Circuit Court for Frederick County
Case No. C-10-CR-21-000535

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 968

September Term, 2023

NORRIS BERNARD ELLIS

v.

STATE OF MARYLAND

Wells, C.J.,
Tang,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: December 4, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Frederick County found Norris Bernard Ellis, appellant, guilty of rape in the first degree and assault in the first degree. The court imposed a life sentence for the rape and a concurrent sentence of twenty-five years' imprisonment for first-degree assault. Ellis noted this timely appeal, raising three issues for our review:

> I. Whether the trial court erred in refusing to hold a *Daubert* hearing regarding the testimony of a State expert in strangulation assessments;
>
> II. Whether the trial court committed plain error in propounding voir dire questions in such a manner as to leave the determination of bias and impartiality to the individual jurors; and in the alternative, whether trial counsel was ineffective in failing to object to the improper compound voir dire questions; and
>
> III. Whether the sentence for first-degree assault must merge with the sentence for first-degree rape.

We shall remand with directions to vacate Ellis's sentence for assault in the first degree but otherwise affirm the judgments.

BACKGROUND

On July 3, 2021, X.[1] went out for a night of bar hopping with some friends. Near closing time, she left the bar where they had been drinking and attempted to make her way home by herself, a distance which was about twenty minutes away by foot.[2] Ellis saw her and followed her.

[1] We denote the victim in this case by an initial unrelated to her name. Md. Rule 8-125(a)(2), (b). To further the purpose of the rule, we redact the identities of other witnesses.

[2] X. called a boyfriend and asked him to take her home, but she left before he arrived to pick her up. The boyfriend drove along the route from the bar to X.'s apartment but never found her that night. Phone records indicated they communicated by text that night but that, around the time X. was assaulted, she stopped responding to text messages.

Ellis "grabbed [her] from behind" and "dragged" her into an alley. X. told him to "[g]et the fuck off" her, and he replied, "[Y]ou need to do what I tell you or I will kill you." Ellis dragged X. to a concrete loading dock at the end of the alley and "pushed" her "very forcefully," causing her to fall "onto [her] hands and knees onto the concrete slab." He then "removed" X.'s underwear and forcibly engaged in vaginal intercourse with her.

X. was still struggling with her attacker. Ellis, however, "forcefully turned [her] over slammed [her] down onto the concrete slab." While X. was asking Ellis to "please stop," he "punched [her] on the right side of [her] face about five times." He then "put his hand around" her throat and "strangled" her, telling X. to "shut up, bitch, shut up."

X. "went into … survival mode" while Ellis continued to assault her. After having vaginal intercourse, Ellis held X.'s legs down and "tried to perform oral sex on [her]." After he concluded, Ellis stood up and exclaimed, "I can't believe I did this to you." He further declared, "I'm going away for a long time." X. protested that she had to go home to take her dog out, and Ellis walked away "towards downtown." X. looked around for her purse, cell phone, and keys, but she had difficulty seeing because her eye was swollen from the assault. X. finally walked home, in the opposite direction from where Ellis had gone, without her purse or its contents.

When X. arrived at her apartment, she encountered a close friend, L.C., who accompanied her earlier that evening and was concerned for her well-being. L.C. was accompanied by her friend, J. The trio returned to the crime scene in J.'s car, and upon arriving, they found X.'s keys, purse, and cell phone. The phone was smashed and inoperable.

J. drove them back to X.'s apartment and then went home because he had to work the following day. L.C. called 911 on a borrowed phone (she had inadvertently left her phone in J.'s car), and police officers responded shortly before 5 a.m. on July 4.

X. gave them a physical description of her assailant. She was taken to Frederick Health Hospital, where a SAFE examination was performed later that day.

Police officers recovered surveillance footage from several nearby businesses. They were able to determine that the assailant followed X. as she walked from the bar towards her apartment. Several days later, an off-duty police officer who saw a department-issued notice spotted the assailant in a Home Depot in Frederick.[3] That officer photographed the suspect's vehicle as he drove away, which enabled police to identify Ellis as the attacker. It was subsequently determined that Ellis's DNA matched that detected in X.'s rape kit.

A three-count indictment was filed in the Circuit Court for Frederick County, charging Ellis with rape in the first degree and assault in the first and second degree. A jury trial was held; evidence was presented over a period of five days. Ellis's defense was based upon consent—according to Ellis, he met X. in a bar that night, and they later rendezvoused in the alley, where he paid her $175 for sex.

The jury found Ellis guilty of first- and second-degree rape and first- and second-degree assault. The court imposed a life sentence for first-degree rape and a

[3] Ellis was wearing "very distinct shoes," both at the time of the assault and when he was spotted at the Home Depot several days later.

concurrent sentence of twenty-five years' imprisonment for first-degree assault.[4] This timely appeal followed.

Additional facts are included where pertinent to the discussion of the issues.

DISCUSSION

I.

Parties' Contentions

Ellis contends that the trial court erred in refusing to hold a *Daubert* hearing regarding the testimony of a State's expert in strangulation assessments.

The State counters that this claim was not properly raised in the trial court and, therefore, is not properly before us. The State further contends that Ellis's contentions are either "factually inaccurate" or "legally unfounded."

Additional Facts Pertaining to the Claim

On the morning of the first day of trial, prior to voir dire, trial counsel moved to exclude the testimony of a State's expert, Pamela Holtzinger, Ph.D., who was expected to testify about strangulation. Although the grounds underlying his oral motion were not entirely clear, it appears that his principal complaint was that the State had failed to provide either a copy of Dr. Holtzinger's curriculum vitae ("CV") or her report. Trial counsel further made a passing reference to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509

[4] During the sentencing hearing, the court imposed a thirty-year sentence for first-degree assault, which it subsequently corrected to twenty-five years, which is the maximum penalty permitted for that offense. Md. Code (2002, 2021 Repl. Vol.), Criminal Law Article, § 3-202(c).

U.S. 579 (1993), declaring in response to the trial court's question whether he had "another argument to make":

> Yes. Expert report, no CV, and I've not been -- no qualifications, she has not been passed under a Daubert examination.

The prosecutor informed the trial court that she had provided notice of the State's intent to call Dr. Holtzinger in September 2022, approximately eight months prior to trial. The trial court denied the motion to exclude Dr. Holtzinger's testimony but stated that it would allow the defense to voir dire her prior to testifying and that it would reconsider its ruling at that time.

On the fourth day of trial, prior to Dr. Holtzinger's scheduled testimony, the trial court held a bench conference to permit trial counsel to explore the issue further. The following occurred:

> [DEFENSECOUNSEL]: I'm just going to the heart of the -- **I don't care about her, the rest of her coming in as an expert as an RN, just to her conclusion**, how --
>
> THE COURT: All right. Let's get that issue resolved.
>
> * * *
>
> [PROSECUTOR]: I just want to -- so, Your Honor, I think the State, obviously, provided that back in 2021.[5] It's, it's very detailed and it's not a pro forma document generated by the State. I actually contacted Dr. Holtzinger and we discussed this case after she reviewed all of the SAFE exams, both SAFE exams; and, and then we formulated this expect notice together based on her conclusions. So, it is, although not a report generated by her, it was made by me in conjunction with her and in consultation with her.

[5] It appears that the prosecutor misspoke. The record indicates that the notice was provided on September 22, 2022, approximately eight months prior to trial. The State additionally filed a substantially similar notice one month prior to the start of trial.

And I think it's very detailed. If Your Honor can read it, it's not a pro forma disclosure. It's very specific to the facts of this case.

I did provide defense counsel with a CV on Monday. I provided him with an updated CV last night that she gave me that is completely up-to-date. Hers is constantly updating.

So, I think at this point, Your Honor, the State has fully complied subject to voir dire, and her being qualified as an expert with the requirements under the rules for an expert notice.

THE COURT: All right. Mr. [defense counsel], I'll hear from you, sir.

[DEFENSE COUNSEL]: Thank you, Your Honor. **Our only issue really with this whole testimony, Your Honor, is how she came to the conclusion. So, I think, ultimately, what she, they were saying she was going to opine to is that she suffered a near-fatal strangulation; and there's just nothing in this report, not even a report, nothing in this notice that says how she came to that conclusion.** So, it's just, and, and the, and the, and the law is very clear. You can't just say, you don't just take the expert's opinion because they say so. They have to show the methodology, what they used, how they got to that conclusion, why they got to the conclusion. Is it reliable? Is it scientifically reliable?

Is she -- when if there is a scientific study that talks about non-fatal strangulations, which I will say there is not, but even if there was, is she a doctor or someone who can opine to that? Is she a vascular surgeon? Did she see -- how is she coming to the conclusion? What studies did she do? What literature that I can then find other literature and say, well, what does it say in this, in this New England Journal of Medicine article under this thing that was peer-reviewed that, another side of this? That's why it's so important and nowadays in this new forum since Rockland's, Rochkind, whatever interpreted Daubert, you now must show not just that she's a, you know, general expert and she can testify about certain things; but as to the heart of what she's going to testify to, the ultimate conclusion. That has to put the defendant on notice of how she got there, not that she could get there. …

(Emphasis added.)

After further argument by counsel for the parties, the following occurred:

> THE COURT: All right. All right. **Before the Court is an issue of whether or not, not whether this witness can testify at all because defense counsel has indicated he doesn't, he's not going to question her qualifications as an expert SANE nurse; but whether or not she can specifically testify to an opinion in this case that the injuries are sufficient or concurrent with, or indicative of a near-death strangulation.** That's, is that, basically put the issue --
>
> [TRIAL COUNSEL]: **Yes, Your Honor.**

(Emphasis added.)

The trial court then denied the defense motion to preclude Dr. Holtzinger from opining whether X. suffered from a near-fatal strangulation. When trial counsel sought to clarify whether the trial court was "going to admit her as an expert no matter what," the court replied that its ruling was subject to the results of voir dire examination.

Defense counsel then conducted voir dire in the jury's presence (he declined the court's offer to conduct it outside of the jury's presence. Upon the conclusion of this examination, the trial court declared:

> Here, here, here's the issue that I'm having. I think Dr. Holtzinger, and the Court has considered all that it said it considered before, in addition to the Matthews case, which I'm sure you all have read, which is a Maryland Supreme Court case in 2022, which is the latest case on expert testimony. She's clearly an expert on strangulation. She's clearly an expert on SAFE nursing.
>
> **What I'm struggling with is whether she can opine that this was a near-death strangulation. She can say it was a non-death strangulation versus a death strangulation; but near death, I've heard nothing that makes me indicate that she can make that.**

(Emphasis added.) The court then granted trial counsel's motion. Defense counsel replied:

> **Thank you, Your Honor. I'm agreeable to that.** She's an expert in -- I'm, I'm not, I'm trying to, she's very capable, I understand that.

(Emphasis added.) Defense counsel subsequently declared:

> **That's the only thing I cared about.**

(Emphasis added.)

Analysis

This is a far simpler question than one might surmise by reading the briefs. As our detailed excerpts from the record disclose, the trial court granted the defense's motion to exclude Dr. Holtzinger's expert testimony to the extent it challenged her conclusion that X. suffered a near-fatal strangulation at the hands of Ellis. This was "the only thing [trial counsel] cared about." The trial court agreed with the defense and did not permit Dr. Holtzinger to testify about X's alleged strangulation. There is no issue properly raised for our review.

II.

Parties' Contentions

Ellis contends that the trial court erred in propounding compound questions during voir dire, in violation of *Dingle v. State*, 361 Md. 1 (2000), and its progeny. Acknowledging that trial counsel failed to preserve this claim for appeal, Ellis asks that we recognize plain error. In the alternative, he asks that we address his derivative claim that trial counsel rendered ineffective assistance in failing to object to the compound questions the court asked.

The State counters that we should decline to review Ellis's admittedly unpreserved claim for plain error. In addition, the State contends that Ellis "affirmatively waived his assignment of error by requesting the voir dire questions about which he now complains," which precludes us from considering the claim.

But even were we to excuse this affirmative waiver, the State contends that plain error review is unwarranted under the circumstances of this case. The State asserts that there is "no need to use this case as a vehicle to illuminate the law" because the law in this area has been settled since 2000. Furthermore, according to the State, Ellis cannot show that the *Dingle* error "affected the outcome of the proceedings."

Additional Facts Pertaining to the Claim

Several days before the beginning of trial, the parties submitted proposed written voir dire questions to the court. Among the question requested by the defense were:

> 19. Is there anything about the nature of the charge itself that would interfere with your impartiality?
>
> * * *
>
> 22. Does any member of the prospective jury panel hold any moral, political, religious, philosophical, or ethical convictions or beliefs that would prevent you from weighing the evidence and returning a fair and impartial verdict?

Among the voir dire questions the trial court asked were:

> All right. Ladies and gentlemen, in this case the defendant is alleged by the State to have committed a sexual offense. While sometimes nobody really wants to hear details of things like that that involve a sexual nature, things like that, is there anybody on the prospective jury panel that has such strong feelings about these types of offenses that they feel they cannot sit on this jury? If so, please stand.

> Ladies and gentlemen, do any of you hold any moral, political, religious, philosophical, or ethical convictions or beliefs that would prevent you from weighing the evidence in this case, and returning a fair and impartial verdict? If so, please stand.

Trial counsel did not object to any of the questions asked. Indeed, upon the conclusion of voir dire, the trial court observed, "Defense is satisfied with the voir dire." Subsequently, trial counsel unqualifiedly accepted the empaneled jury.

Analysis

Preservation

In criminal trials, objections to a trial court's rulings (other than to evidentiary rulings) are governed by Maryland Rule 4-323(c), which states:

> **(c) Objections to Other Rulings or Orders.** For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

"To preserve any claim involving a trial court's decision about whether to propound a voir dire question, a defendant must object to the court's ruling." *Foster v. State*, 247 Md. App. 642, 647 (2020), *cert. denied*, 475 Md. 687 (2021). In the instant case, trial counsel did not object to the court's voir dire questions, and therefore, the *Dingle* claim he raises on appeal is not preserved.

Waiver and Plain Error

If a criminal defendant asks a trial court to take a certain action and the trial court then does so, he may not complain on appeal that the trial court committed error in so doing. This precept is known as the "invited error" doctrine. *See*, *e.g.*, *State v. Rich*, 415 Md. 567, 579-81 (2010) (holding that an invited error resulted in an intentional waiver of the right to raise that claim of error on appeal). Here, trial counsel asked the trial court to propound two compound questions during voir dire. Although the trial court rephrased one of those questions so that it expressly asked about "strong feelings," the court's rephrasing did not alter its compound structure. As for the other question, the trial court propounded it in substantially the same form as trial counsel requested. Under these circumstances, we hold that any error in propounding compound questions during voir dire was invited by the defense.

"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) (quoting *Robinson v. State*, 410 Md. 91, 111 (2009)). We may exercise our discretion to engage in plain error review only if four conditions are satisfied. *Rich*, 415 Md. at 578. One of those conditions is that the defendant must not have "'intentionally relinquished'" or "'affirmatively waived'" the claim of error. *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). Because Ellis invited the error of which he now complains, we conclude that plain error review is not available.

Ineffective Assistance of Counsel

The Supreme Court of Maryland has emphasized repeatedly that an ineffective assistance claim generally should be addressed in a postconviction proceeding rather than on direct appeal, where the record typically is not suited to the task. *See*, *e.g.*, *Mosley v. State*, 378 Md. 548, 558-59 (2003) (declaring that a postconviction proceeding "is the most appropriate way to raise the claim of ineffective assistance of counsel"); *id.* at 560 (explaining that postconviction proceedings "are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or 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"). That is especially true where trial counsel may have had tactical reasons for acquiescing in the court's action because he was satisfied with the jury that had been selected.[6] But even were it true that trial counsel failed to object out of mere inadvertence, and even were we to assume for the sake of argument that the error was structural,[7] Ellis would still be

[6] We recognize that trial counsel's alleged deficient act occurred prior to the completion of jury selection. We further point out that he unconditionally accepted the empaneled jury, thereby waiving any previous objections he could have made to voir dire. *Foster*, 247 Md. App. at 647-48 (stating that "if the claim involves the court's decision to ask a voir dire question over a defense objection, the defendant must renew the objection upon the completion of jury selection"). *See State v. Stringfellow*, 425 Md. 461, 472-73 (2012) (declaring that a "prejudicial voir dire question, when propounded, may inject the very prejudice that voir dire attempts to filter out" and that, accordingly, an objection to such a question "relates directly to the composition of the jury" and is subject to waiver upon unqualified acceptance of the empaneled jury).

[7] Although it is difficult to apply harmless error analysis to claims of voir dire error because it is difficult to determine the effect of such errors on the jury, there are at least (continued)

required to prove prejudice,[8] *see Newton*, 455 Md. at 356-57, and it is doubtful whether he could do so on this record.

III.

Ellis contends that the circuit court erred in imposing separate sentences for assault in the first degree and rape in the first degree. The State agrees, and we accept its concession. *See*, *e.g.*, *Green v. State*, 243 Md. 75, 80-81 (1966) (requiring merger where the same facts form the basis for both an assault and a rape); *Paige v. State*, 222 Md. App. 190, 207 (2015) (same). As the State aptly explains in its brief:

> The critical question here is whether the two convictions were based "on the same act or acts," *i.e.*, whether the act the jury relied on to convict Ellis of first-degree assault—the strangulation—was the same act the jury relied on for his first-degree rape conviction. Notwithstanding the trial court's view of the evidence, examining the indictment, the jury instructions, the verdict sheet, and the argument of counsel, the record does not affirmatively indicate that the jury based the convictions on separate acts. Indeed, as Ellis points out, the prosecutor's closing argument invited the jury to consider the act of strangulation as the fact aggravating both assault and rape into their respective first degrees. Because the record does not unambiguously indicate

two decisions by our Supreme Court holding that the voir dire errors at issue in those cases were harmless. *State v. Jordan*, 480 Md. 490, 493-94 (2022) (holding that the trial court's refusal to ask *Kazadi*-type voir dire questions was subject to harmless error review and that, where the defendant testified on her own behalf, the trial court's refusal to ask a *Kazadi* question was harmless error); *Stringfellow*, 425 Md. at 473-77 (finding that jury instructions cured any error in asking anti-CSI voir dire questions).

[8] Unpreserved structural errors "are not automatically reversible, but, instead, are subject to plain error review." *Savoy v. State*, 420 Md. 232, 243 n.4 (2011). *See also Weaver v. Massachusetts*, 582 U.S. 286, 299 (2017) (declaring that "in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome'") (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)); *Newton v. State*, 455 Md. 341, 354 (2017) (observing that automatic reversal is not mandated where there is unpreserved structural error, but an appellate court may review for plain error) (citing *Savoy*, 420 Md. at 254, 255-56).

> that the convictions were based on separate acts, that ambiguity must be resolved in Ellis's favor. *Brooks v. State*, 439 Md. 698, 739 (2014).

We agree with this analysis and commend the State for adopting it. We therefore remand with instructions to vacate Ellis's sentence for first-degree assault.

CASE REMANDED TO THE CIRCUIT COURT FOR FREDERICK COUNTY WITH DIRECTIONS TO VACATE THE SENTENCE FOR ASSAULT IN THE FIRST DEGREE. JUDGMENTS OTHERWISE AFFIRMED. COSTS ASSESSED TWO THIRDS TO APPELLANT AND ONE THIRD TO FREDERICK COUNTY.