UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2034

September Term, 2013

NELSON CLIFFORD

v.

STATE OF MARYLAND

Wright,
Hotten,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: January 21, 2015

Nelson Clifford, appellant, was convicted in the Circuit Court for Baltimore City of theft under $1,000. In this appeal, he presents one issue for our review: whether the trial court committed plain error in failing to instruct the jury on the "claim of right" defense to the charge of theft. Finding no error, we shall affirm.

I.

Appellant was charged by criminal information with two counts of rape, four counts of sexual offense, two counts of burglary, two counts of assault and theft under $1,000. A jury convicted appellant of the theft and acquitted him of all the remaining charges. The court sentenced appellant to a term of incarceration of eighteen months.

The following evidence was presented at trial. In November 2011, Shatia Landsdowne lived at 3701 Greenmount Avenue in Baltimore, Maryland. Ms. Landsdowne testified that in the early morning hours of November 10, 2011, she awoke to a man with his hand over her mouth threatening to kill her and her children if she did not cooperate. She stated that the man forced her to engage in a number of sexual acts including fellatio, cunnilingus and vaginal intercourse. Ms. Landsdowne noted that the man took $200 from her purse and warned her to not call the police. After the man left, she went to the apartment of Katira Shields who called 911. Officers took Ms. Landsdowne to Mercy Hospital to conduct a sexual assault forensic evidence (SAFE) examination.

Misty Johnson, a SAFE nurse, conducted a physical examination of Ms. Landsdowne at Mercy Hospital. She noted that Ms. Landsdowne had abrasions around her genital and

anal areas. Ms. Johnson opined that the abrasions could have resulted from consensual or non-consensual sexual activity, tampons, a virus, wiping the area or masturbation, among other acts. She found no evidence of gross injury. A SAFE kit was compiled including swabs from the vaginal and anal areas of Ms. Landsdowne.

The court received Lucia Matricciani as an expert in the field of serology. She tested the swabs obtained through the SAFE examination and determined that the vaginal, cervical and perianal swabs had no trace of seminal fluid or semen. A comforter from Ms. Landsdowne's apartment, however, tested positive for both seminal fluid and semen. The DNA from the comforter matched the genetic profile of appellant.

Ms. Landsdowne met with police after she was released from the hospital. She described the assailant as an African-American male, about 5'7"to 5'8", 160 to 170 pounds, wearing a white hoodie and a gray leather jacket. She testified that although she performed fellatio on the man, she did not recall whether he was wearing a condom.

Sargent Carey Snead executed a search warrant at appellant's residence. He discovered a white hooded sweatshirt and a tan jacket inside the bedroom closet. Crystal Allen, appellant's housemate, testified that everything the police recovered from the house belonged to appellant.

Appellant testified that he had consensual sexual relations with Ms. Landsdowne. He stated that he met the victim on an Internet website where they agreed that he would pay her $150 in exchange for sexual intercourse. Appellant stated that he went to Ms. Landsdowne's

apartment and was "turned [] off" because her bedroom was in disarray. He testified that "[the bedroom] was a mess . . . clothes all over the place . . . [t]he bed wasn't made." Nevertheless, appellant agreed to pay Ms. Landsdowne $60 up-front, with the remaining money to be paid after she did what she agreed to do. When Ms. Landsdowne undressed, appellant stated that he noticed a foul odor coming from between her legs. He then told her that he forgot to bring a condom and suggested that she perform fellatio instead of having sexual intercourse. Appellant told Ms. Landsdowne that if she agreed, she could keep the $60. She consented, and performed oral sex on appellant. After sometime, appellant suggested that they just masturbate themselves. He stated that when he ejaculated, he stained inadvertently Ms. Landsdowne's comforter. Appellant then began to get dressed, and Ms. Landsdowne went to the bathroom. When appellant heard the bathroom door shut, he noticed Ms. Landsdowne's wallet in which she had put the $60 that he had given her. Appellant, "without thinking," took the money out of the wallet, "hurried up" and left the apartment. On cross-examination, appellant conceded that he "stole [his] money back from" Ms. Landsdowne.

As indicated, appellant was convicted of the theft charge and sentenced to incarceration. This timely appeal followed.

II.

Before this Court, appellant argues that, despite his counsel's failure to request a claim of right jury instruction, the court's failure to so instruct the jury constituted plain error. Appellant contends that he generated some evidence to warrant the instruction and that it was not fairly covered by the general theft instruction. Appellant argues that the jury heard testimony that appellant took the money from the wallet because he believed that it belonged to him. Because appellant's counsel failed to request the instruction and, in turn, the court did not give the instruction, appellant concludes that this Court should exercise its discretion and reverse his conviction for plain error.

The State argues that there was no error, no less plain error, in failing to give a claim of right defense instruction. The State maintains that the record is devoid of any evidence generating the instruction. The State contends that there is no evidence that appellant took the $60 because he believed Ms. Landsdowne did not fulfill their agreement. The State argues also that this Court should decline to review appellant's claim for ineffective assistance of counsel because such claims are best left for post-conviction proceedings. The State maintains that appellant's argument should be rejected nonetheless because the claim of right defense instruction was not generated from the evidence and hence, defense counsel's failure to request it did not constitute deficient performance.

III.

Appellant concedes that he did not request a claim of right defense instruction at trial. On appeal, he asks this Court to exercise its discretion and reverse his conviction for plain error because the court should have instructed the jury on the claim of right defense despite his counsel's failure to request the instruction. We hold that the failure to give the claim of right instruction did not constitute plain error.

Ordinarily, we will not decide an issue unless it "plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Pursuant to Rule 4-325(e), we may exercise our discretion and review for plain error a court's failure to give an instruction despite counsel's failure to request it. Rule 4-325(e) states, in pertinent part, as follows:

> "(e) Objection. No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. *An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.*"

(emphasis added). *See Martin v. State*, 165 Md. App. 189, 194-98 (2005) (reviewing for plain error, appellant's claim that the court erred by failing to instruct the jury on the offense of conspiracy and the alibi witness defense despite his counsel's failure to request the instructions). Plain error is a rare circumstance that "vitally affects a defendant's right to a

fair and impartial trial." *Diggs v. State*, 409 Md. 260, 286 (2009). The test for plain error is as follows:

> "First, there must be an error or defect–some sort of '[d]eviation from a legal rule'–that has not been intentionally relinquished or abandoned . . . . Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, 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 [trial] court proceedings.' Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error."

State v. Rich, 415 Md. 567, 578 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009).

In reviewing alleged errors in jury instructions, we "have been rigorous in adhering steadfastly to the preservation requirement." *Peterson v. State,* 196 Md. App. 563, 589 (2010). It follows that surmounting the high hurdle of plain error "nowhere looms larger than in the context of alleged instructional errors." *Martin*, 165 Md. App. at 198; *see Peterson*, 196 Md. App. at 589 (noting that plain error has been "noticed sparingly" in the context of erroneous jury instructions). An improper instruction, or, the failure to give an instruction, will rarely result in reversal on appeal where no timely objection has been made. *U.S. v. Taylor*, 54 F.3d 967, 976 (1995); *see United States v. Gomez*, 255 F.3d 31, 37 (1st Cir. 2001) (stating that "the plain-error exception is cold comfort to most defendants pursuing claims of instructional error"). We will not review for plain error an "appellate afterthought" in the form of an instruction that was not requested at trial, but may have been

generated by the evidence. *See Malaska v. State*, 216 Md. App. 492, 526 (2014) (declining to review for plain error the failure to give a defense of others instruction when it was not requested and where appellant failed to present a defense of others defense "in any meaningful fashion" at trial).

Mindful of the challenge appellant is presented with, we turn to his claim that the court committed plain error by failing to instruct the jury on the claim of right defense. It is well-settled that defendants are "entitled to have the jury instructed on any theory of defense that is fairly supported by the evidence." *Sims v. State*, 319 Md. 540, 550 (1999). Maryland Code (2002, 2012 Repl. Vol.) § 7-110 of the Criminal law Article[1] provides for the claim of right defense and states, in pertinent part, as follows:

> "(c) It is a defense to the crime of theft that:
>
> > (1) the defendant acted under a good faith claim of right to the property involved;
> >
> > (2) the defendant acted in the honest belief that the defendant had the right to obtain or exert control over the property as the defendant did . . . ."

The claim of right defense "usually arises when a person asserts a right to the property on demand in satisfaction of a claim. *Sibbert v. State*, 301 Md. 141, 148 (1984).

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[1]Unless otherwise indicated, all subsequent statutory references herein shall be to Maryland Code (2002, 2012 Repl. Vol.) of the Criminal Law Article.

In the case *sub judice*, the court's failure to give the claim of right defense instruction did not constitute plain error. The lynchpin to determine whether appellant was entitled to the claim of right instruction is whether he generated some evidence that he acted in the honest belief that he was entitled to take the $60 from Ms. Landsdowne's wallet. The complexity of the circumstances involved in resolving this issue leads to the conclusion that any error in failing to give the instruction was not clear or obvious.

We note first that appellant and Ms. Landsdowne entered into an unlawful agreement by agreeing to exchange money for sex. It follows that Ms. Landsdowne was not entitled legally to the $60 that appellant had given her in exchange for oral sex. Nevertheless, appellant gave Ms. Landsdowne $60, and she put the money into her wallet. Appellant testified that, while Ms. Landsdowne was in the bathroom, he went into her wallet and took or "stole" his money back. Appellant did not state that the reason he took his money back from Ms. Landsdowne was because he knew the agreement to be illegal and thus, he believed he could recoup his money. Conversely, he stated that "without thinking" he took his money back and hurriedly left the victim's apartment. The court would need to consider whether the fact that appellant took money that did not belong legally to Ms. Landsdowne from her wallet and without her consent, generated some evidence that appellant could have acted under an honest belief to recover his money. The resolution of this issue is not evident, but it is necessary for the court to determine whether appellant was entitled to a claim of right defense instruction. There is little, if any, case law on whether one is entitled to a claim of

right defense under these circumstances. Because appellant did not request the instruction at trial, the court did not have the opportunity to grapple with the issue. Based on these circumstances, we hold that any error in failing to instruct the jury on the claim of right defense was hardly clear or obvious and hence, did not constitute plain error.

IV.

To the extent that appellant presents a claim of ineffective assistance of counsel before this Court, we decline to address it in this appeal.[2] Ordinarily, claims of ineffective assistance are best left for review on post-conviction and not on direct appeal. *Taylor v. State*, 428 Md. 386, 396 n.4 (2012). Claims for ineffective assistance of counsel on direct appeal are disfavored because "[t]he record is usually inadequate for appellate review and devoid of a response from defense counsel concerning the allegations." *Lettley v. State*, 358 Md. 26, 32 (2000). It is when the claim is based on a conflict of interest and the record is abundantly clear that "there is no need to await a post-conviction hearing." *Id*.

We agree with the State that appellant's claim for ineffective assistance of counsel is best left for post-conviction proceedings. Appellant's sole contention of ineffectiveness

[2]Based on appellant's brief, it is not entirely clear whether he is raising a claim of ineffective assistance of counsel before this Court. In only one instance, appellant requests that this Court consider his attorney's failure to request the claim of right instruction "to be plain error under Md. Rule 8-131 . . . and the failure to state the motion with particularity as ineffective assistance of counsel." Appellant does not support substantively his claim for ineffective assistance of counsel nor does he raise the issue in his "Question Presented."

appears to be trial counsel's failure to request a claim of right instruction. As indicated, it was not clear or obvious that a claim of right instruction was generated by the evidence. Moreover, defense counsel has not had an opportunity to respond to appellant's allegations. Accordingly, we decline to address appellant's ineffective assistance of counsel claim on direct appeal and leave it for post-conviction, should appellant elect to pursue such a claim.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.