UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2707

September Term, 2014

DONTE ISAIAH MCKENNY

v.

STATE OF MARYLAND

Wright,
Kehoe,
Arthur,
JJ.

Opinion by Kehoe, J.

Filed: February 10, 2017

After a trial before a jury of the Circuit Court for Allegany County, Donte Isaiah McKenny was convicted of possession of heroin with the intent to distribute, possession of crack cocaine with the intent to distribute, two counts of conspiracy to possess those controlled dangerous substances with intent to distribute, and simple possession of heroin. In March 2015, the trial court found Mr. McKenny to be a fourth time subsequent offender and imposed two mandatory sentences of 40 years, to run concurrently without the possibility of parole.

McKenny appeals his convictions and sentences and presents two issues, which we have reorganized and reworded:

> 1. Did the trial court err by denying McKenny's motion for a new jury pool?
>
> 2. Did the trial court abuse its discretion during voir dire when it asked a compound question and then failed to adequately follow up with juror responses?
>
> 3. Did the State present legally sufficient evidence to sustain the trial court's finding that McKenny was a four-time subsequent offender?
>
> 4. Were McKenny's prior convictions under pre-recodification criminal law statutes covered under the current subsequent offender provision of the Criminal Law Article?

We will affirm the judgments of the circuit court.

I. and II. The Jury Selection Process

Trial courts are given wide latitude to conduct voir dire, and errors arising from voir dire are reviewed under the abuse of discretion standard. *Wright v. State*, 411 Md. 503, 508 (2009). However, a trial court's interpretation of the law is subject to de novo review. *Davis v. Slater*, 383 Md. 599, 604 (2004).

In his first two appellate contentions, McKenny takes issue with the trial court's jury selection process. There is some inconsistent usage of terms in the briefs; we will use the term *pool* to refer to the individuals who were eligible to be chosen as jurors, and *panel* to refer to the jurors and alternate jurors who were actually selected to serve.

McKenny's co-defendant, Joseph Caster, was tried and convicted in the same court just prior to McKenny's trial. Early on in the jury selection process, McKenny's trial counsel raised a concern with the judge that some of the members of the jury pool for McKenny's trial could have been members of the jury pool for Caster's trial as well. {TR II 5-6} The trial court asked whether McKenny was seeking a new jury pool, defense counsel indicated that he was, and the trial court denied the request.

Implicit in McKenny's appellate contentions is the assertion that the trial court erred in denying his motion.[1] However, the cases he points to in support of his contention, *United State v. Malloy*, 758 F.2d 979, 981 (4th Cir. 1985) and *State v. VanMetre*, 342 S.E.2d 450, 452 (W. Va. 1986), are factually distinguishable because those appeals involved trials in which a member of the jury in the appellant's trial also served as a juror for a co-defendant's trial. We do not believe that the trial court erred in denying the motion because McKenny's concern—that a member of the juror pool may have obtained information about his case through the voir dire questions addressed to the jury pool in

[1] McKenny also asserts that the trial court would have erred if the same individual served on both juries. Accepting for purposes of analysis that McKenny is correct on this point, there is nothing in the record that suggests that any member of the jury for his trial also served on the jury for Caster's trial.

Caster's trial—could be properly addressed through voir dire questions to the members of the juror pool in his own case. This brings us to McKenny's second issue; he argues that the trial court erred by using a compound question during voir dire.

During the voir dire process, the trial court recalled that defense counsel had raised concerns about members of the jury pool having prior knowledge of the case from having been in Caster's jury pool. The judge asked defense counsel what question(s) to pose, but counsel left it to the court to fashion a question. The court began by stating the following to the jury pool:

> [O]ne of the allegations that the State is bringing against Mr. McKenny here is that he was in a conspiracy with respect to controlled substances with a gentleman named Joseph Caster. Now I believe the alleged co-conspirator, Mr. Caster, was brought to trial on December 2nd, and I believe that a number of you were in the back of the courtroom for the voir dire of that case, because it is the same panel that was called in. There is a lot of overlap, certainly not all of you, but I am sure some of you were here when we were going through this . . . with respect to the *State of Maryland v. Joseph Caster*.

Having thus prefaced his remarks, the trial judge then asked the following questions:

> So the first question I would have with regard to that is there anything that any of you heard during the voir dire process in *State v. Joseph Caster*, the alleged co-conspirator with Mr. McKenny, anything that you heard during the voir dire about that case or that you heard with respect to the facts or circumstances or results of that case, at all? So that's the question that I would have, that you feel would affect your ability to be a fair and impartial juror here.
>
> Does anyone remember being here for that case? For the voir dire of that case? Let's see some, I see some hands going up and so my question is, let me ask you this, those of you who were here for that case, did any of you hear anything about the testimony, the deliberations, the verdict, anything about that case after your voir dire? Alright, I mean if there is, just raise your hand… Alright, I see a couple of hands. We will discuss this here at the bench.
>
> {TR II 30-32}

At this point, the court called one of the prospective jurors (No. 179) to the bench. After further questioning, the court excused the potential juror for cause because the juror had a vision problem. {TR II 32-34} The following then occurred:

> The Court: And I believe that there was another hand that arose in the center section? No? Okay. Have any of you or your immediate family members . . . either been the victim of a crime, witness to a crime or charged with a crime?

At no time did defense counsel object to the court's questions. Additionally, while McKenny contends that the trial court compounded its supposed error by failing to follow up with jurors whose responses to the compound question required further examination, McKenny's counsel never objected to the trial court's actions or asked the court to take any further steps to identify members of Caster's jury pool present in McKenny's pool.

Assuming for purposes of analysis that the trial court erred, appellant's failure to object precludes his ability to challenge the trial court's actions on appeal. *See, e.g.*, *Alford v. State*, 202 Md. App. 582, 604 (2011); *Jefferson v. State*, 194 Md. App. 190, 200 (2010). Therefore, in light of defense counsel's silence, McKenny failed to preserve the error.[2]

[2] Appellant does not ask us to exercise plain error review. Even if he had, we would decline to do so. Plain error review is a rarely used and tightly circumscribed method by which appellate courts can, at their discretion, address unpreserved errors by a trial court which "vitally affect[ ] a defendant's right to a fair and impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009) (quotation marks and citation omitted). This discretion "ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *State v. Rich*, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). The suppositional errors by the trial court in conducting its voir dire did not, in our view, seriously affect the "fairness, integrity or public reputation of judicial proceedings."

II. The Sufficiency of the Evidence of McKenny's Prior Convictions

McKenny argues that the trial court erred in concluding that he was a fourth time subsequent offender because the State presented insufficient evidence to sustain that finding. McKenny points to purported errors in the Pre-Sentence Investigation Report ("PSI Report") and in the certified copies of prior convictions that the State provided to the court for sentencing, both of which he objected to at trial.[3]

The State has the burden of proving beyond a reasonable doubt that a defendant meets the statutory requirements for an enhanced sentence, including proving prior convictions. *Bryant v. State*, 436 Md. at 671. Certified copies of prior convictions are not required to meet that burden; indeed, in some cases, the PSI Report itself is sufficient. *See Sutton v. State*, 128 Md. App. 308, 328-29 (1999) (noting that such reports are "'competent evidence' sufficient to prove 'the factual predicate in order to impose enhanced punishment,' provided counsel does not object to the accuracy of the record.").

At sentencing, McKenny challenged the accuracy of some aspects of the report, including the allegation that he was a gang member and the dates of a previous incarceration. {T III 3-4} He also pointed out, correctly, that there was an inconsistency between his actual name and date of birth and the information contained in the PSI Report and listed in the certified copies of the prior convictions. Most significantly, all four of the prior convictions the State presented at sentencing listed the defendant as

[3] We do not agree with the State's contention that this contention is unpreserved.

Donte Smith, with a birthdate of July 29, 1980. That information does not match that of the defendant in this case, Donte Isaiah McKenny, whose birthdate is July 29, 1981.

McKenny is correct that the names and birthdates do not match but there was additional evidence before the court. The PSI Report noted that "Donte Smith" is one of McKenny's several aliases, and the report lists July 29, 1980, as an alias birthdate along with McKenny's actual birthdate. Additionally, the State Identification Number (SID) provided for McKenny in the PSI also matches the SID listed in the records of the prior convictions, and McKenny does not challenge the accuracy of that identifier.

The Fourth Circuit Court of Appeals considered a similar problem in *United States v. McDowell*, 745 F.3d 115 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 942 (2015). The defendant pled guilty to possession of heroin with intent to distribute and to being a felon in possession of a firearm, and based on his prior convictions, he was given an enhanced sentence under the Armed Career Criminal Act. A certified copy of one of the prior convictions the sentence was based on was not available, but a combination of other evidence supported its existence, including a criminal record check from the FBI-administered National Crime Information Center Database. *Id.* at 119. The conviction was 40 years old and had an inaccurate name and birthdate listed; as part of its efforts to substantiate the conviction, the Government presented evidence linking the name on the conviction to one of the defendant's aliases. *Id.* at 122-23. The NCIC report alone would not have been sufficient, the Fourth Circuit opined, but combined with other evidence substantiating the fact of the prior conviction, there was enough to conclude that the trial

court did nor err in finding that the Government had established the conviction.

We similarly conclude that the trial court did not err in attributing the prior convictions to McKenny. The trial court had enough information available to match the name on the prior convictions to McKenny's alias. This, combined with the fact that the SIDs listed on the prior convictions matched the uncontested SID listed in McKenny's PSI Report, was sufficient evidence to substantiate the State's claim that convictions were all for the same individual, McKenny.

III. The Effect of Recodification on Prior Convictions

Finally, McKenny asserts that, even if the prior convictions can be linked to him, they were improperly considered by the trial court. This argument raises a question of statutory construction. The subsequent offender statute McKenny was sentenced under was Md. Code Ann., Criminal Law Article ("CL"), § 5-608. The statute reads (emphasis added):

> **Fourth time offender**
>
> (d)(1) Except as provided in § 5-609.1 of this subtitle, a person who is convicted under subsection (a) of this section or of conspiracy to commit a crime included in subsection (a) of this section shall be sentenced to imprisonment for not less than 40 years and is subject to a fine not exceeding $100,000 if the person previously has served three or more separate terms of confinement as a result of three or more separate convictions:
>
> (i) under subsection (a) of this section or § 5-609 of this subtitle;
>
> (ii) of conspiracy to commit a crime included in subsection (a) of this section or § 5-609 of this subtitle;

> (iii) of a crime under the laws of another state or the United States that would be a crime included in subsection (a) of this section or § 5-609 of this subtitle if committed in this State; or
>
> (iv) of any combination of these crimes.

Section § 5-608(a) reads:

> (a) Except as otherwise provided in this section, a person who violates a provision of §§ 5-602 through 5-606 of this subtitle with respect to a Schedule I or Schedule II narcotic drug is guilty of a felony and on conviction is subject to imprisonment not exceeding 20 years or a fine not exceeding $25,000 or both.

At sentencing, the State presented copies of prior convictions from two cases in 2001, one in 2002, and one in 2005, which it explained were for offenses related to manufacturing and distributing cocaine and heroin. {TR IV 7-8} McKenny contends that the 2001 and 2002 convictions should not count against him because they were not under CL § 5-608(a) as the enhanced sentencing statute requires. Instead, those convictions were under former Article 27, § 286, which was replaced by what is now CL § 5-601 to § 5-608 when Article 27 was recodified in 2002. Therefore, McKenny's prior convictions are not, strictly speaking, under CL § 5-608(a), and he argues that the trial court was incorrect in using those prior convictions to satisfy the sentencing enhancement requirements. We disagree.

Maryland's recodification process is presumed to leave the effect of the revised statute unchanged. As the Court of Appeals had noted, this process is done "for the purpose of clarity rather than change of meaning, and thus, even a change in the phraseology of a statute by a codification will not ordinarily modify the law unless the change is so radical and material that the intention of the Legislature to modify the law

appears unmistakably from the language of the Code." *Comptroller of Treasury v. Blanton*, 390 Md. 528, 538 (2006) (citations omitted). In *Allen v. State*, 402 Md. 59 (2007), the Court of Appeals considered a situation in which the defendant challenged his conviction for unauthorized use of a vehicle on the basis that the 2002 recodification of the Criminal Law Article had changed the elements of the crime. The Court reviewed the language of the statute and the Revisor's note stating that any changes were nonsubstantive, as well as the lack of any apparent "intent to abrogate the extensive pre-existing case law interpreting the previous unauthorized use statute." *Id.* at 73-74. The Court also noted Section 13 of the session law enacting the recodified Criminal Law Article, which read: "AND BE IT FURTHER ENACTED, That it is the intention of the General Assembly that, except as expressly provided in this Act, this Act shall be construed as a nonsubstantive revision, and may not otherwise be construed to render any substantive change in the criminal law of the State." *Id.* at 70-71. The Court then concluded that the General Assembly did not intend to alter the elements of the former statute. *Id.* at 73-74.

Taking a similar approach here, we find nothing to persuade us that the General Assembly intended to provide individuals who have been convicted of multiple offenses a free pass so long as their prior convictions were dated before the Criminal Law Article was recodified. The Revisor's note states that CL § 5-608 and the statutes providing the predicate offenses are "new language derived without substantive change" from various

portions of former Article 27, § 286.[4] This note, together with the General Assembly's statement in Section 13 of the session law enacting the Recodified Criminal Law Article that any changes should be construed as nonsubstantive, indicates that the General Assembly had no intention of changing the application of the enhanced sentencing statute at recodification. We decline his invitation to radically reinterpret CL § 5-608 to preclude use of all pre-2002 criminal convictions for prior conviction purposes.[5]

Finally, McKenny's reliance on the rule of lenity is misplaced. The rule of lenity is a canon of statutory interpretation that can aid a criminal defendant when a statute is ambiguous but, as this Court recently observed, appellate courts do not employ it to "create an ambiguity where none exists[.]" *Latray v. State*, 221 Md. App. 544, 556 (2015); *see also Jones v. State*, 336 Md. 255, 261 (1994) (The rule of lenity "may not be used to create an ambiguity where none exists"). The Revisor's note, together with the

[4] The Revisor's note for § 5-602, "Distributing, possessing with intent to distribute, or dispensing controlled dangerous substances", notes that it is "new language derived without substantive change from former Art. 27, § 286(a)(1)." Section 5-603, "Equipment to produce controlled dangerous substance," is derived from former Art. 27, § 286(a)(4). Section 5-604, "Counterfeit substance," is derived from former Art. 27, §§ 277(g) and 286(a)(2) and (3). Section 5-605, "Keeping common nuisance," is derived from former Art. 27, § 286(a)(5). § 5-606, "False prescription," is derived from former Art. 27, § 286(a)(6).

[5] We note that the General Assembly eliminated the relevant mandatory minimum sentences pursuant to the Justice Reinvestment Act, Ch. 515 of 2016 laws of Maryland, effective October 1, 2017. In the Act, the General Assembly provided a window to permit individuals serving mandatory minimum sentences for drug violations to seek reconsiderations of their sentence. The window begins on October 1, 2017, and ends on September 30, 2018.

long-standing presumptions regarding Maryland re-codification effort, leave no room for doubt as to the General Assembly's intentions.

THE JUDGMENTS OF THE CIRCUIT COURT FOR ALLEGANY COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.