UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1537

September Term, 2015

DEMETRIUS MACKLIN

v.

STATE OF MARYLAND

Graeff,
Friedman,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: August 4, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury sitting in the Circuit Court for Baltimore City convicted Demetrius Macklin, appellant, of possession of a regulated firearm by a disqualified person. The jury acquitted him of wearing, carrying, or transporting a handgun on his person and in a vehicle. Appellant was subsequently sentenced to a mandatory five year term of imprisonment without parole, as a subsequent offender. Appellant raises two questions on appeal:

I. Did the trial court err when it gave a supplemental instruction that the police had a legal right to enter the vehicle from which the handgun was recovered?

II. Did the trial court err in accepting the jury's allegedly legally inconsistent verdict?

For the following reasons, we shall affirm the judgment.

FACTS

During the early morning hours of October 5, 2013, the police responded to a call for a fight in progress at the Paradox nightclub in the 1300 block of Russell Street in Baltimore. Officer Roy Roberts and Sergeant Sean Lawrence, both with the Baltimore City Police Department, arrived simultaneously but in different cars. Upon exiting their cars, they walked toward the approaching security guard.

According to Officer Roberts, while the guard began explaining what had happened he pointed to a man, later identified as appellant, as one of the individuals involved in the fight. Appellant stood next to the passenger side door of a car parked about 20 feet away. There was no one else near the car. When Officer Roberts saw appellant kneel down into the front passenger seat foot well of the car, the officer asked, "[W]hat's he doing?" At that

point, the guard commanded appellant several times to step away from the car, and at the same time, someone yelled, "[G]un." As the officers and guard approached with weapons drawn, Officer Roberts heard a "thump" and then saw appellant close the car door. Appellant was taken to the ground and arrested. Officer Roberts looked in the car window and saw in plain view a handgun in the front passenger seat foot well. He retrieved the key to the car from appellant's hand, unlocked and opened the door, and recovered a .40 caliber handgun. Officer Roberts admitted on cross-examination that he did not write in his police report that someone had yelled, "[G]un."

Sergeant Lawrence testified similarly to Officer Roberts. The sergeant testified that when he and Officer Roberts approached the guard, he noticed a man, later identified as appellant, walking toward the front passenger door of a car. He saw appellant open the passenger door, bend down, and then reach toward the glove box area. Simultaneously, the officers and security guard drew their weapons and somebody yelled, "[G]un." They ran toward appellant. The guard pulled appellant away from the car, but appellant shut the car door and locked it with his electronic key. Through the passenger window a handgun was seen in the foot well under the glove box. Appellant was arrested, the keys to the car were recovered from him, and the police retrieved a .40 caliber handgun from the front passenger seat foot well. The handgun had a "live" round in the chamber and a magazine that contained an additional 14 bullets.

A firearms examiner expert testified that the handgun was operable. The parties stipulated that appellant was prohibited from possessing a regulated firearm because of a previous conviction.

The theory of defense was that appellant did not possess the gun. Appellant presented no witnesses on his behalf.

DISCUSSION

I.

Appellant argues that the trial court committed reversible error in giving the jury the following verbal supplemental instruction: "[I]t is the law in this case that the police had a right to go into the vehicle." Appellant argues that because probable cause was not a proper consideration for the jury to make or to learn that the court had made earlier at a suppression hearing, we must reverse his conviction. He argues that the instruction was prejudicial because it communicated an endorsement of the police's conduct where only police witnesses testified. Appellant cites *Gore v. State*, 309 Md. 203 (1987) and *Dempsey v. State*, 277 Md. 134 (1976) in support of his argument. The State argues that the trial court committed no error in giving the instruction, but even if it had, the error was harmless.

A brief recitation of additional facts will help place the supplemental instruction in context. Prior to trial, defense counsel moved to suppress the handgun found in the car. After Officer Roberts testified for the State similar to his later trial testimony, and appellant testified in support of his motion, the State argued that the police had probable cause to arrest

appellant and seize the handgun from the car. Defense counsel argued to the contrary. The court denied the motion to suppress, ruling that there was sufficient probable cause to support the arrest of appellant and the seizure of the handgun.

At trial, the defense produced no testimonial witnesses but extensively cross-examined the two responding police officers, calling into question what they saw, what they heard, and what they did or did not do, in an attempt to cast doubt generally on the sufficiency of the State's case. For instance, Officer Roberts was cross-examined for over an hour reflected in over 60-pages of typed transcript, about what he observed and what actions he did and did not take. In keeping with his cross-examination, defense counsel argued during closing argument that the State generally failed to inform the jurors what had happened.

Less than an hour after the jury retired to deliberate, they sent a note to the trial court with four questions. Three of the questions concerned possession. The last question is the focus here and read: "Should we consider probable cause for [the] police entering [the] vehicle?" A bench conference ensued. The trial court stated that it would instruct the jury that as a matter of law the police had a right to go into the vehicle. The court's reasoning in formulating its response was that it wanted "to take probable cause out of their deliberations." Defense counsel objected and asked the court to advise the jury that they should "base [their] decision on the evidence that's been presented." The State suggested that the court tell the jury that it was not to consider probable cause, but defense counsel

objected to that suggestion. The court then gave the jury the following verbal supplemental instruction: "[I]t is the law in this case that the police had a right to go into the vehicle."

Md. Rule 4-325(a) states, in relevant part: "The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate." "The decision to give supplemental instructions is within the sound discretion of the trial court and will not be disturbed on appeal, absent a clear abuse of discretion." *Roary v. State*, 385 Md. 217, 237 (2005)(citation omitted). We have stated: "[t]here is an abuse of discretion where no reasonable person would take the view adopted by the [trial] court . . . [and] where a trial court's ruling is reasonable, even if we believe it might have gone the other way, we will not disturb it on appeal." *Fontaine v. State*, 134 Md. App. 275, 288 (2000)(quotation marks and citations omitted).

When a jury makes evident its confusion about a central aspect of applicable law, the trial court is under an obligation to respond. The Court of Appeals has explained:

> In *Lovell* [*v. State*], 347 Md. at 623 . . . [(1997)], we held that a trial court must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case. We concluded that the trial court abused its discretion in a capital case when it refused to provide further guidance on the term "youthful age" when youthful age was a statutory mitigating circumstance. *Id.* at 660 . . . . In reaching our holding, we cited *Bollenbach v. United States*, 326 U.S. 607, 612-13 . . . (1946), in which Justice Frankfurter, writing for the Court, stated that when "a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy," as well as to *Price v. Glosson Motor Lines, Inc.*, 509 F.2d 1033, 1037 (4th Cir.1975), for the proposition that when "a jury makes a specific difficulty known . . . and when the difficulty

> involved is an issue . . . central to the case . . . helpful response is mandatory." *Lovell*, 347 Md. at 658-59[.]

State v. Baby, 404 Md. 220, 263 (2008)(secondary citations omitted, some ellipses original to *Baby*).

It is understandable that the jury here was curious about the police officers' right to seize the handgun in the car given defense counsel's zealous and broad cross-examination of the police officers in which defense counsel questioned every facet of the event and their actions. Nonetheless, probable cause was not a question, let alone a central question, for the jury to decide. Accordingly, the trial court was under no obligation to respond to the question. Under the circumstances, we think the better response from the trial court to the jury would have been, "No, you should not consider probable cause."

Nonetheless, even if the trial court erred in its supplemental instruction, reversal is not warranted.

In *Dorsey v. State*, 276 Md. 638, 659 (1976), the Court of Appeals said:

> when an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

(Footnote omitted).

Certainly, the response given by the court was a correct statement of the law – the suppression court had denied appellant's motion to suppress the handgun, finding that the police had the legal right (probable cause) to enter the car and seize the gun. We cannot, however, make the logical leap in reasoning as appellant does, that in giving the instruction the trial court gave a stamp of approval to the police's actions and prejudiced appellant's case. We fail to see how the trial court's instruction improperly affected the jury for the instruction did not take a determination from the jury or confuse a question of fact within their purview. This distinguishes the facts before us from those cases on which appellant relies.

In *Gore v. State*, 309 Md. 203, 205 (1987), defense counsel argued in closing that the evidence was insufficient to sustain a guilty finding. After closing argument, the trial court then *sua sponte* instructed the jury that the court had decided that the evidence was sufficient as a matter of law but that the jury was to decide whether the evidence was sufficient beyond a reasonable doubt. *Gore*, 309 Md. at 209. The Court reversed, holding that the instruction, while legally correct, could confuse a lay juror to mistakenly believe that the trial court was expressing its belief that the State had proven its case. *Id*. at 214.

In *Dempsey v. State*, 277 Md. 134, 137-38 (1976), the trial court instructed the jury that the court had made a preliminary determination that the defendant's confession was voluntary in all respects but the jury had the ultimate determination of deciding whether the statement was voluntary. The Court reversed, holding that it was error for the court to

disclose to the jury the court's findings of voluntariness because the court suggested to the jury its opinion about a question of fact that was before the jury. *Id.* at 154.

Unlike the facts of *Gore* and *Dempsey*, the trial court's supplemental jury instruction here did not reveal to the jury that the trial court had made a determination regarding probable cause. Moreover, the determination of probable cause was a legal determination for the court to make, not the jury, and therefore, whether or not the police were authorized to enter the car had no bearing on any factual issue before the jury. For these reasons, we fail to see how the trial court's supplemental instruction endorsed the police's actions. Accordingly, we are persuaded that the trial court's supplemental instruction was harmless and in no way influenced the jury.

II.

Appellant argues that the trial court erred in accepting legally inconsistent verdicts – the jury convicted him of possession of a regulated firearm by a disqualified person but acquitted him of wearing, carrying, or transporting a handgun both on his person and in a vehicle. He argues that because a defendant must have control over a weapon to wear, carry, or transport it, the jury's acquittal on those charges required, as a matter of law, a finding that appellant did not possess the handgun. Anticipating that the State will argue that appellant has not preserved his argument for our review because he did not timely object, appellant claims that lack of preservation is an "affirmative defense," and that the State "must carry the burden of convincing [us] that . . . the jurors were not available for further deliberations."

The State, as appellant predicted, argues that appellant has failed to preserve his argument for our review by not timely objecting below, but even if preserved, appellant's argument is without merit. Appellant's argument is likely unpreserved, but even if preserved, it lacks merit.

A. Preservation.

In *Price v. State*, 405 Md. 10, 29 (2008), the Court of Appeals broke with a long line of cases that had permitted inconsistent verdicts and held that "where the issue was preserved . . . inconsistent verdicts shall no longer be allowed." The majority opinion, however, did not explain what was required to preserve an inconsistent verdict objection. The concurring opinion authored by Judge Harrell stated that to preserve an inconsistent verdict challenge for appellate review, a defendant must object "before the verdict is final and the jury is discharged." *Price*, 405 Md. at 42.

Since *Price*, we have applied Judge Harrell's preservation rule, and further clarified that a verdict is not final when "the jury is still under the aegis of the court [and] the jury may resume its deliberations to resolve the verdicts required to be rendered." *Teixeira v. State*, 213 Md. App. 664, 676 (2013)(quotation marks and citation omitted). We have explained that the operative element in deciding when and whether a jury's functions are at an end:

> is not when the jury is told it is discharged but when the jury is dispersed, that is, has left the jury box, the court room or the court house, had an opportunity

> to discuss the case with others and is no longer under the guidance, control and jurisdiction of the court.

Id. at 677.

Here, the jury announced their verdict on the record. The jury was then polled and harkened to the verdict. The trial court thanked the jurors for their service and dismissed them, after ensuring that none of them had left any belongings in the jury room.

The court then asked the parties whether appellant wanted to be sentenced immediately or on another date. After some discussion, defense counsel indicated that he had a motion for new trial and the following colloquy occurred:

> [DEFENSE COUNSEL]: . . . I do have a legitimate motion for new trial that of course I could argue now, but I mean I don't – you know, I think I –
>
> THE COURT: Well, I'[ll] give you the opportunity if you want to argue now.
>
> [DEFENSE COUNSEL]: I'll be glad to.
>
> THE COURT: Or you can wait.
>
> [DEFENSE COUNSEL]: Why I believe that we should get a new trial. I mean I can argue it now. I can come up with some of the reasons. There may be more.
>
> THE COURT: Well, if there may be more –
>
> [DEFENSE COUNSEL]: Well, then I will file an additional [motion] within the ten day period.

Defense counsel set out four arguments in support of his new trial motion. He first argued that he was entitled to a new trial because the trial court had erred in admitting

hearsay evidence. After several pages of trial transcript, defense counsel then argued: "Second, I would indicate to the court that somehow – I might have to research it a little more, but the verdict seems relatively inconsistent." This was the first time defense counsel mentioned that the verdict may have been inconsistent. Defense counsel made his third argument – that appellant was entitled to a new trial because he was not present at any of the bench conferences. Lastly, defense counsel argued that the trial court had erred in its supplemental instruction to the jury regarding probable cause. After hearing from the State, the trial court ultimately denied the motion but held *sub curia* defense counsel's argument pertaining to inconsistent verdicts, asking the attorneys to address it before sentencing.

Under the circumstances presented, we are persuaded that appellant has not preserved his inconsistent verdict argument. After the jury was dismissed, defense counsel addressed other matters and made other arguments for several pages of transcript before informing the court of a possible inconsistent verdict. The several pages of transcript between when the jury was discharged and when defense counsel suggested to the court a possible inconsistent verdict suggests that the jury had already been dismissed and left the courtroom for defense counsel certainly evinced no concern regarding timing.

We decline to address appellant's argument that the State "must carry the burden of convincing this Court that as a practical matter the jurors were not available for further deliberations" or the State's response that appellant bears the burden, for even if appellant had preserved his argument for our review, we would have found it without merit.

B. Inconsistent verdicts?

In *McNeal v. State*, 426 Md. 455, 458 (2012), decided four years after *Price*, the Court of Appeals limited the holding in *Price*, so that only legally inconsistent verdicts are impermissible. Factually inconsistent verdicts are "illogical, but not illegal. *Id*. (citation omitted). The Court explained the difference between a legally and factually inconsistent verdict. A "legally inconsistent" verdict is one where the jury acts contrary to the trial court's instructions with regard to the proper application of the law. *Id*. (citation omitted). Where a defendant is convicted of one charge, but acquitted of another charge that is an essential element of the first charge, the verdict is inconsistent as a matter of law. *Id*. (citation and footnote omitted). In contrast, a "factually inconsistent" verdict is one where the "charges have common facts but distinct legal elements and a jury acquits a defendant of one charge, but convicts him or her on another charge." *Id*. (citation and footnote omitted).

McNeal is dispositive here. In that case, the defendant was convicted of possessing a handgun after conviction of a disqualifying crime but acquitted of wearing, carrying, or transporting a handgun. *Id*. at 458. The Court of Appeals upheld the possession conviction on appeal, explaining: "The charge of possession of a handgun contains legal elements that are distinct from the elements in a wearing, carrying, or transporting a handgun charge. There is no lesser included offense or predicate crime involved in McNeal's inconsistent verdicts." *Id*. at 472. The Court concluded: "[W]e must assume that the guilty verdict here is 'curious' or factually inconsistent (compared to the acquittal on the other charge), and that

what occurs within the minds of the jurors is outside the reach of our appellate grasp." *Id*. at 473 (citation omitted).

Appellant attempts to distinguish *McNeal* by stating that *McNeal* involved only a single count of wearing, carrying, or transporting a handgun while appellant's case involved two counts of that crime – on his person and in a vehicle. We fail to see, and appellant does not argue why, that distinction makes *McNeal* inapplicable. Because *McNeal* is directly on point, and any difference between the facts of *McNeal* and the facts of our case are of no practical importance for purposes of our analysis, we shall affirm the judgment.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.