Circuit Court for Baltimore County
Case No. C-03-CR-22-000133

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2196

September Term, 2023

ISIAH ABRAHAM JEWEL

v.

STATE OF MARYLAND

Nazarian,
Tang,
Kehoe, S.,

JJ.

Opinion by Tang, J.

Filed: February 11, 2025

*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).

Following a jury trial in the Circuit Court for Baltimore County, Isiah Abraham Jewel, the appellant, was convicted of possession of fentanyl with the intent to distribute, possession of buprenorphine with the intent to distribute, and possession of paraphernalia. On appeal, the appellant presents three questions, which we quote:

> I. Was it plain error for the [c]ourt to admit expert testimony that [the appellant] intended to distribute narcotics?
>
> II. Was it plain error for the [c]ourt to admit [the appellant's] rap lyrics into evidence?
>
> III. Was the [j]ury's verdict legally inconsistent, entitling [the appellant] to a new trial?

For the following reasons, we affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2021, during a narcotics investigation, Detective Philip Wilson of the Baltimore County Police Department discovered a phone number linked to the appellant. On December 1, Detective Wilson instructed a confidential informant to call this number and ask "if they had any product." The appellant answered the informant's call, negotiated a price, and agreed to meet.

At the arranged location, the appellant sold the informant eight capsules of fentanyl and three capsules of cocaine. After the transaction, the appellant drove a tan Chevrolet Impala to an apartment complex on Waldorf Drive in Dundalk, Maryland.

On December 3, Detective Wilson arranged another controlled purchase. Before meeting at the arranged location, the appellant exited apartment "E" at the Waldorf Drive apartment complex and entered the Impala. He then drove to the meeting location, where

he sold the informant eleven capsules of fentanyl. The appellant then returned to the apartment.

Search Warrant

Detective Wilson obtained a search warrant for the appellant, the Impala, and the apartment. On December 14, a task force executed the search warrant. Officers conducting surveillance observed the appellant leaving the apartment and entering the Impala. One officer initiated a traffic stop on the vehicle and detained the appellant. Detective Wilson recovered one gel cap of fentanyl from the floorboard under the driver's seat. He also seized two cell phones from the appellant's person—one iPhone and one "CTE" smartphone.

Police searched the two-bedroom apartment. Someone other than the appellant leased the apartment, and at least one other person occupied it. In the closet of one bedroom, officers found a plastic tub containing an unregistered, nine-millimeter handgun with no serial number (known as a "ghost gun"), a loaded .45 caliber Glock handgun, and ammunition. The Glock's registered owner was never verified. Fingerprints were found on one of the guns but were never compared to the appellant's.

Next to the plastic tub in the closet, officers found a shoebox containing the appellant's Social Security card and a letter from the Social Security Administration addressed to the appellant. Inside a jacket in the closet, officers discovered thirty-five buprenorphine strips. On top of the bedroom dresser, they located a plastic bag containing thirty-nine gel capsules of fentanyl, as well as another plastic bag containing various denominations of U.S. currency. Officers also discovered another iPhone on the bed.

On the dining room table in the kitchen, officers found a clear plastic bag that contained six smaller plastic bags and multiple gel capsules with suspected fentanyl. They also discovered two rolls of U.S. currency worth $280 and $250 in the living room closet.

In the kitchen, officers located a community college student ID bearing the appellant's name and photograph. They recovered eight small plastic jugs, eight capsules, a plastic container, and a plastic bag, all containing white powder.

There were also sifters, cutting agents (such as baking soda), multiple digital scales, gloves, and numerous unused plastic jugs, containers, and capsules in the kitchen. Detective Wilson testified that cutting agents are used in drug preparation to reduce the potency of fentanyl, making it less lethal. He explained that drug distributors use a sifter to mix cutting agents with powdered narcotics, and gloves are worn to prevent skin contact with fentanyl, which can be deadly.

Detective Wilson, who was qualified as an expert in packaging, detecting, and valuing narcotics, opined that the fentanyl seized was intended for distribution. He based his opinion on the way the fentanyl was packaged, the presence of paraphernalia in the apartment used for making and packing the drug, and the absence of items like straws or syringes that would indicate personal use. He also opined that the buprenorphine seized was packaged for distribution, as evidenced by the thirty-five packets found.

Cell Phones

Detective Michael Romano of the Baltimore County Police Department extracted the contents of the three cell phones recovered under the search warrant, which were

admitted into evidence. On the "CTE" smartphone, Detective Romano found numerous text messages "indicating drug transactions" along with phone numbers of known "drug users" and "drug distributors." This phone also contained the phone number associated with the confidential informant involved in the controlled purchases.

Both iPhones contained various photographs of the appellant in the apartment. A photo of the kitchen depicted a small, knotted bag containing suspected drugs, along with a plastic container identified by Detective Wilson as containing a cutting agent used to mix drugs. There were photos of the appellant over the stove, which the detective testified was a strong indication that the appellant was preparing narcotics. The iPhones also contained images of the bedroom where the drugs and firearms were recovered.

The iPhone found on the bed also contained videos. Detective Wilson testified that in one video, he saw a razor blade on a table alongside a white powdery substance, which he suspected to be cocaine. He explained that a razor blade is typically used to cut cocaine, whether to create a powdered form or to weigh it for packaging and sale. The iPhone found on the bed also contained video recordings of the appellant rapping, which were played for the jury and admitted into evidence. The timestamps on the three videos indicated they were created within a few months before the search warrant was executed.

Trial & Verdict

A grand jury indicted the appellant, charging him with thirteen counts as follows: (1) possession of heroin with the intent to distribute; (2) possession of fentanyl with the intent to distribute; (3) possession of a mixture of heroin and fentanyl with the intent to

distribute; (4) possession of buprenorphine with the intent to distribute; (5) possession of a Glock 21 .45 semi-automatic handgun during and in relation to a drug trafficking crime; (6) possession of a 9-millimeter semi-automatic handgun during and in relation to a drug trafficking crime; (7) possession of a regulated firearm after being convicted of a crime of violence; (8) illegal possession of a regulated firearm; (9) illegal possession of ammunition; (10) possession of heroin; (11) possession of fentanyl; (12) possession of buprenorphine; and (13) possession of drug paraphernalia.

The court held a two-day jury trial during which the State called Detective Wilson, Detective Romano, and the forensic scientist who analyzed the drugs, all of whom testified consistently with the facts summarized above. The appellant exercised his right not to testify, and the defense did not call any witnesses.

At the close of the case, the State entered a *nolle prosequi* to counts 1, 3, 7, and 10. The jury found the appellant guilty of possession of fentanyl with the intent to distribute (count 2), possession of buprenorphine with the intent to distribute (count 4), and possession of drug paraphernalia (count 13). The jury found the appellant not guilty of possession of the two firearms during and in relation to a drug trafficking crime (counts 5 and 6), illegal possession of a regulated firearm (count 8), and illegal possession of ammunition (count 9). The jury did not reach a verdict on counts 11 and 12, as instructed on the verdict sheet.[1]

[1] The verdict sheet indicated that if the jury found the appellant guilty of possession of fentanyl and buprenorphine with intent to distribute (counts 2 and 4, respectively), it

The court sentenced the appellant to ten years, suspending all but three years, with credit for time served. This timely appeal followed.

We shall include additional facts as necessary in the discussion.

DISCUSSION

During oral argument, the appellant acknowledged that none of the three issues had been preserved and requested this Court to recognize plain error. However, in the "Questions Presented" and arguments sections of his brief, the appellant sought plain-error review only for the first two issues, not the third. Because the claim of plain error was neither included in his Questions Presented nor addressed in the arguments section as to the third issue, we shall not consider it. *See Green v. N. Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 426 (1999) ("Appellants can waive issues for appellate review by failing to mention them in their 'Questions Presented' section of their brief."); *Klauenberg v. State*, 355 Md. 528, 552 (1999) ("[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.").

Regarding the first two issues, "[p]lain 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) (citation and internal quotation marks omitted). Before we can exercise our discretion to find plain error, four conditions must be met:

must "skip" rendering verdicts on the counts for possession of these substances (counts 11 and 12).

> (1) there must be an error or defect–some sort of deviation from a legal rule–that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant;[2] (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Beckwitt v. State, 477 Md. 398, 464 (2022) (cleaned up). "[T]he court's analysis need not proceed sequentially through the four conditions; instead, the court may begin with any one of the four and may end its analysis if it concludes that that condition has not been met." *Winston v. State*, 235 Md. App. 540, 568 (2018).

I.

Intent to Distribute

The appellant's first plain-error claim relates to the testimony of Detective Wilson, the State's expert in the packing and distribution of narcotics. The appellant claims that Detective Wilson's testimony that the fentanyl found was "intended for distribution" constituted an improper opinion regarding the appellant's mental state under Maryland Rule 5-704(b). The State responds that the appellant failed to establish that the court committed an error that was "clear or obvious," under the second requirement of the plain-error test, or that the error affected the trial's outcome, under the third requirement.

[2] There is a fundamental distinction between affirmative waiver, which forecloses our review, and mere forfeiture, which does not: whereas "[f]orfeiture is the failure to make a timely assertion of a right," waiver is "the intentional relinquishment or abandonment of a known right." *State v. Rich*, 415 Md. 567, 580 (2010) (citation and internal quotation marks omitted).

The appellant's claim is based on the emphasized language in the following excerpt from Detective Wilson's testimony:

> [PROSECUTOR]: Based upon your training, knowledge and experience and your expertise, *are you able to form an opinion as to whether the Fentanyl seized in this case was intended for personal use or intended for distribution?*
>
> [DET. WILSON]: *In this case this was intended for distribution.*
>
> [PROSECUTOR]: Okay. And can you, with respect to the Fentanyl, please cite the basis for your opinion?
>
> [DET. WILSON]: Based on the totality of the evidence that was seized from the search warrant, the Fentanyl, the way it was packaged. It was packaged in a manner of distribution on street sales. It was also with the paraphernalia found in the house for making and packaging these type[s] of drugs. *It was all intended for distribution.* It was no plastic straws found. That would be of good indication if someone is using to snort heroin. All paraphernalia or Fentanyl. It was no hypodermic syringes inside the apartment. That is another way or form of injecting heroin into your system, or Fentanyl. It was none of that recovered on the scene during the search warrant.

(emphasis added).

Rule 5-704(b) prohibits some types of expert testimony about a defendant's mental state:

> An expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may not state an opinion or inference as to whether the defendant had a mental state or condition constituting an element of the crime charged. That issue is for the trier of fact alone.

In *Gauvin v. State*, 411 Md. 698 (2009), the Supreme Court of Maryland considered the application of Rule 5-704(b) to situations in which a law enforcement officer testifies to a defendant's intent to distribute narcotics. There, the Court considered the following exchange, which took place during the prosecutor's direct examination of an expert witness regarding the defendant's intent to distribute PCP:

> [PROSECUTOR]: Sergeant McDonough, have you had occasion during the course of this case to review the evidence that was seized by Deputy Gray in connection with the arrest of [the defendant]?
>
> [SGT. MCDONOUGH]: Yes, I have.
>
> [PROSECUTOR]: And have you had the occasion here today to hear the testimony of the witnesses who have come before you today in connection with this matter?
>
> [SGT. MCDONOUGH]: Yes, I have.
>
> [PROSECUTOR]: And based on your review of the evidence that was seized in this case and based upon your observations regarding the testimony of the witnesses here today, *do you have the ability to form an opinion as to whether or not the PCP that was seized from [the defendant] on December 15th, 2006 was for her personal consumption or for distribution?*
>
> [SGT. MCDONOUGH]: Yes, I was able to form an opinion.
>
> [PROSECUTOR]: And what is that opinion?
>
> [SGT. MCDONOUGH]: That the am—
>
> [DEFENSE COUNSEL]: Objection, Your Honor, just for the record.
>
> THE COURT: Certainly. Overruled.
>
> [DEFENSE COUNSEL]: Thank you.
>
> [SGT. MCDONOUGH]: *That the amount would indicate to me that it was possessed with intent to distribute*. I would base that on different factors.

411 Md. at 701–02 (emphases added). The factors included the unusually large amount of PCP discovered as well as gloves and currency in all twenties. *Id.* at 702.

The Court determined that the challenged question—"whether or not the PCP that was seized from [the defendant] was for her personal consumption or for distribution?"—was prohibited by Rule 5-704(b). *Id.* at 710–11. Although the prosecutor's question "strayed from the track" established by Rule 5-704(b), the expert's response to the improper question did not cross the line established by the Rule. *Id.* at 713. This was

because the expert "never directly and unequivocally testified to [the defendant's] mental state; he never stated directly that [she] had the intent to distribute." *Id.* at 711 (citation omitted). Instead, the expert's opinion was based upon his "knowledge of common practices in the drug trade, rather than on some special familiarity with the workings of [the defendant's] mind." *Id.* (citation omitted).

Cases both preceding and following *Gauvin* are in accord with its holding. In *Barkley v. State*, this Court held that the expert's testimony "did not even get close to the line" established by Rule 5-704(b), where he testified that the fifty-three baggies of heroin seized were intended for distribution based exclusively on the amount, the manner of packaging, and the absence of a device for personal use. 219 Md. App. 137, 155 (2014). Similarly, in *Pringle v. State*, this Court held that the expert's opinion that "the drugs were going to be distributed," absent any reference to the defendant's intent, was not barred by Rule 5-704(b). 141 Md. App. 292, 300–01 (2001), *rev'd on other grounds*, 370 Md. 525 (2002), *rev'd on other grounds*, 540 U.S. 366 (2003). The expert's opinion was based on the quantity and packaging of the drugs. *Id.* at 300.

The appellant and the State rely on *Gauvin* to support their respective positions. The appellant contends that Detective Wilson's testimony crossed the line established by Rule 5-704(b). The State, in contrast, argues that the detective did not purport to have a special understanding of the workings of the appellant's mind. Instead, says the State, he based his opinion on his prior experience and how the drugs seized were packaged. We agree with the State.

Like the expert testimony in *Gauvin*, *Pringle*, and *Barkley*, Detective Wilson's testimony did not cross the line into inadmissibility under Rule 5-704(b) when he testified that the fentanyl seized "was intended for distribution" "in this case." He did not reference the appellant's state of mind. Instead, his opinion was based on his knowledge of the drug trade and the facts adduced at trial: the way the drugs were packaged, the amount recovered, the paraphernalia typically used to prepare drugs for distribution, and the absence of any paraphernalia that would be expected if for personal use.

Contrary to the appellant's assertion, Detective Wilson did not "state an opinion or inference" as to whether the appellant intended to distribute the fentanyl. *See* Md. Rule 5-704(b). Seizing on the word "inference," the appellant claims that the State admitted in its brief that Detective Wilson improperly testified about the appellant's intent to distribute fentanyl. The State wrote that Detective Wilson "*was drawing an inference* from what was discovered during the search (the amount of drugs and type of packaging) and what was not discovered (paraphernalia that would enable a user to consume the drugs)." (emphasis added). However, the State seemed to be indicating that the detective made a general inference about an intent to distribute fentanyl, rather than a specific inference about the appellant's intent. This distinction was clarified in the previous sentence of the State's brief, which stated that the detective "was not claiming special familiarity with the workings of [the appellant's] mind."

We also disagree with the appellant's claim that the detective's reference to the intent to distribute "in this case" constitutes a statement of an opinion or inference of the

appellant's intent to distribute. As explained above, the detective did not directly and unequivocally testify to the appellant's mental state or that he had the intent to distribute; the opinion was based on the way the drugs were packaged and the amount recovered, among other evidence. Moreover, the apartment was leased to someone else, and other individuals occupied it. Therefore, the detective's reference to the intent to distribute "in this case" could not be interpreted as solely referring to the appellant.

For the reasons stated, even if the court erred in permitting the detective to opine that "in this case," the fentanyl found "was intended for distribution," the alleged error was neither clear nor obvious under the second requirement of the plain-error test. The appellant has failed to meet the requirements for plain-error review on this issue.

II.

Rap Lyrics

The appellant argues that it was plain error for the circuit court to admit the audio of the appellant rapping contained in the admitted videos. Specifically, he contends that the State must show that the appellant wrote the rap lyrics for them to be admissible. However, the claim fails under the first prong of the plain-error test because defense counsel said he had no objection to the admission of audio of the rapping contained in the videos.

During trial, the prosecutor asked Detective Wilson about videos recovered from one of the phones, which were on a CD marked as State's Exhibit 19:

> [PROSECUTOR]: Okay. And on those cell phones did you observe any videos?
>
> [DET. WILSON]: Yes. Recovered several videos on different dates, time stamps and different dates where the [appellant] was rapping, making music

> videos of him either cooking over the stove, preparing narcotics on the dining room table, so forth, inside the apartment.
>
> [PROSECUTOR]: Okay. I have marked for identification purposes State's Exhibit Number 19, which is a CD. I'm going to ask to play those items for you and have you identify them.

After playing the videos, which included audio of the appellant rapping, the State moved to admit the videos, to which defense counsel said he had no objection:

> [PROSECUTOR]: Your Honor, I'm going to move the CD containing those videos, which is State's Exhibit Number 19, into evidence.
>
> THE COURT: *Any objection?*
>
> [DEFENSE COUNSEL]: *No objection, Your Honor.*
>
> THE COURT: State's 19 is admitted.

(emphasis added).

The appellant affirmatively waived his claim by saying that he had "[n]o objection" to the admission of the videos that contained audio of him rapping. *See Brice v. State*, 225 Md. App. 666, 679 (2015) (holding that appellant affirmatively waived the right to seek review of *voir dire* questions where he requested the inclusion of two questions, court intentionally omitted them, court asked appellant whether he had any comment or objection, and defense counsel responded "no"). Because the appellant affirmatively waived his challenge to videos containing the audio of the rap lyrics, he failed to satisfy the first prong of the plain-error test. We therefore decline to address the merits of his second claim. *See Booth v. State*, 327 Md. 142, 180 (1992) (holding that plain-error review was not required because "defense counsel affirmatively advised the court that there was no objection" to the jury instruction).

III.

Inconsistent Verdicts

Finally, the appellant contends that the guilty verdicts of the drug offenses were inconsistent with the acquittals of the handgun-related offenses. He argues that the verdicts were "legally" inconsistent. According to the appellant, this is because the drug and handgun offenses, which share the "identical core element" of possession, were supported by similar evidence but resulted in "opposite" verdicts.

As mentioned, the appellant acknowledged during oral argument that this issue was not preserved. Indeed, the appellant failed to object or otherwise make known his position before the verdicts became final and the court discharged the jury. *See Givens v. State*, 449 Md. 433, 472–73 (2016) ("[T]o preserve for review any issue as to allegedly inconsistent verdicts, a defendant in a criminal trial by jury must object to the allegedly inconsistent verdicts or otherwise make known his or her position before the verdicts become final and the trial court discharges the jury."); *cf. McNeal v. State*, 426 Md. 455, 460–61 (2012) (explaining that the defendant preserved a challenge to a factually inconsistent verdict by requesting that the case be sent back to the jury to resolve the inconsistency before the jury harkened to the verdict). As indicated, the appellant did not request plain-error review as to this issue in his Questions Presented or the arguments sections in his brief. Consequently, we neither conduct a plain-error analysis nor address the merits of the claim.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.