UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2778

September Term, 2015

CHRISTOPHER ALLAN MILBURN

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Shaw Geter,

JJ.

Opinion by Graeff, J.

Filed: October 13, 2016

A jury in the Circuit Court for Washington County convicted Christopher Milburn, appellant, of second-degree assault. Appellant was sentenced to a term of four years' imprisonment.

On appeal, appellant presents the following question for our review:

> Did the trial court err in allowing the State to present improper and prejudicial comments during closing argument?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2015, Bryan McDonald, an inmate at the Roxbury Correctional Institution in Hagerstown, was attacked from behind by "a couple of people" and "hit in the head with a lock." Correctional Officer Brandon Renner witnessed the attack and observed three attackers, one of whom was striking Mr. McDonald with a lock while another attacker, identified as appellant, was "punching and kicking" Mr. McDonald. Officer Renner was not able to identify the third attacker.

Correctional Officer Mark Worrell also witnessed the attack. He identified appellant as one of the attackers.

At trial, Steven Hartwig, another inmate, testified on appellant's behalf. He indicated that he witnessed the attack, and appellant was not one of the attackers. On cross-examination, however, Mr. Hartwig refused to identify the attackers by name, expressing fear of retribution from other inmates. Mr. Hartwig admitted that he had three prior convictions for burglary.

At the close of evidence, the trial court instructed the jury on the elements of second-degree assault against an inmate or employee of the Department of Corrections, the only charge the jury considered, as follows:

> Now assault is causing offensive physical contact to another person.
>
> In order to convict [appellant] of assault, the State must prove that [appellant] caused physical harm to Bryan McDonald, that the contact was the result of an intentional or reckless act of [appellant] and was not accidental, and that the contact was not consented to by Bryan McDonald, and that [appellant] was at the time of the incident an inmate in the Division of Corrections.
>
> * * *
>
> [W]ith respect to . . . offensive physical contact, it may be offensive physical contact or physical harm.

Closing argument ensued. During the State's rebuttal argument, the prosecutor made the following remarks about Mr. Hartwig and his testimony:

> He said, "The whole thing happened right in front of me. I saw it. I saw who did it and it wasn't [appellant]." Then when I asked him, I said, "You saw who struck him with the lock?" "Yes." "Who was it?" He wouldn't tell me. Then he changed his story. He said, "Well I don't know who it was." So then I asked him about everybody involved in the assault and he wouldn't tell me. He said that he was afraid. There is some fear that made him not tell you the whole truth, that made him violate his oath to tell the truth. I don't know what that fear is. Could be the same fear that has him coming here today and say it wasn't [appellant]. The fact is Mr. Hartwig is completely not credible. He is a convicted burglar. He changed his story on the stand. He lied about his oath and he has a reason to lie. There is some threat that is placed upon him.

There was no objection at this time. Near the end of its rebuttal argument, the State addressed a point raised by defense counsel during his closing argument, and the following occurred:

> [STATE]: And the last thing that I want to talk to you about before I let you go and deliberate, [d]efense counsel mentioned that [appellant] was not involved with striking Mr. McDonald with the lock. And I will tell you that's not true. He was involved. He may not have been the one to swing the lock but he was just as involved as if he had. I will give you an example. Two people go into a bank, one person has two guns in his hand and tells everybody to keep their hands up. Another person comes in with a bag and hops the counter and takes the money out of the drawer. They are both guilty of armed robbery even though one person didn't have a weapon and one person took no money because you're liable for what [your] co-conspirators do. If you go into a joint attack on one individual with two others, you are just as liable for everything that they do.
>
> [DEFENSE]: Your Honor, may we approach?
>
> THE COURT: I think you're a little far afield there with that analogy [counsel].
>
> [STATE]: Suffice it to say you are liable [for] what your co-conspirators do.
>
> [DEFENSE]: Again your, your Honor –
>
> THE COURT: Come on up.
>
> [(Whereupon a bench conference was held.)]
>
> [STATE]: I apologize your Honor. I wasn't going back to the analogy.
>
> [DEFENSE]: My client has not been charged with conspiracy.
>
> THE COURT: He's not charged with conspiracy. He's not charged with being an aider and abettor. He's charged with the individual act of assault. I mean I understand where you are going, but they haven't been instructed on this and I think it's, it is sending the wrong message.
>
> [STATE]: I'll move on.

THE COURT: Thank you.

[DEFENSE]: Thank you.

DISCUSSION

Appellant argues that the trial court erred in allowing the State to make "improper and prejudicial comments at closing argument." He makes two assertions in this regard. First, he contends that "the prosecutor [improperly] made arguments based on facts not admitted into evidence directly implying that the eyewitness called by the defense had been threatened by Mr. Milburn without any evidence in the record to support such a claim." Second, he asserts that the State improperly argued law regarding two new theories of culpability on which the jury had not been instructed. Appellant asserts that these two arguments deprived him of a fair trial, and the trial court erred in failing to properly address the State's comments.

The State contends that appellant "states no basis for reversal." With respect to the claim that the prosecutor argued facts not in evidence, the State asserts that this claim is unpreserved for review because defense counsel failed to lodge an objection during trial, and this Court should decline to review for plain error.

Regarding the claim that the prosecutor improperly argued law to the jury, the State contends that, because the court sustained defense counsel's objection, and defense counsel did not request any further relief from the court, there is nothing for this Court to review on appeal.

We begin with the claim that the prosecutor improperly argued facts not in evidence. In support, appellant points to the prosecutor's statement in closing argument that

Mr. Hartwig would not say who was involved in the assault because "[t]here is some fear that made him not tell you the whole truth, that made him violate his oath to tell the truth. I don't know what that fear is. Could be the same fear that has him coming here today and say it wasn't [appellant]."

Initially, we agree with the State that, because defense counsel failed to object to the argument below, the issue is not preserved for this Court's review. "Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). Here, the record is clear that defense counsel did not object below to the statement he contends on appeal was erroneous, and therefore, the issue is not preserved for appellate review.

Although this Court has discretion to review unpreserved errors, the Court of Appeals has emphasized that "appellate courts should rarely exercise" their discretion under Md. Rule 8-131(a) because considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented first to the trial court so that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge. *Chaney v. State*, 397 Md. 460, 468 (2007). *Accord Kelly v. State*, 195 Md. App. 403, 431 (2010), *cert. denied*, 417 Md. 502, *cert. denied*, 131 S. Ct. 2119 (2011). In assessing whether we should, as appellant requests, exercise our discretion to review the argument for plain error, we note that plain error is error that "'vitally affects a defendant's right to a fair and impartial trial.'" *Conyers v. State*, 345 Md. 525, 563 (1997) (quoting *Rubin v. State*, 325 Md. 552, 588 (1992)). "We

reserve our discretion to exercise plain error review for instances when the unobjected to error is 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Stone v. State*, 178 Md. App. 428, 451 (2008) (quoting *State v. Brady*, 393 Md. 502, 507 (2006)). *Accord Steward v. State*, 218 Md. App. 550, 566-67, *cert. denied*, 441 Md. 63 (2014). Appellate review based on plain error is "a rare, rare, phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). The alleged error here is not so extraordinary to convince us to exercise our discretion to review this claim under the plain error doctrine.

We turn next to appellant's contention that the State improperly "inject[ed] two theories of culpability that were not charged," and "the court failed to instruct the jury that it could not rely on those bases to convict [a]ppellant." In response, the State implicitly concedes that the prosecutor's argument suggesting that the jury could convict appellant on a conspiracy or accomplice liability theory was improper. It argues, however, that appellant obtained the relief he requested, and therefore, there is no appealable issue. We agree.

When the prosecutor attempted to analogize this case to a conspiracy among bank robbers, the court chastised the State in front of the jury, stating that the prosecutor was "a little far afield" with his analogy.[1] The trial court then asked counsel to approach the bench,

[1] Appellant's reliance on *Cruz v. State*, 407 Md. 202 (2009) and *People v. Millsap*, 724 N.E.2d 942 (Ill. 2000), is unavailing. In both of those cases, the *trial court* instructed the jury on an alternate theory of liability after the parties had presented closing arguments. *See Cruz*, 407 Md. at 219-21. Here, by contrast, the court properly instructed the jury only on assault of the battery variety. It was the State, not the trial court, who (continued…)

and the court again noted the impropriety of the remark, at which time the prosecutor apologized and agreed to withdraw the argument. Given that appellant's objection was sustained, by the court, and defense counsel expressed no further objection or request for additional relief, there is no court error for us to review. *See Bittenger v. CSX Transp. Inc.*, 176 Md. App. 262, 290 (when an objection to closing argument is sustained, objector must request specific relief, such as motion for mistrial, to strike, or for further cautionary instruction; otherwise, there is nothing for appellate court to review) (quoting *Hairston v. State*, 68 Md. App. 230, 236 (1986)), *cert. denied*, 402 Md. 356 (2007).

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

provided the jury with the "alternate" theory of liability, and as indicated, the court granted appellant's requested relief in response to the comments.