Circuit Court for Worcester County
Case No. C-23-CR-18-000212

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3024

September Term, 2018

DASHAWN ANDREW COWARD

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Alpert, Paul E.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Kehoe, J.

Filed: February 25, 2020

After a jury trial in the Circuit Court for Worcester County, Dashawn Andrew Coward, appellant, was convicted of one count of distribution of cocaine and acquitted of one count of possession of cocaine. The court sentenced Coward to a one-year term of incarceration and a $500 fine. In this appeal, Coward presents two questions, which we have rephrased slightly:

> I. Did the trial court plainly err by propounding a compound "strong feelings" *voir dire* question and, if not, did defense counsel render ineffective assistance by failing to object to the question?
>
> II. Did the trial court err by accepting legally inconsistent verdicts?

For the following reasons, we shall affirm the judgment of the circuit court.

Background[1]

Coward was charged by criminal indictment with one count of distribution of cocaine and one count of possession of cocaine, both arising from an undercover controlled-buy operation on June 15, 2018 on the Ocean City boardwalk. The charges against Coward were tried to a jury on January 3, 2019.

The evidence adduced at trial showed that Coward approached Ocean City Police Detective Michael Kirkland, who was working undercover with two other detectives, and asked him if he was "looking for some coca?" Coward was with a second man, Sean

[1] Although we have reviewed the record as a whole, "[i]t is unnecessary to recite the underlying facts in any but a summary fashion because for the most part they . . . do not bear on the issues we are asked to consider." *Teixeira v. State*, 213 Md. App. 664, 666 (2013) (citations and quotations omitted).

Dotson. Ultimately, Detective Kirkland and the two other undercover detectives followed Coward and Dotson off the boardwalk. According to Detective Kirkland, Coward reached into the groin area of his sweatpants and pulled out two vials, which he then handed to Dotson. Detective Kirkland gave Dotson $80 and Dotson handed the detective two vials. Coward was arrested later that night at a hotel. A forensic analysis of the content of the vials Detective Kirkland received from Dotson revealed .304 grams of cocaine. Body camera recordings of the encounter with Coward and Dotson were introduced into evidence and played for the jury.

We shall include additional facts as necessary to our resolution of the issues.

Analysis

1. The Strong Feelings Question

During *voir dire*, the court propounded a compound "strong feelings" question to the venire: "Do you have such strong feelings about any of the crimes of which the Defendant is charged that it would make it difficult for you to fairly and impartially weigh the facts in this case?"[2] Defense counsel did not object to that question, although it

[2] One prospective juror answered yes to that question. He was excused for cause.

differed somewhat from Coward's requested "strong feelings" question.[3] At the end of *voir dire*, defense counsel affirmatively stated that he had no exceptions.

On appeal, Coward asserts that the trial court erred by asking the strong feelings question in compound form. Recognizing that he failed to preserve this issue, he asks us to exercise plain error review. We decline to do so.

Plain error review is "reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Robinson v. State*, 410 Md. 91, 111 (2009) (citation, alteration, and internal quotation marks omitted). It is available, at the discretion of an appellate court, if four elements are satisfied: (1) "'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'"; (2) "'the legal error must be clear or obvious, rather than subject to reasonable dispute'"; (3) "'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'"; and (4) the error must "'seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings.'" *State v. Rich*, 415 Md. 567, 578 (2010) (quoting

[3] Coward requested the following "strong feelings" question in his proposed *voir dire*: "The State alleges that the Defendant committed the crimes of possession of cocaine and distribution of cocaine. Do you have strong feelings about any of those crimes?"

Puckett v. United States, 556 U.S. 129, 135 (2009)) (additional citations, quotation marks, and alteration omitted).

We have no hesitation in concluding that the trial court clearly erred by posing the "strong feelings" question in compound form. The Court of Appeals held that such questions were improper in *Pearson v. State*, 437 Md. 350 (2014), and reiterated its holding in *Collins v. State*, 463 Md. 372 (2019).[4] In *Pearson*, the Court of Appeals held that a trial court must ask a "strong feelings" question if one is requested and, properly phrased, the question should be: "'Do any of you have strong feelings about [the crime

[4] In its brief, the State points out that *Collins* was filed on April 2, 2019, nearly four months after Coward's trial, which took place on January 3, 2019. We don't think this makes much of a difference. In *Pearson*, the court held that a "strong feelings" voir dire question posed in that case "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?" was "phrased improperly." 437 Md. at 361 (footnote omitted) The Court explained that such a question "shifts from the trial court to the [prospective jurors] responsibility to decide prospective juror bias." *Id.* at 362 (brackets in *Pearson*) (quoting *Dingle v.* State, 361 Md. 1, 21 (2000)).

In *Collins*, the Court made it clear that *Pearson* was, and remains, the law of this State:

> In this case, we *reaffirm our holding* in *Pearson*, that, on request, a trial court is required to ask a properly-phrased—i.e., non-compound—"strong feelings" question. In other words, under *Pearson*, during voir dire, on request, a trial court must ask: "Do any of you have strong feelings about [the crime with which the defendant is charged]?" We reiterate that, during voir dire, on request, a trial court must ask the "strong feelings" question in the form set forth above, and *it is improper for a trial court to ask the "strong feelings" question in compound form*.

Collins, 463 Md. at 396 (cleaned up and emphasis added).

with which the defendant is charged]?'" 437 Md. at 354 (brackets in original). In *Collins*, the Court emphasized that, unlike a non-compound "strong feelings" question, which permits a trial court to assess the impartiality of the prospective jurors, compound "strong feelings" questions, like the one asked in the instant case, "make it impossible to know whether any prospective juror, in fact, had strong feelings about the crimes with which the defendant was charged, yet determined for him- or herself that he or she could be fair and impartial despite his or her strong feelings." 463 Md. at 397.

However; by stating on the record at the end of *voir dire* that he had no exceptions, and then by accepting the jury, Coward affirmatively waived this issue, making plain error review unavailable. *See Carroll v. State*, 202 Md. App. 487, 513–14, (2011), *aff'd*, 428 Md. 679 (2012) (distinguishing between forfeited and affirmatively waived trial errors, the former being eligible for plain error review and the latter being ineligible).

Even if not waived, we would not exercise plain error review. The compound question was not the sort of trial error that would seriously affect the fairness, integrity or public reputation of judicial proceedings. In the context of the discretion review of unpreserved trial issues, fairness:

> ordinarily require[s] that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge.

Chaney v. State, 397 Md. 460, 468 (2007).

In the plain error review context, we view the concept of "integrity" as referring to the degree to which the reviewing judges are confident that trial was a fair one. Coward was permitted to participate fully in the *voir dire* process, to strike jurors for cause and to exercise peremptory strikes. That Coward was acquitted on one of the two counts suggests to us that the jury did not have feelings about drug trafficking that prevented them from fairly and impartially weighing the evidence. Finally, we do not believe that the public's confidence in the fairness of judicial proceedings would be undermined by the outcome of this case.

Alternatively, Coward asks this Court to "find that trial counsel rendered ineffective assistance . . . for failing to object to the question." That claim is better pursued in post-conviction proceedings. *See Mosley v. State*, 378 Md. 548, 562, 565 (2003) ("[T]he adversarial process found in a post-conviction proceeding generally is the preferable method in order to evaluate counsel's performance" because on direct appeal "'we do not have the benefit of all the facts concerning why defense counsel did or did not do certain things.'") (quoting *State v. Zernechel*, 304 N.W.2d 365, 367 (Minn. 1981)). The failure to except to the form of a *voir dire* question does not fall into that category of cases where ineffectiveness is shown to be "blatant and egregious by the record alone." *Washington v. State*, 191 Md. App. 48, 71 (citation and internal quotation marks omitted).

2. Inconsistent Verdicts?

The jury found Coward guilty on the charge of distribution of cocaine and not guilty on the charge of possession of cocaine. After the jurors hearkened to the verdict, the trial judge asked counsel if there was "[a]nything before [he] release[d] the jury?" Defense counsel requested that the court poll the jury. The jury was polled and the trial judge asked, "Anything else?" Defense counsel replied, "No, Your Honor. Thank you." At that juncture, the judge thanked the jurors for their service and excused them.

Immediately after the jurors were released, the trial judge asked counsel if they were ready for sentencing. Defense counsel stated that he had a "preliminary matter" and objected to the court "receiving this verdict as it's legally inconsistent." He asked the court to grant a mistrial and schedule a new trial. The prosecutor responded that the verdict reflected the juror's belief that Dotson had possession of the cocaine during the controlled-buy and that Coward merely directed him to provide the cocaine to Detective Kirkland.

The court ruled as follows:

> Well, I'm persuaded that this – the facts of this case which could reasonably be found by the jury, as well as the way the case is argued, present one of those unusual circumstances where the crime or charge of possession of cocaine is not necessarily a lesser-included offense of the crime of distribution of cocaine because of the possible factual ambiguity and the jury's perception of the exhibit and interpretation of the testimony and, indeed, in the way the case was argued.
>
> So, you don't see it very often, but I think this is one of those instances in which it is not a legally inconsistent verdict, and the request not to receive the verdict for that reason and to grant a mistrial is denied.

Coward contends that the verdicts are legally inconsistent because the Court of Appeals has held that possession of a controlled dangerous substance is "necessarily an element of [the crime of] the distribution [of that substance]." (quoting *Anderson v. State*, 385 Md. 123, 133 (2005)). Thus, he asserts, under the authority of *Price v. State*, 405 Md. 10 (2008), and *McNeal v. State*, 426 Md. 455 (2012), that the verdicts may not stand and that his conviction for distribution of cocaine should be reversed.

Coward further maintains that this issue is preserved for our review even though he did not object until after the jury had been discharged because he objected immediately after the jurors were excused, at a time when they "were still in the courthouse and could have been reconvened to conduct further deliberations if necessary." Even if the objection was untimely, Coward asserts that we should reach the merits because the court's erroneous ruling that the verdicts were not legally inconsistent was not related to the timing of his objection and, in any event, should be reviewed for plain error. Alternatively, Coward argues that his attorney was constitutionally ineffective for failing to object to the inconsistent verdicts prior to the jury being discharged and that this issue should be addressed on direct appeal.[5]

[5] Coward states that "[p]ost-conviction proceedings are not available to [him]" because he already has served his one-year sentence and is not on parole or probation. Though Coward is not eligible to pursue a petition under the Uniform Postconviction Procedure Act, *see* Md. Code (2001, 2018 Repl. Vol.), § 7-101 of the Criminal Procedure Article (Act applies to "a person convicted in any court in the State who is: (1) confined under sentence of imprisonment; or (2) on parole or probation"), he could be eligible to

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The State responds that this Court should decline to address this issue because Coward affirmatively waived it by accepting the verdicts. Even if preserved, it contends that the verdicts are factually, not legally, inconsistent and may stand. Further, for the same reasons asserted above, it maintains that the ineffective assistance of counsel claim is better pursued in a collateral review proceeding.

Accepting without deciding that the verdicts were legally inconsistent, we nevertheless hold that this issue is not properly before us. "[T]o preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position before the verdicts become final and the trial court discharges the jury." *Givens v. State*, 449 Md. 433, 472-73 (2016). This is so because when legally inconsistent verdicts have been rendered, a defendant is at a "distinct tactical advantage":

> When inconsistent verdicts are rendered, the [trial court] may not, *sua sponte*, send the jury back to resolve the inconsistency, because it is the defendant who is entitled, should he [or she] so wish, to accept the benefit of the inconsistent acquittal. By the same token, the prosecutor may not ask to have the jury sent back to resolve the inconsistency, because it is the defendant, once again, who is entitled, should he [or she] so wish, to accept the benefit of the inconsistent acquittal. The defendant is authorized to call the shots at that critical moment, but the defendant must call them before the moment passes.

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pursue *coram nobis* relief. *See generally* Md. Rules 15-1201 – 15-1207 (*coram nobis* procedures); *State v. Smith*, 443 Md. 572, 623 (2015) ("Coram nobis is extraordinary relief designed to relieve a petitioner of substantial collateral consequences outside of a sentence of incarceration or probation where no other remedy exists.").

Tate v. State, 182 Md. App. 114, 134-35 (2008). Here, Coward failed to take any action prior to the verdicts becoming final and the jury being excused. Consequently, he waived this contention for appellate review. *See id*. at 135 ("The defendant may not stand mute and later complain about the verdicts he did nothing to cure at the only time a cure was still possible."); *Givens*, 449 Md. at 477 ("Simply stated, it would be incongruent with the administration of justice to permit a defendant to acquiesce while a trial court accepts inconsistent verdicts—despite the circumstance that the inconsistent verdicts may be easily recognized—then raise the issue of the inconsistent verdicts later, when it is too late for the trial court to send the jury back to resolve the inconsistency."). Having waived this issue, it also is unreviewable for plain error. *See, e.g., Carroll v. State*, 202 Md. App. 487, 514 (2011) (waived claims are not subject to review for plain error).

Coward's reliance upon *Teixeira v. State*, 213 Md. App. 664 (2013), is unavailing. In that case, the defendant did not object to allegedly inconsistent verdicts until after the jury had been hearkened, polled, and discharged, but immediately thereafter, asked if he could raise an issue "before the jury leaves[.]" *Id*. at 669. The court quickly directed the clerk to "'[h]ave the jury remain'" while it heard argument. *Id*. at 670 (alteration in original). The court ultimately ruled that the verdicts were factually inconsistent, not legally inconsistent, and thus could stand. On appeal from the judgments of conviction, this Court held, as a threshold matter, that because "[t]he venire remained subject to recall and was finally dismissed only after the trial judge heard argument and ruled[,]"

the alleged inconsistency of the verdicts was preserved for appellate review and, on the merits, affirmed the trial court's ruling. *Id*. at 674.

In the instant case, in contrast, Coward was given multiple opportunities to argue the alleged inconsistency in the verdicts before the jury was excused. Even after making his untimely objection, Coward did not ask the court to reconvene the jury or to direct the jury to remain in the jury room while the issue of inconsistency was argued. Rather, he asked the court to grant a mistrial, which is not a remedy for an inconsistent verdict.

We also decline to address on direct appeal Coward's argument that defense counsel was constitutionally ineffective for failing to timely object to the allegedly inconsistent verdicts. As discussed, *supra*, ineffectiveness claims ordinarily are reserved for post-conviction proceedings because only then can a factual record be developed to determine "'why defense counsel did or did not do certain things.'" *Mosley*, 378 Md. at 565 (2003) (quoting *Zernechel*, 304 N.W.2d at 367). Here, Coward had been acquitted of one of the two charges against him and defense counsel may have made a strategic decision to accept the acquittal before raising the issue of inconsistency, in an effort to "have his cake and eat it too." *Tate*, 182 Md. App. at 132.[6] Consequently, we decline to address this argument on direct appeal.

[6] Coward maintains that there was no possible strategic reason for defense counsel not to object to the inconsistency because, had the jury been sent back to deliberate *and* had convicted him of both charges, the possession charge would have merged with the distribution charge, leaving him facing the same exposure at sentencing. Defense counsel

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

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may reasonably have believed that, were the jurors sent back to deliberate, the most likely outcome would have been a second conviction and that having two convictions on his record, as opposed to just one, might cause collateral consequences for Coward after he served his sentence. This is but one possible strategic reason that might have impacted defense counsel's choices.