Circuit Court for Washington County
Case No. 21-K-15-051410

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 94

September Term, 2017

LEWIS MARSELLOUS CHAMBERLAIN

v.

STATE OF MARYLAND

Berger,
Friedman,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: December 6, 2018

Lewis Marsellous Chamberlain, appellant, was convicted, following a jury trial in the Circuit Court for Washington County, of both possession and distribution of heroin and was sentenced to forty years' imprisonment, with all but twenty-five years suspended, to be followed by three years' probation. He then noted this appeal, raising two issues:

> I. Whether the trial court abused its discretion when it refused to ask jurors whether they would be biased against Chamberlain if he chose not to testify.
>
> II. Whether the trial court committed plain error by failing to declare a mistrial after the prosecution's key witness informed the jury that Chamberlain had a history of drug use and had been on probation at the time of the charged offenses.

Finding neither abuse of discretion nor plain error, we affirm.

BACKGROUND

This case arose from a controlled drug purchase conducted by Robert LaGrave, a confidential informant cooperating with police officers assigned to the Washington County Narcotics Task Force. Hagerstown Police Officer Frank Toston, an agent with the Task Force, testified at Chamberlain's trial that he had first encountered the informant, LaGrave, during an unrelated investigation, which led to the recovery of "a small amount of crack cocaine" and "other drug paraphernalia" from LaGrave's apartment. Seeking to avoid the legal consequences he faced, LaGrave "indicated his willingness to cooperate . . . with other investigations."

Among the persons LaGrave identified to the Task Force as "involved" in the sale of narcotics was Chamberlain, whom he knew as they had previously lived in the same

apartment building. On April 1, 2015, members of the Task Force arranged for LaGrave to conduct a controlled drug purchase from Chamberlain at his residence.

LaGrave walked into the Hagerstown Police Station and, at the direction of members of the Task Force, called Chamberlain. During that call, which was recorded and subsequently played before the jury, the two men agreed that LaGrave would enter Chamberlain's apartment through a side entrance, whereupon he would purchase a "G," which, according to the State, was understood to mean a gram of heroin. LaGrave was searched by a Task Force member and found to be free of cash and contraband, except for the pre-recorded bills he was given to effect the controlled purchase. Then, equipped with a hand-held video recorder, Chamberlain was transported from the police station and dropped off several blocks away, with instructions to walk to Chamberlain's residence and consummate the drug purchase. According to the original plan, LaGrave would be picked up in a Task Force vehicle several blocks away immediately after completing the controlled purchase.

LaGrave successfully conducted the controlled purchase. As he was leaving Chamberlain's apartment, however, a neighbor called out that he had spotted a police vehicle nearby, which caused LaGrave to deviate from the original plan. When he was several blocks away and no longer in earshot of Chamberlain or his neighbors, LaGrave called Officer Toston, and they agreed that LaGrave would walk in the opposite direction to the Hagerstown Police Station. When LaGrave arrived there, he was searched, and Task Force members recovered a small baggie of suspected heroin, which was

subsequently analyzed and determined to contain 0.90 grams of heroin. LaGrave no longer possessed the cash he had been given to make the controlled purchase.

Because the Task Force had several other suspects, in addition to Chamberlain, under investigation, they did not arrest him at that time. Consequently, they did not recover the currency that had been used in the controlled buy.

Chamberlain was subsequently charged, in a five-count indictment, with two counts each of distribution of heroin and possession of heroin, as well as maintaining a common nuisance. He was thereafter tried, by a jury sitting in the Circuit Court for Washington County, on the first two counts of that indictment, namely, distribution of heroin and possession of heroin. The jury found him guilty of both charges, and the court thereafter sentenced Chamberlain, as a subsequent offender, to forty years' imprisonment, with all but twenty years suspended, to be followed by three years' probation. He then noted this timely appeal.

DISCUSSION

I.

Chamberlain contends that the circuit court abused its discretion in declining to give his requested voir dire question, which, he claims, was "designed to expose juror bias against the defendant":

> 22. Under the law, the Defendant, Mr. LEWIS MARSELLOUS CHAMBERLAIN, has an absolute right to remain silent and refuse to testify. No adverse inference of guilt may be drawn from his refusal to testify. Is there any member of the prospective jury panel who believes that the Defendant has a duty or responsibility to testify or that he must be guilty merely because he may refuse to testify?

In refusing to propound that question, the circuit court, according to Chamberlain, effectively denied him the right to be tried by a fair and impartial jury.[1]

In support of that contention, Chamberlain raises several interrelated arguments, which boil down to two: first, that the circuit court erred in declining to propound the disputed voir dire question because it was mandatory; and second, that, even if the decision whether to propound the question was discretionary, the circuit court failed to exercise its discretion in "rejecting [the voir dire question] without consideration."

A. Whether Chamberlain's requested voir dire question was mandatory

In support of his contention that his proposed voir dire question 22 was mandatory, Chamberlain cites several Maryland decisions that have held that certain types of voir dire questions are mandatory upon a defendant's request. *See*, *e.g.*, *Thomas v. State*, 454 Md. 495, 513 (2017) (holding a trial court, upon a defendant's request, must determine whether "any witnesses testifying in the case—based on their occupation, status, or affiliation—may be favored or disfavored on the basis of that witness's occupation, status or affiliation, and then propound a voir dire question that is tailored to those specific occupations, statuses, or affiliations"); *Pearson v. State*, 437 Md. 350, 363 (2014) (holding that a trial court, upon a defendant's request, must propound a voir dire question directed toward whether a venireperson has "strong feelings" about the crime

[1] Although Chamberlain ultimately accepted the empaneled jury without qualification, we have held that, in so doing, a defendant does not waive a subsequent challenge to a trial court's refusal to propound a voir dire question. *Marquardt v. State*, 164 Md. App. 95, 143 (2005); *see State v. Stringfellow*, 425 Md. 461, 471 (2012) (citing *Marquardt* with approval).

with which the defendant is charged); *State v. Shim*, 418 Md. 37, 54 (2011) (holding that a trial court, upon a defendant's request, must ask whether any member of the venire has "such strong feelings about" the crimes charged that it would be difficult "to fairly and impartially weigh the facts"), *abrogated by Pearson*, 437 Md. at 363; *Moore v. State*, 412 Md. 635, 640 (2010) (holding that a trial court, upon a defendant's request, must ask whether any member of the venire "would tend to view the testimony of witnesses called by the defense with more skepticism than that of witnesses called by the State, merely because they were called by the defense") (citation and quotation omitted); *Thompson v. State*, 229 Md. App. 385, 411 (2016) (holding that a trial court, upon a defendant's request, must ask whether any member of the venire has "strong feelings" regarding the possession of firearms, if such possession is "a crucial element of" a charged offense).

Chamberlain nonetheless acknowledges that Maryland appellate courts previously have upheld the denial of claims similar or even identical to his, reasoning that the specific type of voir dire question he submitted was more akin to a jury instruction and that a trial court does not abuse its discretion in declining to propound such a question during voir dire. He contends, however, that our decisions rest upon a faulty foundation, *Twining v. State*, 234 Md. 97 (1964), which purportedly has been "undermine[d]" by subsequent changes in the law, specifically, the de facto abrogation, by the Court of Appeals, of the first part of Article 23 of the Declaration of Rights, the

jury-as-judges-of-law provision.[2] We should instead, Chamberlain suggests, look to judicial decisions from other states,[3] which hold that a defendant is entitled to ask voir dire questions directed to whether venirepersons would follow a court's instructions on the law. He further cites several academic studies,[4] which call into question whether jurors understand the instructions they are given and that, therefore, instructions are no substitute for additional probing questions during voir dire.

[2] *See, e.g.*, *Stevenson v. State*, 289 Md. 167 (1980) (effectively abolishing advisory jury instructions in criminal cases); *Montgomery v. State*, 292 Md. 84 (1981) (same); *Unger v. State*, 427 Md. 383 (2012) (holding that a person, convicted by a jury that had been given advisory instructions, may seek vacatur of that conviction, notwithstanding his failure to raise such a claim in a prior postconviction proceeding).

[3] Chamberlain cites *State v. Hightower*, 417 S.E.2d 237, 240 (N.C. 1992); *State v. Moore*, 585 A.2d 864, 883 (N.J. 1991); *State v. Cere*, 480 A.2d 195 (N.H. 1984); *People v. Zehr*, 469 N.E.2d 1062, 1064 (Ill. 1984); *State v. Lumumba*, 601 A.2d 1178 (N.J. Super. Ct. App. Div. 1992); *People v. Skis*, 523 N.E.2d 983, 988 (Ill. App. Ct. 1988); and *Jones v. State*, 378 So. 2d 797 (Fla. Dist. Ct. App. 1980). We note that an identical argument was raised in *Baker v. State*, 157 Md. App. 600 (2004), citing many of the same decisions. *Id.* at 617. We further note that all these jurisdictions employ a more expansive scope of voir dire than Maryland, which continues to adhere to "limited" voir dire, in which questions may be directed to uncovering cause for disqualification but not to assist counsel in the intelligent exercise of peremptory challenges. *See* Nancy S. Forster, *Between a Rock and a Hard Place: Maryland Criminal Defendants, Already Subject to Severely Limited Voir Dire, Now Also Face the Prospect of Anonymous Juries*, 40 U. BALT. L.F. 229, 245-46 (2010) (stating that, "of those states that have addressed the issue, only California, Pennsylvania, and Maryland limit *voir dire* to questioning solely for the purpose of determining causes for disqualification") (footnotes omitted); *id.* at 245 n.119 (including, among the States that permit expanded voir dire, Florida, Illinois, New Hampshire, New Jersey, and North Carolina).

[4] See the numerous law review articles cited in the footnotes at pages 16-18 of Appellant's Brief.

In *Twining*, the defendant had been accused of bastardy[5] and, during voir dire, had requested the trial court to ask the venirepersons whether they "would give the accused the benefit of the presumption of innocence and the burden of proof." *Id.* at 99. The Court first recited the standard of review, which, at that time, was abuse of discretion, *id.* (citing *Grogg v. State*, 231 Md. 530, 532 (1963)), but without any of the subsequent gloss adopted in more recent decisions, which have gradually circumscribed a trial court's discretion in propounding voir dire questions.[6] It then concluded that the trial court had

[5] At the time of Twining's trial, bastardy was a criminal offense in Maryland. *See* Md. Code (1957), Art. 12, §§ 1, 2, 5, 9. Shortly after his conviction, Article 12 was repealed, and a new subtitle, "Paternity Proceedings," was added to Article 16. 1963 Md. Laws, ch. 722, at 1497. The result was to "entirely revis[e] the laws" of Maryland "concerning bastardy and fornication and paternity proceedings." *Id.* Thereafter, jury trials in such cases were to "proceed as far as practical in accordance with the statutes, rules, and practice pertaining to the selection and empanelling of jurors and trial before juries in other civil cases[.]" Md. Code (1957, 1966 Repl. Vol.), Art. 16, § 66F(d).

[6] Even a recent decision of the Court of Appeals has set forth the following deferential standard as the default rule: "In the absence of a statute or rule prescribing the questions to be asked of venirepersons during the examination, 'the subject is left largely to the sound discretion of the court in each particular case.'" *Moore v. State*, 412 Md. 635, 644 (2010) (quoting *Corens v. State*, 185 Md. 561, 564 (1946)). Nonetheless, it is beyond dispute that a long line of decisions, rendered over the past few decades, has gradually circumscribed a trial court's discretion in conducting voir dire, both in the content of the questions and in their form. *See, e.g.*, *Thomas v. State*, 454 Md. 495, 513 (2017) (holding that a specifically tailored occupational bias question is mandatory if the court determines that "any witnesses testifying in the case—based on their occupation, status, or affiliation—may be favored or disfavored on the basis of that witness's occupation, status or affiliation"); *Pearson v. State*, 437 Md. 350, 363 (2014) (holding that a "strong feelings" question about a charged offense is mandatory); *Atkins v. State*, 421 Md. 434, 454 (2011) (holding, "based on the particular facts in this case," that a trial court had abused its discretion in giving an "anti-CSI" voir dire question upon the State's request); *Wright v. State*, 411 Md. 503 (2009) (disapproving the practice of asking voir (continued)

not abused its discretion in refusing the defendant's request to propound the question at issue. The Court reasoned that the "rules of law" stated in the proposed question "were fully and fairly covered in subsequent instructions to the jury" and that it is "generally recognized that it is inappropriate to instruct on the law at this stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." *Twining*, 234 Md. at 100 (citation omitted).

Then, almost as an afterthought, the Court observed: "This would seem to be particularly true in Maryland, where the courts' instructions are only advisory." *Id.* The Court's observation apparently[7] referred to Rule 756, which then provided that a circuit court "shall" give advisory instructions in criminal trials.[8] Md. Rule 756 b (1963). That rule, in turn, was grounded upon Article XV, § 5 of the Maryland Constitution, now the first paragraph of Article 23 of the Declaration of Rights,[9] which stated (and still states): "In the trial of all criminal cases, the Jury shall be the Judges of Law as well as of fact,

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dire questions *en masse*); *Dingle v. State*, 361 Md. 1, 21 (2000) (disapproving the use of compound questions during voir dire).

[7] The Court's opinion did not cite either Rule 756 or the Maryland Constitutional provision upon which that rule was based.

[8] Rule 756 was the antecedent of present-day Rule 4-325. Unlike the present-day rule, Rule 756 provided for advisory instructions and furthermore mandated that "[t]he court shall in every case in which instructions are given to the jury, instruct the jury that they are the judges of the law and that the court's instructions are advisory only." Md. Rule 756 b (1963).

[9] Article XV, § 5 was subsequently transferred to Article 23 of the Maryland Declaration of Rights. 1977 Md. Laws, ch. 681, at 2747-49, ratified Nov. 7, 1978.

except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

We do not think that *Twining*'s holding concerning the voir dire question at issue has been, as Chamberlain insists, "undermine[d]" by subsequent changes in the law. Several decisions, issued well after the date, in 1980, when the Court of Appeals effectively abolished advisory jury instructions, have reaffirmed *Twining*'s holding that a circuit court is generally not obligated to give a voir dire question that is subsequently covered by a jury instruction and even cited it as authority. *See, e.g.*, *Stewart v. State*, 399 Md. 146, 162-63 (2007) (observing that "questions asking whether prospective jurors would follow the court's instructions on the law are disfavored in Maryland and a court does not abuse its discretion in refusing to ask them") (citing *State v. Logan*, 394 Md. 378, 399 (2006)); *Logan*, 394 Md. at 399 (noting that "solicitation of whether prospective jurors would follow the court's instructions on the law" is a practice that is "generally disfavored in Maryland") (citing *Twining*, 234 Md. at 100)); *Thompson*, 229 Md. App. at 404-05 (collecting cases); *Marquardt v. State*, 164 Md. App. 95, 144 (2005) (observing that "[w]e begin by stating that this Court has not, nor could it, retreat from *Twining*" and that "[w]e have consistently held that voir dire need not include matters that will be dealt with in the jury instructions") (collecting cases). Simply stated, *Twining*'s holding did not depend upon the fact that advisory jury instructions were then mandated in Maryland criminal trials, and its remark in that regard was dictum.

Even if Chamberlain were correct that *Twining* was based upon what is now Article 23 of the Declaration of Rights, we would still decline his invitation to "overrule"

it. We simply lack the authority to do so. In *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court "reaffirm[ed]" that if "a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," a lower court "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237 (quoting *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989)). Although we are aware of no similar declaration by the Court of Appeals, we do not doubt that our State's highest Court would prefer for us to adhere to the same restraining principle, which is consistent with our role as an intermediate appellate court. We reiterate what we said in *Baker v. State*, 157 Md. App. 600 (2004):

> In any event, it is up to the Court of Appeals, not this Court, to decide, as appellant suggests, that the reasoning of *Twining* is "now outmoded."

Id. at 618.[10]

It has, for many years, been the rule in Maryland that voir dire is not intended to serve the purpose of jury instructions. That is especially true where, as here, the trial court asked whether there "was any member of the prospective jury panel who knows of any reason whatsoever why you believe you could not sit as fair and impartial juror and decide this case solely upon the evidence to be presented during the course of the trial," that is, in compliance with the instructions that would be and subsequently were

[10] Because we are bound by *Twining* and its progeny, we shall not address Chamberlain's out-of-state and secondary authorities to the contrary.

provided, and no venireperson responded affirmatively.[11] We therefore conclude that the trial court did not err or abuse its discretion in declining Chamberlain's request to propound his proposed voir dire Question Number 22.

B. Whether the circuit court failed to exercise its discretion

In the alternative, Chamberlain maintains that, even if his proposed voir dire question was not mandatory, the circuit court "had the discretion to ask it." Seizing on a remark the court made in declining his request, Chamberlain asserts that the court failed to exercise its discretion to consider his request and, ipso facto, abused its discretion. We disagree.

This claim is focused upon the following colloquy:

> [DEFENSE COUNSEL]: Your Honor, just so you know just for the record, did you ask 22 and 25?
>
> THE COURT: **No I didn't ask 22 and I'm not going to ask number 22.**
>
> [DEFENSE COUNSEL]: Okay.
>
> THE COURT: I think that will be covered in the instructions if we get there. . . .
>
> * * *

[11] The trial court further asked whether anyone would be more likely to believe a State's witness or less likely to believe a defense witness; whether anyone disagreed with the proposition that the State must prove the defendant's guilt beyond a reasonable doubt and that, otherwise, the jury has a duty to acquit; whether anyone would be unable to base their verdict solely upon the evidence presented, without regard to pity, sympathy, passion, or any other emotion; and whether anyone had a moral, religious, or philosophical belief that would prevent them from sitting in judgment of another human being. No member of the venire answered affirmatively to any of these questions.

> [DEFENSE COUNSEL]: I note my objection for 22 your Honor. Thank you.
>
> THE COURT: What is the basis for that, Mr. [defense counsel]? I mean if he doesn't testify, I will certainly file the instruction. If he does testify, it's moot. Your request is denied.
>
> [DEFENSE COUNSEL]: My - - My - - Do you need me to respond? No.
>
> THE COURT: **Well do you want to respond? Sure. I'll be glad to hear from you.**
>
> [DEFENSE COUNSEL]: For the reason that at this point when we're impaneling the jurors and you impanel a juror, if a juror believes that if my client [does] not take the stand, does not testify that somehow there is an inference of guilt, even with the jury instruction, that might already be seeded in their thought that he needs to take the stand, so
>
> THE COURT: I find that the jurors are very willing and try very hard to follow the Court's instructions. **Uh, maybe I'm way off base, but I have declined always to give that particular voir dire question because I think it is not appropriate.** It doesn't go to picking an unbiased jury in this matter and jurors will follow the instructions. So your request is denied.

(Emphasis added.)

Chamberlain compares this case to *Gunning v. State*, 347 Md. 332 (1997), in which the Court of Appeals found abuse of discretion where a trial judge had stated that he "never" gave the pattern instruction on eyewitness identification of the defendant because "'identification is a question of fact' that, unlike a question of law, requires no instruction to the jury." *Id.* at 335. The instant case, however, is vastly different.

We think it is clear from the colloquy that the circuit court, in the instant case, gave reasoned consideration to Chamberlain's request but rejected it nonetheless. Moreover, whereas the circuit court, in *Gunning*, stated that it never gave a specified pattern instruction, the court, in the case before us, stated, in effect, that it never departed from the legal rule approved by the Court of Appeals in *Twining* and its progeny. Those are not comparable situations—clearly, the existence of a pattern instruction means that there may be circumstances where it is appropriate to give that instruction, *see Minger v. State*, 157 Md. App. 157, 161 n.1 (2004) (noting that "[a]ppellate courts in Maryland strongly favor the use of pattern jury instructions"), whereas the circuit court, in the instant case, merely expressed its policy of consistently following established and binding precedent. *See, e.g., Holland v. State*, 122 Md. App. 5432, 547 (1998) (observing that where "a judge, even as a general rule, has a policy of imposing stiff sentences on those who bring a 'killer drug' into his community," there is no failure to exercise discretion). We conclude that the circuit court properly exercised its discretion in declining Chamberlain's request to propound his proposed voir dire Question Number 22.

II.

Chamberlain contends that the circuit court plainly erred in failing, sua sponte, to declare a mistrial after John LaGrave, whom he characterizes as "the prosecution's key witness," testified that Chamberlain had supplied him with heroin and customers during the time period that preceded the controlled purchase and, furthermore, that Chamberlain had been on probation at the time of the controlled purchase. That testimony, Chamberlain contends, should have been excluded under Maryland Rule 5-404(b), and its

admission into evidence, he complains, was so unfairly prejudicial that we should overlook the failure of his trial counsel to move for a mistrial below. We are not persuaded.

First, we set forth the relevant context. Because the defense focused upon the credibility (or, in its view, the lack thereof) of the informant, the State sought to prove, in part through LaGrave's testimony, that the drug he had purchased on the date at issue was, in fact, heroin and not marijuana, as the defense alleged. During the State's case-in-chief, LaGrave testified in part as follows:

> [LAGRAVE]: And u'm, yeah I called Mr. Chamberlain on the speaker phone and arranged to buy a gram.
>
> [THE STATE]: A gram of what?
>
> [LAGRAVE]: Of heroin.
>
> [THE STATE]: If you said you were going to buy, wanted to know if you could buy a "G", what would that have been?
>
> [LAGRAVE]: A "G" is a gram of heroin.
>
> [THE STATE]: Could it have been marijuana? Cocaine?
>
> [LAGRAVE]: No as far as I know he never sold marijuana. It couldn't have been anything else.
>
> [THE STATE]: Would you have to clarify more than a "G", cocaine? How was it understood to be heroin?
>
> [LAGRAVE]: Because at the time, as far as I knew, that's what I was primarily selling. Cocaine was kind of like a side thing.
>
> [THE STATE]: How do - - How do you know Lewis Chamberlain?

> [LAGRAVE]: He was my neighbor.
>
> [THE STATE]: Was he a neighbor at that time on April 1st?
>
> [LAGRAVE]: No not on April 1st. At the time I was living on the corner of Locust and Washington and uh he lived in the apartment building next to mine. They were pretty much attached but they were next to each other. It was basically two doors over and, u'm, you know **he was just a neighbor, talked a few times and he let me know that he sold heroin.**
>
> [THE STATE]: All right. When you met him and he told you that, what did you do?
>
> [LAGRAVE]: Well at first **he was just you know putting it out there so I could try and find people to buy it.** U'm, but I really didn't know anyone at the time. And I started using myself and he began to supply me. U'm, after which time, he, uh, **he moved and would come over to my apartment and give me bags to sell for him. I didn't really know clientele or anything so he sent them to me.**
>
> [THE STATE]: How long did that go on?
>
> [LAGRAVE]: **A couple months.** I'm not exactly sure.

(Emphasis added.) Defense counsel did not object.

Then, during redirect examination, the State sought to clarify LaGrave's testimony regarding the choppy video footage, obtained from the hand-worn video camera, which LaGrave had attempted to deploy inconspicuously. The following exchange occurred:

> [THE STATE]: But what did you see? You had a better vantage point perhaps than the video.
>
> [LAGRAVE]: Yeah because the - - like I said it was in my hand inconspicuous. I was trying to keep it down by my waist otherwise you know why are you waiving your hand around. [S]o I uh - - Yeah I saw clear as day you know he was weighing heroin on a scale, bag it bagging it up for me. U'm I remember the - -

> [THE STATE]: Is it possible - - You didn't see - - I think I asked you that. You didn't see marijuana?
>
> [LAGRAVE]: No there was no marijuana.
>
> [THE STATE]" Okay.
>
> [LAGRAVE]: **He was actually on probation. He didn't smoke marijuana for that reason.**
>
> [DEFENSE COUNSEL]: **Objection your Honor.**
>
> [LAGRAVE]: Oh I'm sorry.
>
> [DEFESNE COUNSEL]: **Move to strike.**
>
> [LAGRAVE]: I'm so sorry.
>
> THE COURT: **Sustained. The jury will disregard that last testimony.**

(Emphasis added). Although the defense successfully objected and moved to strike the offending testimony, it did not request a mistrial, which Chamberlain now insists was the only proper remedy.

"Plain error review is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Newton v. State*, 455 Md. 341, 364 (2017). Before we may exercise our discretion to recognize plain error, the following conditions must be 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.

Id. (citations and quotations omitted).

In the instant case, several of these conditions have not been met. For one thing, Chamberlain's trial counsel affirmatively waived this claim below when he withdrew his request for the trial court to give *Maryland Criminal Pattern Jury Instruction* ("MPJI-Cr") 3:23 (Maryland State Bar Association 2017), which instructs that the jury "may not consider" other bad acts "as evidence that the defendant is of bad character or has a tendency to commit crime."

Moreover, it is far from clear that the testimony regarding LaGrave's previous dealings with Chamberlain was inadmissible. In *Odum v. State*, 412 Md. 593 (2010), the Court of Appeals explained that "the strictures of 'other crimes' evidence law, now embodied in Rule 5-404(b), do not apply to evidence of crimes (or other bad acts or wrongs) that arise during the same transaction and are intrinsic to the charged crime or crimes." *Id.* at 611. The Court further defined "intrinsic" to include, "at a minimum, other crimes that are so connected or blended in point of time or circumstances with the crime or crimes charged that they form a single transaction, and the crime or crimes charged cannot be fully shown or explained without evidence of the other crimes." *Id.*

In the instant case, whether LaGrave had, in the recent past, purchased heroin from Chamberlain was relevant to establish that he was, at the relevant time, also seeking to purchase heroin from Chamberlain, which was a contested issue at trial. Although the degree to which the past and then-present drug purchases were intertwined may not have

been as clear as in *Odum*, it suffices to say that, even if it had been error to permit the testimony, it was not at all obvious error. Thus, for this additional reason, plain error review is not appropriate. *See Newton*, 455 Md. at 364 (noting that, to qualify for plain error review, "the legal error must be clear or obvious, rather than subject to reasonable dispute").

Finally, as the State points out, granting a mistrial sua sponte is an extraordinary remedy, which should only rarely be taken because of the defendant's right to be tried by the jury then constituted. *State v. Baker*, 453 Md. 32, 47-48 (2017). Especially given the defense's appropriate and timely objection and motion to strike LaGrave's inadmissible testimony concerning Chamberlain's probation status, it was certainly not an abuse of discretion for the court not to sua sponte order a mistrial.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.