was all dead."

Williams returned to the Biddison Lane house and told Steed and Royston what had happened. That same day, Williams moved out and went to stay at her best friend's house.

For a couple of days, Williams's relationship with Floyd improved, but on June 6, 2009, they had a fight that involved Floyd biting Williams's nose. Williams left Floyd and went to stay at her cousin's house. Floyd called Williams and told her "that they was gone." He did not identify the people about whom he was speaking, but after that conversation, Williams tried to contact Steed and Royston. When she was unable to reach them by phone, Williams called 3-1-1 and asked for a police officer to be sent to the Biddison Lane home.

At some time, on or after June 11, 2009, Williams's sister called and told Williams that the bodies of Steed and Royston had been found. Williams called Floyd, who tried to persuade her to come to his location, but she refused. Eventually, Floyd told Williams that he was "going to go do something to [her] aunt and [her] family on North Clinton Street[.]" Williams called the police and asked for someone to pick up her and her children because Floyd was threatening her family. While at the police station, Floyd

called Williams. Williams allowed police to look in her phone and recover messages from it.

After Floyd was arrested, he called Williams from the jail and told her to tell the police that the boyfriend of the mother of his children had been threatening him and that the boyfriend was the person she thought killed Steed and Royston. Friends of Floyd also called Williams and asked her to tell the police the same thing. Floyd also asked Williams to tell the police that she was in the house "asleep or hiding under the bed or something," and that she caught glimpses of what happened and saw the person who killed Steed and Royston.

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

At trial, Floyd elicited evidence and argued that the State failed to submit certain items of evidence for serological and DNA testing. On July 22, 2011, prior to closing argument, the circuit court propounded the following "anti-CSI instruction":[1]

[1] In *Atkins v. State*, 421 Md. 434, 458 (2011), the Court of Appeals explained:

> The popularity of forensic dramas garnered increased media attention in recent years, with speculation that the shows produced a "CSI effect" that may skew jury verdicts, most frequently in criminal law matters. The theory behind the so-called "CSI effect" is that the millions of viewers of forensic dramas develop unrealistic expectations about the availability and results of specific scientific forensic techniques, such as DNA sequencing, fingerprint analysis, and ballistics analysis, increasing the likelihood of a finding of "reasonable doubt" where such forensic evidence (continued…)

> During this trial you may – you have heard testimony of witnesses and maybe argument of counsel that the State did not utilize a specific investigative technique or scientific test. You may consider those facts in deciding whether the State has met its burden of proof. You should consider all of the evidence or lack of evidence in deciding whether a defendant is guilty.
>
> However, I instruct you that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case. Your responsibility as jurors is to determine whether the State has prove [sic], based upon the evidence, the defendant's guilt beyond a reasonable doubt.

When asked if there were any objections to the jury instructions, defense counsel responded, "I don't have any, I don't have any."

The instruction given, commonly referred to as an "anti-CSI instruction," was substantially the same instruction that we approved in *Evans v. State*, 174 Md. App. 549, 562 (2007). Subsequent to Floyd's July 2011 trial, but prior to his 2013 retrial on the second-degree murder charges, the Court of Appeals decided two cases, *Atkins v. State*, 421 Md. 434 (2011), filed on August 8, 2011, and *Stabb v. State*, 423 Md. 454 (2011), filed on November 22, 2011, which clarified the standard use of "anti-CSI" instructions. The Court of Appeals held that an "anti-CSI" instruction should not be given preemptively before closing arguments or other improper questioning or commentary regarding the absence of scientific evidence in the State's case and should be "confined to

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> is not produced, and, thus, an increased likelihood for an acquittal or hung jury. *See* Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Realty and Fiction*, 115 Yale L.J. 1050, 1052 (2006).

(Additional citation omitted). The "anti-CSI instruction" is meant to counter the "CSI effect."

situations where it responds to correction of a pre-existing overreaching by the defense, *i.e.*, a curative instruction." *Stabb*, 423 Md. at 472-73; *Atkins*, 421 Md. at 453-54.

In the instant case, Floyd contends that his arguments at trial about the State's failure to submit certain evidence for testing were "far from the dominant theme" and, as a result, the "anti-CSI instruction" was not justified. Recognizing that no objection was lodged below, Floyd asks us to exercise our discretion to grant plain error review. In support of that request, Floyd points out that, at the time the instruction was given, *Evans* was the prevailing law and, therefore, the absence of an objection should be excused.

The power to decide issues not raised below is "solely within the court's 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) (citation omitted). While we may invoke the plain error doctrine in support of our review of allegations of unobjected to error, we reserve such gratuitous 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)). Absent plain error, "'we lack even the discretionary authority to analyze an unpreserved issue.'" *Morris v. State*, 153 Md. App. 480, 507 n.1 (2003) (quoting *Stockton v. State*, 107 Md. App. 395, 398 (1995)) (emphasis omitted).

In *Allen v. State*, 204 Md. App. 701 (2012), we addressed the issue of whether the holdings in *Atkins* and *Stabb* were applicable to convictions rendered before those cases

were decided. Allen was tried in February 2011 and convicted by a jury of, among other things, possession with intent to distribute cocaine. *Allen*, 204 Md. App. at 703. The trial judge instructed the jury using an "anti-CSI" instruction similar to the one given by the trial courts in *Atkins*, *Stabb*, and the instant case. *Id.* at 704.

On appeal, the State asserted that, although in hindsight, it might have been error for the trial court to give an "anti-CSI" instruction, the holdings in *Atkins* and *Stabb* applied only prospectively and not to convictions that were rendered before those cases were decided.[2] *Id.* at 706, 715. Allen argued that the holdings in *Atkins* and *Stabb* should apply to his case, which was pending on direct appeal at the time those cases were decided. *Id.* at 705-06.

After thoroughly reviewing pertinent case law addressing the prospective/retrospective application of non-common law changes in the criminal law, we concluded that the holdings in *Atkins* and *Stabb* applied to Allen's case because there was no final judgment at the time those cases were decided and the issue had been preserved. *Id.* at 721. We explained:

> Thus, under current Maryland law, the question of whether a new constitutional or statutory decision in the criminal law area should be applied prospectively or retroactively arises only when the decision declares a new principle of law, as distinguished from applying settled principles to new facts. If it does not declare a new principle, it is fully retroactive and applies to all cases. *Denisyuk* [*v. State*, 422 Md. 462, 478-79 (2011)]. A new constitutional or statutory ruling, in the criminal law

[2] In *Allen*, Judge James Eyler, writing for this Court, noted that "generally speaking, the Supreme Court uses the term 'retroactive' when it applies an announced principle to cases pending on direct review, and not to convictions which were final at the time of the announcement, whereas the Court of Appeals uses the term 'prospective' to mean the same thing." *Allen*, 204 Md. App. at 715.

> context, ordinarily applies to the facts in the case announcing the change and those cases pending on direct review in which the issue was preserved. A new constitutional or statutory decision will also be fully retroactive, ***i.e.***, apply to convictions which were final, when the change affected the integrity of the fact finding process or the change involved the ability to try a defendant or impose punishment.
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> We conclude that the *Atkins* and *Stabb* holdings apply to the case before us. There was no final judgment at the time of the *Atkins* and *Stabb* decisions, and the issue is preserved. First, as noted above, the decisions were constitutionally based. They did not announce changes in Maryland common law and, thus, are not the type to be applied only "to the instant case and to all criminal trials commencing and trial in progress on or after the date this opinion is filed." *Ruffin v. State*, 394 Md. 355, 373 n.7, 906 A.2d 360 (2006) (citations omitted).
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> Second, it is not clear that a retroactivity analysis is implicated. The *Atkins* and *Stabb* holdings are clearly based on constitutional principles, *Atkins*, 421 Md. at 443, *Stabb*, 423 Md. at 472, but we read the decisions not as creating new constitutionally based principles but rather as applying settled Federal and State constitutional guarantees to "new and different factual situations." *Potts v. State*, 300 Md. 567, 577, 479 A.2d 1335 (1984). The Court of Appeals did not overrule our decision in *Evans*; it clarified and distinguished it. In such a case, "the decision always applies retroactively." ***Id.***
>
> Third, if *Atkins* and *Stabb* did contain new constitutional principles, the decisions come within the general rule and apply to all cases pending on direct review in which the issue was preserved.

Allen, 204 Md. App. at 721-22.

In the instant case, defense counsel's arguments at trial did not distort the law or constitute the type of overreaching, as explained in *Stabb*, that would require a curative instruction. Moreover, unlike in *Allen*, Floyd's case was not pending on direct appeal at the time *Atkins* and *Stabb* were decided and the issue was not preserved. Maryland Rule 4-325(e) provides that "[n]o party may assign as error the giving or 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." Floyd affirmatively advised the circuit court that he did not have any objection to the instruction given. As we stated in *Allen*, the holdings in *Atkins* and *Stabb* apply retroactively only to those "cases pending on direct review in which the issue was preserved." *Allen*, 204 Md. App. at 722. As Floyd's case was not pending on direct review and the issue was not preserved, the holdings in *Atkins* and *Stabb* do not apply retroactively to his case. There was no error, much less plain error, and we decline to exercise our discretion to grant plain error review on this issue.

II.

Floyd next contends that the circuit court should have instructed the jury on the unindicted lesser included offense of theft under $500.00. This issue was not properly preserved for our consideration.

Floyd was charged with numerous crimes including, but not limited to, armed robbery and theft. At the close of the State's case, he moved for judgment of acquittal "as to each and every charge," but only argued that there was "really no evidence" of a taking during the robbery. There was no argument presented with respect to the theft charge. Floyd's motion was denied. At the close of all the evidence, Floyd renewed his motion for judgment of acquittal, stating only, "I'll renew my motion." That motion was also denied.

Prior to instructing the jury, the trial judge reviewed the instructions with counsel. When discussing the instruction on theft, defense counsel twice stated that he wanted a theft instruction and argued that the State had failed to establish that the value of the

goods allegedly stolen exceeded $500.00. The State advised the circuit court that if defense counsel refused to stipulate that the value of the stolen items exceeded $500.00, it would dismiss the theft count. Defense counsel refused to stipulate to the value of the goods and requested that the jury be instructed on theft. Thereafter, the State *nolle prossed* the theft count, and the trial judge stated, "It's gone," and moved on to the next proposed instruction without any objection. Floyd did not lodge any objection with respect to the theft charge after the jury was instructed.

Floyd maintains that he was entitled to have the jury instructed on misdemeanor theft, which was a lesser included offense of the felony theft charge, and that the circuit court's failure to give such an instruction constituted prejudicial error because the jury could have found him guilty of misdemeanor theft but not robbery. For several reasons, this argument was not properly preserved for our consideration. First, Floyd not only failed to lodge an objection after the court instructed the jury, but specifically stated that he did not have any objection or exceptions to the instructions given. Md. Rule 4-325(e) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury . . . ."). Moreover, Floyd did not lodge any objection to the verdict sheet. Nor did Floyd make any argument with respect to a charge of misdemeanor theft when arguing for judgment of acquittal, and he did not object after the State entered a *nolle prosequi* as to the theft charge. As a result, this issue is not properly before us and, to the extent Floyd asks us to exercise our discretion to grant plain error review, we decline to do so. *See Smith*, 64 Md. App. at 632 (quoting *Hutchinson*, 287 Md. at 203) (reserving plain error review for instances where

the "'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'").

III.

Floyd's final contention is that the circuit court erred, and in some instances committed plain error, in admitting evidence of Floyd's misconduct and bad character for which he was not on trial. Specifically, he directs our attention to the admission of the following evidence: (1) Williams's testimony that after Floyd "came home . . . from jail," they reestablished their relationship; (2) Williams's testimony that, on one occasion, Floyd broke into the Biddison Lane house, got into a fight with Williams in the presence of Steed and Royster, produced a gun, and threatened to kill Williams; (3) Williams's testimony about another occasion when Floyd produced both a gun and a knife and actually cut Williams; and, (4) Williams's testimony that Floyd told her he was going to kill her aunt and "do something to [her] aunt and [her] family."

As we have already noted, while we may invoke the plain error doctrine in support of our review of allegations of unobjected to error, we reserve such gratuitous 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*, 64 Md. App. at 632 (quoting *Hutchinson*, 287 Md. at 203). Plain error review remains "a rare, rare phenomenon." *Morris*, 153 Md. App. at 507. The instant case does not warrant plain error review.

With respect to Williams's testimony that after Floyd "came home . . . from jail," they reestablished their relationship, we note that Williams's testimony was not

responsive to the question asked and there was no objection, motion to strike, or request for a curative instruction, so the issue was not preserved properly for our consideration. Moreover, there was no testimony concerning why Floyd had been in jail and the statement was made in passing and was isolated. Admission of Williams's testimony is not the type of extraordinary error that justifies our exercise of plain error review and we decline to do so.[3]

We turn now to the issue of Williams's testimony that, on one occasion, Floyd broke into the Biddison Lane house, got into a fight with her in the presence of Steed and Royster, produced a gun, and threatened to kill her and, on another occasion, produced both a gun and a knife and cut her. Although there was a pre-trial motion *in limine* with respect to this testimony, the circuit court did not exclude it. Rather, the court excluded testimony concerning Floyd and Williams's volatile relationship, but allowed the State to adduce testimony concerning threats made against the victims. This was clarified at trial when the judge explained that "when [he] heard the [motion *in limine*] [he] didn't realize that" Steed and Royster intervened or had anything to do with the fights between Floyd and Williams.

Williams's testimony about the first fight established that Floyd had a gun in Steed and Royster's home, that it was used to threaten Williams, that Steed and Royster broke

[3] To the extent that Floyd asserts that the failure to object to Williams's testimony constituted ineffective assistance of counsel on the part of defense counsel, the record does not reveal the reasons for defense counsel's decision and the issue is best left to a post-conviction proceeding. *See Robinson v. State*, 404 Md. 208, 219 (2008) ("We have held repeatedly that a claim of ineffective assistance of counsel should be raised in a post-conviction proceeding[.]").

up the fight, and that the fight and the weapon caused Steed and Royster to tell Floyd he could no longer live in their home. This testimony gave context to Steed and Royster's decision to ask Floyd to leave their home and established Floyd's identity and intent. The testimony about the second incident, where Floyd produced both a knife and a gun, gave context to Williams's testimony that Floyd threatened to kill Steed and Royster and everyone else in the house if Williams did not leave with him. Again, this evidence established both Floyd's identity and intent.

A prior bad act is admissible "if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989) (citations omitted). Williams's testimony provided clear and convincing evidence of Floyd's involvement in the incidents and the probative value of that evidence outweighed any undue prejudice.

To the extent that Floyd argues that the circuit court should have excluded "the most damaging of the necessary details" of Williams's testimony, we note that this issue was not preserved properly for our consideration. It is well established that "[w]hen the evidence, the admissibility of which has been contested previously in a motion *in limine*, is offered at trial, a contemporaneous objection generally must be made pursuant to Maryland Rule 4-323(a) in order for the issue of admissibility to be preserved for the purpose of appeal." *Reed v. State*, 353 Md. 628, 638 (1999). Floyd did not lodge contemporaneous objections in an effort to exclude specific portions of Williams's testimony.

Finally, as to Williams's testimony that Floyd threatened her aunt and family members after Steed and Royster's bodies had been discovered, we note that there was no objection at trial and we decline to grant plain error review on that issue. *Smith*, 64 Md. App. at 632.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.