Circuit Court for Baltimore City
Case No. 121166013

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1223

September Term, 2022

DAQWAN A. SAWYER

v.

STATE OF MARYLAND

Wells, C.J.,
Friedman,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 23, 2023

* 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 MD. R. 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

A jury in the Circuit Court for Baltimore City convicted appellant, Daqwan A. Sawyer, of first-degree murder, use of a firearm in the commission of murder, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and use of a firearm in the commission of robbery with a dangerous weapon.[1] The trial court sentenced Sawyer to a total of life plus ten years in prison, after which he filed a timely notice of appeal.

Sawyer asks us to consider: (1) whether the trial court erred when it allowed the State to introduce into evidence Sawyer's co-defendant's statement to the police; and (2) whether the trial court committed plain error when it failed to instruct the jury on the charge of robbery with a dangerous weapon. Finding no error on the part of the trial court related to these issues, we affirm that court's judgments. We, however, vacate the sentence

[1] Sawyer, in his brief, states that he was also convicted of a charge of conspiracy to commit murder resulting in death, which was merged into the first-degree murder charge for sentencing purposes. The verdict sheet, however, instructed the jury not to consider the conspiracy charge if it found Sawyer guilty of first-degree murder, and no verdict on that charge was marked on the verdict sheet, announced in open court, or hearkened. Moreover, the docket entries indicate that no verdict was entered on the conspiracy charge. Nonetheless, during the sentencing proceeding, the trial court stated it would merge the sentence for the conspiracy charge into the sentence for the murder charge, and the commitment record and docket entries reflect that sentence. A trial court has no power to impose a sentence on a crime for which a defendant has not been convicted. *Turner v. State*, 301 Md. 180, 186 n.3 (1984). When it does so, the sentence imposed is illegal. *Chaney v. State*, 397 Md. 460, 466 (2007). Maryland Rule 4-345(a) permits a court to "correct an illegal sentence at any time," even if, as here, no objection was made when the sentence was imposed and the sentence is not challenged in an appeal. *Waker v. State*, 431 Md. 1, 8 (2013). We do so here.

imposed on the charge of conspiracy to commit murder resulting in death, as explained in footnote 1, above.

FACTS AND LEGAL PROCEEDINGS

At approximately 2:30 a.m. on May 4, 2021, Officer Luis Lizama responded to 5015 Williston Street, Baltimore City, for a requested check on the well-being of Danny Henson.[2] When he entered the residence, Lizama found Danny deceased, lying on the living room floor next to the sofa. Autopsy determined that the cause of Danny's death was a gunshot to the head and that the manner of death was a homicide.

The narrative of events leading to Danny's death is based on testimony from several witnesses. Odem Henson (having no relation to Danny Henson) testified that he spent the night at Danny's apartment from May 2 through May 3. The morning of May 3, Danny's acquaintances—including Sawyer and Cadeem Green—showed up to his apartment with his car. Danny asked Green to give Odem a ride home in the car.

Odem testified that after putting his luggage and electronics in the car trunk, he sat in the back seat next to Sawyer. On the way to Odem's home, Green pulled over the car, Sawyer pulled a gun out of the seat, and pointed the gun at Odem. Sawyer directed Odem to empty his pockets, and Odem handed over the contents, including his phone. After Odem exited the car, Green immediately sped off, thus leaving Odem without his laptop, tablet, keys, and wallet.

[2] Because Danny Henson shares a last name with the other victim of the charged crimes—Odem Henson—we will refer to each by his given name, for clarity. *See* MD. R. 8-111(b).

Later that day, as identified by Detective John Amato from security video of Danny's apartment building, Danny's car returned at 3:31 p.m. Sawyer and Green walked from the car into the apartment building shortly before a single gunshot rang out at 3:32 p.m. At 3:33 p.m., Sawyer and Green returned to the car.

Green later recounted his perspective of the shooting. As described by Green, Sawyer coerced Green to return to Danny's apartment with him by cocking the gun soon after robbing Odem. When Green and Sawyer got back to Danny's apartment, Green opened the door, pretended to look for Danny, then stepped out to tell Sawyer that Danny wasn't there. Sawyer, undeterred, entered the apartment and saw Danny asleep on his couch. Sawyer proceeded to shoot Danny in the head and then rushed out and said they had to go.

Even later the same day, Green was pulled over for running a red light. Green was arrested when the officer discovered he had an open warrant for failure to appear in court.[3]

In a recorded statement to detectives, Green agreed that he had been at Danny's apartment on May 3, as he had been many times before, because he and Danny were friends. Green explained to the detectives that Sawyer and Danny had been having a secret relationship, were "sexually active, and Danny was telling everybody about it and [Sawyer] didn't want nobody to know that." Green said it was Sawyer's intention to shoot Danny

[3] Green later pleaded guilty to first-degree murder and was sentenced to life in prison with all but 40 years suspended.

that day because he was scared Danny was "put[ting] his business out there that they were sexually active."

At Sawyer's trial, the prosecution called Green as a witness. At first, Green asked to invoke his right against self-incrimination. The trial court, however, compelled Green to testify.[4]

The prosecutor questioned Green:

Q: Do you recall the events of May 3, 2021?

A: I don't remember. No, I don't remember.

* * *

Q: Do you recall going to Danny Henson's apartment?

A: Not fully, no.

Q: What do you mean by "not fully"?

A: I don't remember.

Q: Do you recall speaking to detectives on May 26, 2021?

A: Yeah.

Q: And do you remember what you told them?

[4] The governing statute provides that "[i]f a witness refuses, on the basis of the privilege against self-incrimination, to testify or provide other information in a criminal prosecution or a proceeding before a grand jury of the State, and the court issues an order to testify or provide other information under subsection (c) of this section, the witness may not refuse to comply with the order on the basis of the privilege against self-incrimination." Md. Code, CTS. & JUD. PROC. § 9-123(b)(1).

A: No.

At that point, the prosecutor moved to have the trial court consider Green's recorded police interview as a prior inconsistent statement on the basis that Green was feigning lack of memory. Defense counsel objected, and the trial court ruled that the prosecutor had not yet laid an adequate foundation to determine that Green was feigning lack of memory.

Upon further questioning, Green said that he remembered entering a guilty plea in court the day before and admitting that he was involved in the murder of Danny Henson, but he claimed not to remember the facts that were read into the record in support of the plea. The prosecutor again moved to enter Green's recorded statement into evidence, and Green's attorney objected. The court ruled:

> As I understand what [the prosecutor] was doing, it was establishing whether your client would acknowledge remembering what happened in Court even yesterday, and in my estimation at this point I am prepared to find that he's feigning memory loss from the day that he went over to Danny Henson's home.
>
> Given his answers to the questions thus far, I do believe that there is sufficient—I've had the opportunity to evaluate his demeanor. I've had the opportunity to evaluate how he has answered each of the State's questions.
>
> At this point I am prepared to make a finding that given that he entered a guilty plea yesterday, and was sentenced on it this morning, and is now explaining on the record that he has no memory of going over there, at this point—given his reluctance to answer the questions and my evaluation of his demeanor and answers—at this point I am prepared to make a finding that he's feigning memory loss of the incident.

Defense counsel explained that he was concerned about "the scope of the prior inconsistent statement" that the State intended to use. Before permitting the prosecutor to play the entirety of Green's interview for the jury, the trial court therefore required the

prosecutor to "ask some more specific questions about whether he remembers anything about that day, about the day of going over to Danny Henson's apartment."

The prosecutor continued to question Green:

Q: Mr. Green, do you remember going over to Danny Henson's apartment on May third?

A: No.

Q: Do you remember going inside the apartment on May third?

A: No, sir.

Q: No, sir?

A: No.

Q: Is that what you said? Do you remember who you went there with on May third?

A: No, I do not.

Q: Do you remember how you got there on May third?

A: No.

Q: Do you remember where you went after leaving the apartment?

A: No, I do not.

Q: Do you remember being pulled over by the police on May third?

A: No.

Q: Do you remember being arrested on May third?

A: No.

The trial court, finding that Green was feigning lack of memory and that he was available for cross-examination, ruled that it would permit the State to play his recorded

statement as a prior statement inconsistent with his in-court testimony. The recorded statement was played for the jury and transcribed on the record, as summarized above.

DISCUSSION

I. Admission of Prior Inconsistent Statement

Sawyer contends that the trial court erred when it permitted the State to admit into evidence the recording of Green's interview with the police. The entire statement, he argues, did not meet the exception to the rule against admitting hearsay.

At the outset, we explain the rule against admitting hearsay and an exception to that rule by which a proponent may offer a witness's prior inconsistent statement. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MD. R. 5-801(c). Hearsay is generally inadmissible at trial because of its inherent untrustworthiness, unless some exception applies. MD. R. 5-802; *Parker v. State*, 365 Md. 299, 312 (2001).

There is also, however, an exception that allows for the admission of a trial witness's prior inconsistent statements as substantive evidence under certain circumstances when that witness is subject to cross-examination. MD. R. 5-802.1(a); *Tyler v. State*, 342 Md. 766, 776 (1996). "Inconsistency includes both positive contradictions and claimed lapses of memory," *i.e.*, an implied contradiction through knowingly withholding testimony or deliberately evading questioning. *Nance v. State*, 331 Md. 549, 564 n.5 (1993); *see also Wise v. State*, 471 Md. 431, 447 (2020).

An inconsistency may be implied when a witness feigns memory loss. *Corbett v. State*, 130 Md. App. 408, 425 (2000). Thus, a trial court may find a witness is feigning

memory loss when the witness claims they do not remember an event they would be reasonably expected to remember under the circumstances, or when they remember only a part of an event but the circumstances suggest they have the ability to testify fully about the event yet are unwilling to do so. *Id.* "[T]he decision [about] whether a witness's lack of memory is feigned or actual is a demeanor-based credibility finding that is within the sound discretion of the trial court to make." *Id.* at 426. "When determining whether inconsistency exists between testimony and prior statements, in case of doubt the courts should lean toward receiving such statements to aid in evaluating the testimony." *McClain v. State*, 425 Md. 238, 250 (2012) (cleaned up).

Here, Sawyer does not argue that the trial court erred in determining that Green was feigning memory loss. Instead, he argues that the portions of Green's statement suggesting that Sawyer killed Danny and robbed Odem were not inconsistent because the prosecutor never asked Green specifically about the killing or the robbery. We find neither legal error nor abuse of discretion by the trial court in determining that Green's statements were inconsistent.

Green was asked whether he remembered going to, and inside, Danny's apartment on May 3, 2021, who he went there with, how he got there, where he went after leaving the apartment, if he remembered getting pulled over by the police shortly thereafter, and if he remembered being arrested. On the witness stand, Green's claims that he did not remember Sawyer's robbery of Odem, returning to Danny's apartment, walking into the apartment and seeing Danny asleep on the couch, Sawyer shooting Danny in the head, leaving the apartment, and getting pulled over by the police—were inconsistent with his prior recorded

statements to police.[5] Thus, the statements were sufficiently inconsistent and therefore the trial court did not err in admitting these statements as substantive evidence.

II. Jury Instruction

Sawyer also argues that the trial court erred when it failed to include a requested instruction to the jury about the elements of the charged crime of robbery with a dangerous weapon. Acknowledging that he did not object to the jury instructions as given, or ask the court to give the omitted instruction, Sawyer requests that we review the issue for plain error. We decline to do so.

Prior to trial, Sawyer submitted in writing his requested jury instructions, which included an explanation of the elements of robbery with a dangerous weapon. Maryland Pattern Jury Instruction – Criminal 4:28.1 (MPJI-CR 4:28.1). During discussion on the record about the jury instructions, the trial court provided defense counsel and the prosecutor with its written proposed jury instructions, which the attorneys agreed they had reviewed.

After the trial court and the attorneys came to an agreement about the instructions to be given, the court asked if there were "[a]ny other additions, exceptions or objections to the Court's proposed jury instructions." Defense counsel answered, "No, Your Honor." The court's final written instructions did not include MPJI-Cr. 4:28.1, and the instruction was not read to the jury. After completing its jury instructions, the trial court again asked

[5] Green's feigned memory loss is made even more apparent by the fact that he had entered a guilty plea to the first-degree murder of Danny Henson, based on facts read into the record and agreed upon, only one day before his compelled testimony in Sawyer's trial.

counsel if there was "any need to approach regarding the Court's instructions," and both attorneys answered, "No, Your Honor."

Under Maryland Rule 4-325(f), a party cannot assign error to the trial court unless, promptly after the instructions are delivered, they object to that court's failure to give a particular instruction and state the grounds for the objection. The purpose of this Rule is to provide the trial "court an opportunity to correct the instruction before the jury starts to deliberate." *Allen v. State*, 157 Md. App. 177, 183 (2004). The failure to object before the trial court generally precludes appellate review, because "[o]rdinarily appellate courts will not address claims of error which have not been raised and decided in the trial court." *State v. Hutchinson*, 287 Md. 198, 202 (1980); *see also* MD. R. 8-131(a).

We do have discretion to review unpreserved errors relating to jury instructions. MD. R. 4-325(f); MD. R. 8-131(a). The Supreme Court of Maryland,[6] however, has cautioned that appellate courts should "rarely exercise" this discretion because plain error error review is "reserved for errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130-31 (2012) (cleaned up). Moreover, "[t]he plain error hurdle, high in all events, nowhere looms larger than in the context of alleged instructional errors." *Malaska v. State*, 216 Md. App. 492, 525 (2014) (cleaned up).

[6] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* MD. R. 1-101.1(a).

Here, we decline to overlook the lack of preservation and exercise our discretion to engage in plain error review of this issue. *See Morris v. State*, 153 Md. App. 480, 506 (2003).

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; SENTENCE IMPOSED FOR CONSPIRACY TO COMMIT MURDER RESULTING IN DEATH VACATED; COSTS TO BE PAID BY APPELLANT.