Circuit Court for Wicomico County
Case No. C-22-CR-21-000052

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 172

September Term, 2023

KYLE ALEXANDER CAREY

v.

STATE OF MARYLAND

Ripken,
Tang,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 2, 2024

*This is a per curiam opinion. Consistent with Rule 1-104, the opinion is not precedent within the rule of stare decisis nor may it be cited as persuasive authority.

Following a jury trial in the Circuit Court for Wicomico County, Kyle Alexander Carey, appellant, was convicted of possession of a firearm with a nexus to drug trafficking, possession with intent to distribute methamphetamine, possession with intent to distribute marijuana, possession of methamphetamine, possession of marijuana, two counts of possession of a firearm with a disqualifying conviction, and illegal possession of ammunition. He raises two issues on appeal: (1) whether the trial court erred in its response to a jury note regarding temporal intent, and (2) whether the trial court erred in failing to vacate one of his convictions for possessing a firearm with a disqualifying conviction. For the reasons that follow, we shall vacate one of his convictions for possession of a firearm with a disqualifying conviction but otherwise affirm the judgments of the circuit court.

BACKGROUND

At trial, the State presented evidence that the Wicomico County Sheriff's Office had been investigating a house located at 604 North Westover Drive in Salisbury for several months, and that appellant had been seen at that location approximately 10 times during that period. On December 6, 2020, the police responded to the residence while investigating an unrelated traffic stop. When they arrived, the police observed appellant standing next to the open driver's side door of a vehicle that was parked in the backyard. Appellant fled upon seeing the police, but was quickly apprehended. During a search of the vehicle, the police recovered a .45 caliber Smith and Wesson handgun in the center console, which was located next to a scale containing marijuana residue. A Tupperware container containing 16 methamphetamine pills and marijuana was also found in the back

seat of the vehicle. Subsequent testing revealed that appellant was a "major contributor" to a mix of DNA found on the handgun and the handgun magazine.

The police also obtained a search warrant for appellant's Facebook profile. That search uncovered multiple Facebook messages between appellant and other individuals between October 10, 2020, and December 6, 2020. In those messages, appellant and the other individuals used code words to discuss the sale of drugs, specifically marijuana and methamphetamine. Special Investigator Michael Daugherty was qualified as an expert in "drug evaluation, identification, and investigations of controlled dangerous substances" and opined that the drugs found in the vehicle were possessed for the purpose of distribution based on the Facebook messages, the presence of the firearm and scale, the absence of evidence of drug use, and the fact that the contraband was not found in appellant's direct possession.

During deliberations, the jury sent a note asking: "Does the defendant have to have intent to sell the exact date in order to qualify for 'intent to distribute?' Basically is there a time limit for intent to distribute?" Following a brief discussion, defense counsel indicated that he "would defer to the indictment because the wording on the indictment says on or about this day. I think that's the safest way." The court then stated that its proposed response to the jury note would be that the "'Defendant is charged with [having] the intent to distribute,' and I put in quotes, 'on or about December 6th, 2020.'" Thereafter, the prosecutor requested that the court's response "might also say – because they did ask a positive, is there a time limit – so maybe like, no, there's no time limit, the indictment reads on or about December 6th, 2020." Defense counsel indicated that he did not "have any

objection to that." Thereafter, the court amended its proposed response to the jury note to read: "There is no time limit. The Defendant is charged with having the intent to distribute on or about December 6th of 2020." After reading this response to the parties, the court asked if there was "Any strenuous objection from anyone?" Defense counsel stated, "I don't have any objection at all." The trial court then provided that response to the jury.

DISCUSSION

On appeal, appellant first contends that the court's addition of the phrase "[t]here is no time limit" in its response to the jury note constituted error. Specifically, he asserts that it "allowed jurors to convict [him] even if they did not believe he intended to distribute drugs on or about December 6, 2020, but instead believed he intended to distribute drugs in October, 2020[,]" which was the time that several of the Facebook messages regarding drug distribution had been sent. Acknowledging that he did not object at trial, he requests this Court to engage in plain error review.

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Supreme Court of Maryland has emphasized that appellate courts should "rarely exercise" that discretion because "considerations of both fairness and judicial efficiency ordinarily require 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[.]" *Ray v. State,* 435 Md. 1, 23 (2013) (quotation marks and citation omitted). Therefore, plain error review "is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Savoy v. State*, 218 Md. App. 130, 145 (2014) (quotation marks and citation omitted). Under the circumstances presented, we

decline to overlook the lack of preservation and thus do not exercise our discretion to engage in plain error review. *See Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so[,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation" (emphasis omitted)).

Relying on *Testerman v. State*, 170 Md. App. 324 (2006), appellant alternatively asks us to conclude that his defense counsel's failure to preserve this issue constituted ineffective assistance of counsel. However, "[p]ost-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel . . . omitted to act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003). And, unlike *Testerman*, we are not persuaded that the record in this case is sufficiently developed to permit a fair evaluation of appellant's claim that his defense counsel was ineffective. Consequently, *Testerman* does not require us to consider that claim on direct appeal, and we decline to do so.

Appellant also claims that the court erred in failing to vacate one of his convictions for possessing a firearm with a disqualifying conviction. The State agrees, as do we. Appellant was convicted of two counts of possessing a firearm with a disqualifying conviction based on his possession of a single firearm on the same date. The first count (Count 9) alleged that appellant was barred from possessing a firearm due to his having been convicted of a disqualifying crime specifically, Conspiracy to Participate in a

Racketeering Enterprise. The second count (Count 10) alleged that appellant was barred from possessing a firearm based on his having been convicted of a violation classified as a common law crime and having received a term of imprisonment of more than 2 years. In *Clark v. State*, 218 Md. App. 230, 253 (2014), this Court recognized that Section 5-133 of the Public Safety Article does "not support multiple convictions based on several prior qualifying offenses where there [is] only a single act of possession" (quotation marks and citation omitted). We shall therefore vacate appellant's conviction on Count 10.

CONVICTION ON COUNT 10 VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID 50% BY APPELLANT AND 50% BY WICOMICO COUNTY.