Circuit Court for Baltimore County
Case No. 03-K-17-002705

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2589

September Term, 2018

TAUREAN GARRISON

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Vitale
(Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: February 6, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On September 11, 2018, a jury sitting in the Circuit Court for Baltimore County found appellant, Taurean Garrison, guilty of possession of a firearm after a disqualifying conviction. The court sentenced appellant to 12 years of incarceration, the first five years without the possibility of parole. Appellant presents the following questions for our review:

1. Whether the trial court erred in shifting the burden to the jurors to make a self-determination of bias?

2. Whether the trial court erred denying appellant's motion for judgment of acquittal based on insufficient evidence?

3. Whether the trial court erred in improperly instructing the jury in response to a jury note during jury deliberation?

For the reasons discussed below, we conclude there was no error, and we shall affirm.

BACKGROUND

On May 15, 2017, around 5:00 a.m. Baltimore County police officers Sean Anderson and Davon Lesane responded to Suter Road and Old Frederick Road. Upon arrival, the officers saw a black Land Rover that had apparently collided with another vehicle, resulting in minor damages. Upon closer observation, they noticed appellant sitting in the driver's seat asleep with the engine running. The officers awakened appellant, who appeared to be confused and disoriented as he attempted to put the car in reverse. Appellant was asked if he was injured, and Officer Lesane notified appellant that he was being recorded by his body camera.

The officers then asked appellant to step out of the car, and as he did, they detected

the smell of alcohol and noticed that his eyes were red. The officers directed appellant to perform several field sobriety tests, which he failed. When the officers attempted to arrest appellant, he turned around for the officers to place him in handcuffs, but then ran. As he was being chased by the officers, they noticed appellant reach to his waistband and retrieve a dark object which he then tossed. After he was detained, Officer Lesane searched for the thrown object, at which point he discovered a firearm.

Voir dire

On September 10, 2018, the court began the *voir dire* process. Before the prospective jurors entered the courtroom, the judge asked both the defense and State if there were any objections to the proposed *voir dire* question.

THE COURT: All right. Both counsel have supplied respective *voir dire.* Any objection to any prospective *voir dire,* State?

STATE: None from the State.

THE COURT: Defense?

DEFENSE: Court's indulgence, please.

THE COURT: Sure.

DEFENSE: Your Honor, the Defense would object to number nine of the State when it is actually partially a jury instruction. I respectfully request the Defense to be given and the Defense objects to State's number ten.

THE COURT: State?

STATE: I believe both the *voir dire* are appropriate based on the circumstances of the case. I think number nine which (inaudible) whether or not give police officer's testimony any more credibility or less credibility than any other witnesses, and number ten just is the right to

not discuss the case during the trial.

THE COURT: All right. The State's number nine is very similar to Defense's number six. It just gives a little bit more predicate as to foundational. I'll go ahead and just give Defense's six without the foundational that's in, in nine. So, I won't give nine. I, I will go ahead and give ten. I think that that's appropriate. That's is a reminder to them not to discuss.

The potential jurors were then brought into the courtroom and the judge began conducting the *voir dire* process. Towards the end of questioning, the judge asked

> All right. Ladies and gentlemen, as I said earlier the Defendant is charged with the crime involving a firearm. Many people have strong feelings about firearms. My question to you is, does any member of the jury panel hold any prejudice against an individual merely because they have been charged with the crime of possession of a firearm? Anybody hold any prejudice or strong feelings that would prevent them from being fair and impartial against someone charged with a firearm crime?

Several jurors responded yes, and the judge recorded their juror number and proceeded with additional questions. At the conclusion, the judge asked the attorneys to approach the bench

THE COURT: Any objection to the *voir dire* asked so far, State?

STATE: No, Judge.

THE COURT: Defense?

DEFENSE: No, Your Honor.

THE COURT: Any request for any further *voir dire* that I have not asked, State?

STATE: No, Judge.

THE COURT: Defense?

DEFENSE: No, Your Honor.

Trial Testimony

The State called two witnesses, both police officers, who described their encounter with appellant. Officer Anderson testified that he asked appellant to turn around and he "grabbed his arm, you know, to place him under arrest." Appellant then snatched his arm away and ran into a yard and jumped over a chain-linked fence. The officer remained in steady pursuit of him, approximately three yards behind him when he "saw him digging around in his hip area, around his waistband area." According to the officer, appellant started turning right and threw a black object into a wooded area, which he clarified as a "bushy" area. Officer Anderson, on cross-examination, stated that appellant threw the object with his left hand.

Officer Lesane then described his encounter with appellant, stating:

> . . . when he, we were going to place him under arrest, the Defendant then took a brief foot pursuit through the houses . . . He hopped a, a fence, kind of flipped over the fence as he was hopping, got up, continued to run, behind some houses there's like a bush area, he retrieved a black object from his waistband, tossed it into the bush right here. As he hopped the other fence, I, I decided to hop another fence to t[r]y to cut him off. Officer Anderson continued to stay behind him. The subject then fell over, I guess, his pants fell down. Officer Anderson got on top, we cuffed him up, pat him down for weapons. I went and recovered the actual weapon that he tossed. It was a Glock twenty-two, fully loaded.

Officer Lesane further stated that he observed appellant retrieve the object from his right hand.

Jury Note

During deliberations, did the jury sent the court a note asking, "did the Defense have

the, the ability to have the gun tested for DNA or fingerprinting?" After both attorneys and appellant had the opportunity to review the note, the following discussion occurred:

> DEFENSE: The answer is no.
>
> STATE: No. I think the –
>
> THE COURT: Anybody want to read it?
>
> DEFENSE: I think you did a great job.
>
> THE COURT: Okay. I will tell, I, my suggested response is that, that they have all the evidence, that they have to consider in this matter.
>
> DEFENSE: But the answer to that is no, I don't.
>
> THE COURT: The answer that I'm giving them is that they have all the evidence that they are to consider in this matter. Any objection to me giving them written response or do you want them brought out?
>
> DEFENSE: No, Your Honor.
>
> STATE: That's fine.
>
> DEFENSE: (inaudible) down at the bottom, no. See that's, that exactly goes to my theory that jurors are shifting the burden to the Defense, that the, it's been a big backlash. Twenty years ago we would not have gotten that question.
>
> THE COURT: Okay. All right. My response is, you have all of the evidence that you are to consider in this matter.

Following deliberations, appellant was found guilty of illegal possession of a regulated firearm. Several weeks later, he was sentenced to 12 years' incarceration without the possibility of parole for the first five years.

DISCUSSION

I. The trial court did not shift the burden to the jurors to make a self-determination of bias.

Appellant argues that the court shifted the burden during *voir dire* when it asked the following:

> . . . does any member of the jury panel hold any prejudice against an individual merely because they have been charged with the crime of possession of a firearm? Anybody hold any prejudice or strong feelings that would prevent them from being fair and impartial against someone charged with a firearm crime?

The State argues appellant failed to raise an objection during *voir dire* and therefore, the issue is not preserved. Appellant asks, alternatively, that we review this issue under the plain error doctrine.

Maryland Rule 8-131 provides that "appellate court[s] will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." "[W]hen a defendant fails to object to the actions of the trial court, an appellate court possesses plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court." *James v. State*, 191 Md. App. 233, 246 (2010) (internal quotations omitted). However, "an appellate court should "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." *Id.* Plain error review "is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Hallowell v. State*, 235 Md. App. 484, 505 (2018) (quoting *Newton v. State*, 455 Md. 341, 364 (2017)).

Plain error review has four prongs:

> First, there must be an error or defect—some sort of deviation 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 [trial] court 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 affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

State v. Rich, 415 Md. 567, 578 (2010) (internal citation and quotations omitted).

"[A]n objection during the *voir dire* stage of trial [is preserved] simply by making known to the circuit court 'what [is] wanted done.'" *Brice v. State*, 225 Md. App. 666, 678 (2015) (quoting *Marquardt v. State*, 164 Md. App. 95, 143 (2005)). Conversely, "a waiver is the intentional relinquishment of a known right, or conduct that warrants such an inference" and it "extinguishes the waiving party's ability to raise any claim of error based upon that right." *Id.* at 679 (internal citation and quotations omitted).

Here appellant affirmatively waived his right to appeal any error when he did not object to the *voir dire* question or indicate to the court what he wanted it to say. The trial court asked on two separate occasions whether counsel had any objections to the *voir dire* questions and appellant's counsel responded no to both inquiries. Appellant has thus failed to establish the first of the three required prongs for plain error review. In addition, the error complained of is subject to reasonable dispute. Appellant cites *Pearson v. State*, as persuasive; however, Pearson, held "on request, a trial court must ask [the following question] during *voir dire:* 'Do any of you have strong feelings about the crime with which the defendant is charged?'" 437 Md. 350, 363. Appellant, here, made no such request.

Third the voir dire was comprehensive in nature. Thus, the single question asked did not affect appellant's substantial rights and it did not alter the outcome of the case. Because Appellant has failed to satisfy the three required prongs, we decline plain error review.

II. The trial court properly denied appellant's motion for judgment of acquittal based on insufficient evidence.

Appellant next argues there was insufficient evidence to support his conviction. He claims the inconsistency of the officers' testimony in regard to the hand appellant used to discard the gun and the different areas the officers stated the object was thrown from are in such conflict that the motion for judgment of acquittal should have been granted. The State argues while there may have been some inconsistent testimony, the evidence was sufficient. We agree.

When appellate courts review insufficiency of evidence claims, they are to view "the evidence in the light most favorable to the prosecution, [and determine if] any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Titus v. State*, 423 Md. 548, 557 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[T]he sole concern of the appellate court is 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Jones v. State*, 240 Md. App. 26, 42 (2019) (citing *State v. Manion,* 442 Md. 419, 431 (2015)). Appellate courts are to "defer to any possible reasonable inferences the jury could have drawn from the admitted evidence and need not decide whether the jury could have

drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence." *Fuentes v. State*, 454 Md. 296, 308 (2017) (citing *State v. Smith*, 374 Md. at 557, 823 (2011)).

Appellant argues the officers' testimonies were inconsistent because one officer stated the gun was thrown in a "wooded area" and the other officer stated it was thrown in an area with "bushes." In reviewing the testimony, we note Officer Anderson stated he saw the object thrown "[i]nto a wooded area, like between two fences." Upon being asked to describe what he meant by a "wooded area," he stated "[k]ind of like a bush . . . so there was a fence there and there was like a bushy area there." Officer Lesane testified he observed the object "tossed it into the bush[.]" Both officers noted the general conditions of the surrounding area and the weapon. Officer Lesane testified that the "grass was wet" because of morning dew, and he stated that he did not notice anything "remarkable" about the gun when he found it. Officer Anderson testified the gun had "no weather damage" and was "not dirty," rusty or wet. Both officers testified they saw appellant reach to the waistband of his body, retrieve an object, and then throw that object. As we see it, while some aspects of their testimonies differed, their testimony could fairly convince a trier of fact of appellant's guilt.

As the Court of Appeals explained in *State v. Albrecht*:

> Fundamentally, our concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.

336 Md. 475, 478–79 (1994) (internal citations omitted). The Court explained further:

> the reviewing court is not to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt"; rather, the duty of the appellate court is only to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Id. at 479 (internal quotations omitted) (emphasis in original).

Analyzing the case at bar, using this standard, we hold a rational trier of the fact could have found all the elements of the crime of possession of a firearm beyond a reasonable doubt.

III. The trial court did not improperly instruct the jury when it responded to the jury note.

Appellant claims the court made a "legally inaccurate and highly prejudicial" statement that shifted the burden to the defense when he responded to the jury's question saying, "they have all the evidence that they are to consider in this matter." Appellant asserts that the judge should have responded in one of two ways by saying "no, appellant did not have the ability to test the gun for DNA or fingerprint evidence" or "to instruct the jury that the defense has no burden to present any evidence to the jury and thus, the jury should not consider whether the defense had the ability to perform or conduct testing." The State maintains the court did not shift the burden in responding to the jury's factual question and that an answer of no is not supported by the record and is "contrary to the Maryland discovery rules, and the pretrial pleadings filed in this case." The State also asserts that appellant's second alternative response is not preserved because appellant did not request that response during trial.

To be sure, in order to seek appellate review, an issue must be properly preserved. Here, neither party asserts the first requested response to the note was unpreserved. It was presented to the trial court and thus, it is properly before us. Appellant, however, also requests review of a second proposed response to the jury's question that was not posed to the trial court. He submits that if we find it was not properly preserved, we should undertake plain error review. We hold because the second proposed response was not presented to the judge for his consideration, it was not preserved. Even if preserved, we hold it is without merit.

We review a trial court's decision to give a particular jury instruction under an abuse of discretion standard. *Stabb v. State*, 423 Md. 454, 465 (citing *Gunning v. State*, 347 Md. 332 (1990). Such decision or order of the trial court will not be disturbed on review except on a clear showing of abuse of discretion, that is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Atkins vs. State*, 421 Md. 434, 447 (2011). When a jury poses a question to the court, supplemental instructions may be given and "when [the court is] presented with a question involving an issue central to the case" the court is to respond with "clarifying instruction[s]" to avoid confusion. *Appraicio v. State*, 431 Md. 42, 51 (2013) (internal quotation omitted).

Here, during deliberations, the jury sent out a note asking, "did the Defense have the ability to have the gun tested for DNA or fingerprinting?" The court informed counsel of its proposed response which was, "they have all the evidence that they are to consider in this matter." Defense counsel objected to that response and stated the proper response should be "no." The court then declined that response.

We note, during the trial no witness was asked or testified as to whether the defense had the ability to have the gun tested. The issue was not presented to the jury and it was not a part of the record. While the State's discovery document advised appellant that "[u]pon reasonable notification . . . the Defendant or his counsel may inspect . . . tangible things that the State's Attorney intends to use at a hearing or at trial," the record does not reflect that appellant availed himself of this process, nor did he ask the court for assistance in obtaining discovery. As we see it, appellant's requested response would have required the court to go outside the record and to give an answer that would have been factually incorrect and misleading.

Appellant further claims that the court's response shifted the burden. He argues, "absent an answer that specifically advises the jury that defense did not have the ability to have the gun tested for DNA or fingerprinting, the juror is left with the presumption that since they have all the evidence, that in turn, defense counsel had the ability to test the gun for DNA and fingerprinting yet failed to submit the handgun for testing." The State contends that the burden was not shifted because the jury's question did not inquire about whether or not appellant had a burden of proof but rather if he had the ability to get the gun tested.

In *Brogden v. State*, the Court of Appeals was tasked with determining whether "a trial court erred in its response to the jury's inquiry as to the effect of a license on the handgun charge." 384 Md. 631, 648 (2005). During deliberations, the jury asked, "whether the State had the burden of proving that petitioner did not have a license to carry a handgun." *Id.* at 635. The court responded that the burden was on the defense to prove

evidence of a license. *Id.* at 643. Finding that "[t]he supplemental jury instructions . . . did not state the 'applicable law' as to the issues relating to the handgun charge then properly before the jury for deliberation," the Court of Appeals found that at the time "the supplemental instruction was given, the entire burden of proving the commission of that particular crime rested with the State." *Brogden v. State*, 384 Md. 631, 644. *Id.*

The Court reasoned:

> While it may be commonplace for a jury to pose questions during deliberations to a trial court for clarification and often these questions are reasonable, this does not mean that a trial court judge is obliged to provide answers via supplemental instructions to every question that a jury presents to the court, especially when those questions deal with aspects of the law that have absolutely nothing to do with the case *as presented to that jury* and create burdens of proof on a defendant, that the defendant, under the circumstances of the particular case, does not have. The jury should be limited in its deliberations to the issues and evidence as presented to it and should not be given answers to inquiries which reach outside of the case as presented at trial.

Id. at 644–45 (emphasis in original).

In *Mulley v. State*, we held the trial court did not err when it provided the jury with a written copy of its initial verbal jury instructions. 228 Md. App. 364, 380 (2016). During deliberations the jury asked the court several questions, one being "does State have to prove each element of 'wear, carry or transport?'" *Id.* at 372. We stated:

> the jury in this case did not communicate to the court an unambiguous question of law that the trial judge refused to clarify. In the instant case, a correct answer to the jury's question (as the trial court interpreted the question) was contained within the court's supplemental instruction. And, although Mr. Mulley contends that the trial judge's interpretation of the jury's question was possibly the incorrect reading, the lack of any further inquiry from the jury supports our conclusion that the jury's confusion was satisfactorily resolved by the court's response.

Id. at 381.

In the case at bar, appellant's assertion that the court's response shifted the burden is without merit. The court gave no additional instructions regarding the burden of proof, but simply advised the jury they had received all the evidence. The court's response was a direct answer based upon the record in the case. As in *Mulley*, the lack of further inquires by the jury supports our conclusion.

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