Circuit Court for Baltimore County
Case No. C-03-CR-23-002490

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1930

September Term, 2023

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JOSHUA SWAIN

v.

STATE OF MARYLAND

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Leahy,
Shaw,
Tang,

JJ.

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Opinion by Shaw, J.

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Filed: December 31, 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 Rule 1-104(a)(2)(B).

Appellant Joshua Swain was convicted by a jury sitting in the Circuit Court for Baltimore County of stalking, harassment, and electronic communications harassment.[1] He presents one question for our review:

1. Did the circuit court err in ruling that he had knowingly and voluntarily waived his right to testify because the trial court wrongly advised him that he could be impeached with one or more of his prior convictions?

For the reasons that follow, we shall affirm the judgment of the circuit court.

## BACKGROUND

Because Appellant's only question on appeal relates to the waiver of his right to testify, the underlying facts elicited at trial will not be detailed. We include only those facts that relate to his waiver.

At the conclusion of the State's case, Appellant's counsel motioned for judgment of acquittal. The court denied the motion and the following colloquy occurred at the bench:

> THE COURT: At this point, what does the Defense plan on doing?
>
> [DEFENSE COUNSEL]: You said that you don't want to testify?
>
> THE DEFENDANT: I mean I'll get up and testify. I requested her to call the police.
>
> [DEFENSE COUNSEL]: If I could step back out for a brief indulgence with my client before we decide.
>
> THE COURT: Sure. Absolutely.

[1] Appellant was subsequently sentenced by the court to a total of five years of imprisonment, three years suspended, and three years of probation following his release from prison.

After Appellant and his attorney spoke, the court asked if they would like to approach the bench. Appellant's attorney advised the court: "Your Honor, I can say that we will not have any witnesses." The court then requested the parties to approach the bench.

The court advised Appellant that he had "a right to testify or not testify":

> THE COURT: [I]f you testify, the prosecutor has a right to cross-examine you.
>
> THE DEFENDANT: Oh, I know that.
>
> THE COURT: Well, let me – I have a lot to tell you, so let me just finish. The State has a right to cross-examine you about facts, allegations, and what you testify to. But in addition, they're allowed to ask you questions about your background, including prior convictions that might have something to do with your – or tend to indicate your lack of credibility or trustworthiness or – in terms of if you have any prior convictions for theft, burglary, any kind of crime that involve like moral turpitude, things of that nature, or any sort of felony, and so forth. Let me ask the State. *If the Defendant were to testify, do you have any prior convictions that you would – okay. So the State's telling me there are at least one prior conviction that they believe they would – we'd discuss it further, but the State believes there are a prior conviction or more than one that they believe they would be able to ask you about them*.
>
> THE DEFENDANT: They might bring up this –
>
> THE COURT: Okay. How about you let me finish, okay? I appreciate that you have something to say, but let me finish.
>
> *So, if you were to testify, the State could ask you questions in front [of] the jury about your prior record that has to do or go to your credibility or truthfulness.* Any type of crimes, like theft-related crimes, things that go to your truthfulness or lack thereof.

(Emphasis added). The court advised Appellant that if he decided not to testify, he was entitled to have the jury instructed not to consider his silence, after which the court stated:

> THE COURT: Have you had an opportunity – I should say I've already given you an opportunity at the trial table to privately discuss with your attorney whether or not you wish to testify and that's why I brought you up after your attorney said, "We will not be presenting any evidence." That tells

me that you decided not to testify. But I don't want to put words in your mouth. Have you sufficiently talked with [your attorney] about your – the pros and cons and whether you want to testify or not?

THE DEFENDANT: I'm fine with not testifying, Your Honor, but there was things I would've liked to bring up, but they're probably here nor there. I'll take care of that after I leave court today.

THE COURT: Okay. Well, I'm not sure what that means. My – I have one direct question for you. Do you choose testify or not?

THE DEFENDANT: No.

THE COURT: Do you have any – do you need to discuss that any further with [your attorney], or are you confident in that decision?

[THE DEFENDANT]: No.

THE COURT: Do you have any questions of your attorney?

[THE DEFENDANT]: No.

THE COURT: All right, and your decision right now is to not testify.

THE DEFENDANT: I'm not worried about it.

THE COURT: Okay. So that answer is no. You do not want to testify.

THE DEFENDANT: Right.

Appellant did not testify and was ultimately convicted of stalking, harassment, and electronic communications harassment.

## DISCUSSION

Appellant argues that we must reverse his convictions as the waiver of his right to testify at trial was not knowing and voluntary. He asserts that he detrimentally relied on

the court's erroneous advice that the State could impeach him with his prior conviction(s).[2] Appellant cites *Morales v. State*, 325 Md. 330 (1992) to support his argument. The State responds that although the trial court's advisement was "potentially misleading" as a defendant may not be impeached with a prior conviction that was more than fifteen years old, Appellant is not entitled to reversal of his convictions. The State contends that Appellant has failed to show that he relied on the court's advisement in electing not to testify. Assuming *arguendo* that the advice given by the court was incorrect, we shall still affirm Appellant's convictions because Appellant has failed to shoulder his burden of establishing that he detrimentally relied on the court's advisements.

A criminal defendant has the constitutional right to testify and the corresponding right to remain silent. *Rock v. Arkansas*, 483 U.S. 44, 49–53 (1987) (citing U.S. CONST. amend. V, VI, XIV); *Savoy v. State*, 218 Md. App. 130, 147 (2014) (citing *Rock*, 483 U.S. at 49–53). Because the right to testify is a fundamental right, it must be personally waived

[2] Both Appellant and the State agree that Appellant's prior convictions were too old to be the subject of cross-examination under Md. Rule 5-609. The rule, which governs impeachment by a prior conviction, provides that evidence of prior infamous crimes or crimes relevant to a witness's credibility that are less than fifteen years old, unless it is a perjury conviction, may be used to impeach a witness's credibility if a court determines its probative value outweighs the danger of unfair prejudice.

At sentencing, the State proffered that between 2003 and 2008, Appellant had twelve convictions and two probations before judgment. Pursuant to MDEC records, Appellant's most recent conviction was for theft, and that conviction occurred fifteen years and seven months prior to his trial. *See* Md. Rule 5-201; *Stovall v. State*, 144 Md. App. 711, 717 (2002) (holding that courts may take judicial notice of official court records). Accordingly, the State could not have used any of Appellant's prior convictions to impeach him.

knowingly and voluntarily. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Savoy*, 218 Md. App. at 148.

In Maryland, a trial court has no obligation to advise a represented defendant about his right to testify or remain silent because of the rebuttable presumption that defendant's counsel has properly advised the defendant about that constitutional right. *Savoy*, 218 Md. App. at 148. A court need not advise a defendant, represented or not, about any potential impeachment with a prior conviction before a defendant decides whether to testify. *Morales*, 325 Md. at 336. If, however, the court elects to give such advice, it must do so correctly. *Id*. at 336–37; *see also Williams v. State*, 110 Md. App. 1, 32 (1996) ("A trial judge has no obligation to advise a defendant . . . with respect to the possibility of impeachment if the defendant elects to testify, but, if the trial judge undertakes to do so, he or she must do so correctly.").

Erroneous advice about the possibility of impeachment does not necessarily result in reversal. Reversal is required only if the defendant detrimentally relied on the erroneous advice. *Savoy*, 218 Md. App. at 155 ("[A]ppellant must nonetheless establish that the incorrect advice influenced his election not to testify."); *Oken v. State*, 327 Md. 628, 639, 641–42 (1992) (rejecting a challenge to the defendant's right to testify waiver when the record provided "no clear indication that the . . . court's advice regarding Oken's right to testify had any influence on his decision not to testify."); *Gregory v. State*, 189 Md. App. 20, 38 (2009) ("Detrimental reliance on the erroneous advice is a necessary element in determining that the defendant did not knowingly and voluntarily waive his constitutional right to remain silent.") (citation omitted). The defendant has the burden of establishing

detrimental reliance by showing that the incorrect impeachment advice caused him to change his mind. *Savoy*, 218 Md. App. at 155.

In *Morales*, *supra*, the defendant elected to proceed without counsel over the trial court's strenuous objection. *Morales*, 325 Md. at 332. The trial court correctly advised him of his rights to remain silent and to testify. *Id*. at 333. Morales stated that he wished to testify. *Id*. The court then incorrectly advised Morales that, if he took the witness stand, he risked being impeached by the State with *any* of his prior convictions. *Id*. at 334. When the court told Morales to "think about this," Morales immediately changed his mind and elected not to testify. *Id*. He was subsequently convicted of two drug-related crimes. The Maryland Supreme Court granted Morales a new trial. The court explained:

> A reasonable inference from the . . . colloquy between the judge and Morales is that Morales intended to testify until the judge advised him to "think about this" and that his convictions could be brought out to show whether he should be believed or not. Since Morales apparently changed his decision to testify based on the trial court's incorrect implication that all of his prior convictions could be used to impeach him, the defendant's decision to waive his constitutional right to testify and to exercise his constitutional right to remain silent was not knowingly and intelligently made. If the trial court – although not required to do so – had given the correct information regarding impeachment by evidence of prior convictions, the result would be different.

*Id.* at 339.

In *Savoy v. State*, defense counsel incorrectly advised his client that the State could impeach him with his prior conviction for first-degree assault if he chose to testify.[3] 218

[3] Although *Savoy* concerned advice given by defense counsel, the Maryland Supreme Court has cited both types of cases, those involving advisements given by defense counsel and those involving advisements given by a trial court, in its discussion about detrimental reliance and the law that it is a prerequisite for appellate relief. *See Thanos v.* (continued)

Md. App. at 137. Savoy agreed to think about the advice given, and the next day, his counsel advised the court that Savoy had decided not to testify. *Id*. Savoy was subsequently convicted of several crimes. *Id*. at 138. On appeal, both parties agreed that Savoy's counsel's advice about impeachment was incorrect. Savoy additionally argued that it was "highly likely" that he had decided not to testify based on his counsel's erroneous advice. *Id*. at 155–56. This Court concluded that this was "mere speculation," as Savoy never claimed he originally planned to testify nor "that he changed his mind after his lawyer told him about the impeachment risk." *Id*. at 156. We declined to reverse the convictions, holding that Savoy failed to establish that he detrimentally relied on his counsel's erroneous advice. *Id*. at 156–58.

In the present case, after the State closed its case in chief, Appellant spoke with his attorney at the trial table. His attorney then advised the court that the defense would not present any witnesses. The logical inference from the record is that Appellant and his counsel discussed his right to testify, and that Appellant decided to waive his right. *See Gilliam v. State*, 320 Md. 637, 653 (1990) (supporting the principle that it is appropriate for an appellate court to consider "references to previous discussions between" the defendant and defense counsel when analyzing a defendant's waiver of his right to testify). Like in *Savoy*, there is no evidence here that Appellant changed his mind after the allegedly

*State*, 330 Md. 77 (1993) (involving advisements by defense counsel); *Oken v. State*, 327 Md. 628 (1992) (involving advisements by trial court); *Morales v. State*, 325 Md. 330 (1992) (involving advisements by a trial court); *Savoy v. State*, 218 Md. App. 130 (2014) (involving advisements by trial court); *Gregory v. State*, 189 Md. App. 20 (2009) (involving advisements by defense counsel and trial court); *Tilghman v. State*, 117 Md. App. 542 (1997) (involving advisements by defense counsel).

erroneous advice. The record suggests that Appellant planned to waive his right to testify before the court's advice was given.

Appellant argues, without any explanation, that defense counsel's statement that the defense would not have any witnesses "does not negate [his] detrimental reliance" on the court's later incorrect advice. This argument, however, is speculative and unsubstantiated. Unlike *Morales*, *supra*, where the defendant initially told the judge that he was going to testify in his own defense and then changed his mind immediately after the judge erroneously advised him about the law on impeachment, in the present case, the record suggests that Appellant changed his mind and decided not to testify before the court advised him. As such, we hold that Appellant has failed to meet his burden to show that he detrimentally relied on the trial court's advisement. We, therefore, affirm.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**