UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2486

September Term, 2014

JERMAINE ANTHONY CONWAY

v.

STATE OF MARYLAND

Wright,
Graeff,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: June 28, 2016

Following a trial in the Circuit Court for Baltimore County, a jury convicted appellant, Jermaine Anthony Conway, of first-degree assault, use of a firearm in the commission of a crime of violence, possession of a regulated firearm following the commission of a disqualifying crime, and reckless endangerment. The circuit court sentenced appellant to 20 years, plus two 15-year concurrent sentences on the firearms charges.

On appeal,[1] appellant presents the following questions for our consideration:

> 1. Did the trial court err in limiting the cross-examination of the State's key witness?
>
> 2. Did the trial court err in allowing the State to make improper and prejudicial statements at closing argument?

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

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 10:30 p.m. on May 8, 2014, Andre Boyd, Mia Henson, Elvira Mack, and Taegan Hicks, employees of the Charles Hickey School (the "Hickey School"), a juvenile detention facility in Baltimore County, exited the building at the end of their 2:00 to 10:00 p.m. shift. As the employees lingered in the parking lot, several shots rang out from inside an automobile.

[1] The Office of the Public Defender filed a timely notice of appeal on appellant's behalf on January 9, 2015. Appellant, stating that he had not received confirmation that his public defender had filed a notice of appeal, filed his own, *pro se*, notice of appeal on February 2, 2015. Because the Office of the Public Defender represents appellant in his appeal, we treat appellant's *pro se* notice of appeal as moot.

Shift Commander Quintina Harold was at the facility's gatehouse dismissing the employees for the night when the shots were fired. Ms. Harold observed the car make a U-turn and proceed slowly up Old Harford Road. She then ran toward the parking lot, calling to her employees to determine whether anyone was injured. Ms. Hicks and Ms. Mack responded immediately, and Ms. Harold found the two women crouched down near a vehicle for safety.

Mr. Boyd did not respond to Ms. Harold's call. Ms. Harold found Mr. Boyd sitting in his vehicle, "in shock" and shaking. Ms. Harold did not see Ms. Henson.[2]

Mr. Boyd testified that he knew that Ms. Henson generally arrived at work in a silver Honda Accord coupe, with an African-American male dropping her off. In court, Mr. Boyd identified appellant as that man. Ms. Henson usually was picked up in the same silver Accord after the end of her shift.

Mr. Boyd stated that, prior to the night in question, co-workers had told him that Ms. Henson found him attractive. He also recently had learned that she told appellant, her boyfriend, about her attraction. Although appellant believed that Mr. Boyd and Ms. Henson were involved in a relationship, Mr. Boyd denied socializing with Ms. Henson outside of work and stated that appellant had no reason to be jealous.

[2] Ms. Hicks and Ms. Mack generally corroborated Ms. Harold's recitation of the events on the night in question. Each woman added that Ms. Henson had met them at Ms. Mack's car to obtain some CDs that Ms. Mack had for her, after which Ms. Henson said she had to leave because her boyfriend, who provided her ride, was waiting for her. Shortly thereafter, they saw shots being fired from inside a silver car, after which the car turned around and slowly drove away.

As Mr. Boyd left work on the evening of May 8, 2014, he observed Ms. Henson in the front passenger seat of her silver Honda Accord. He then observed a black male, whom he assumed to be Ms. Henson's boyfriend, fire approximately five shots upward in his general direction from the driver's side of the Accord. After the shots were fired, the car turned around and slowly went up the street, "like he was trying to make a statement."

Mr. Boyd testified that as a result of the shooting, he had Post-Traumatic Stress Disorder, which necessitated two weeks of medical leave from work and ongoing mental health counseling. Although he had always done his job well, with no infractions, Mr. Boyd was fired almost immediately after returning to work at the Hickey School following the shooting for undertaking an "improper restraint" of a juvenile resident.

Mia Henson testified that she and appellant had become romantically involved approximately one year prior to the May 8, 2014, shooting, and they had been living together for several months by that time. In the first several months of their relationship, appellant was "kind" and "loving," but after she expressed her belief that her co-worker, Mr. Boyd, was attractive, he punched her with a closed fist.

From then on, appellant assumed that Ms. Henson and Mr. Boyd were involved in an affair, although Ms. Henson constantly reassured appellant they were nothing more than co-workers. Ms. Henson testified that she did not end her relationship with appellant, despite his abuse, and his ongoing suspicion that she was cheating on him, because she "really did care for him." By May 8, 2014, however, she described their relationship as "hell," with appellant constantly badgering her about Mr. Boyd.

Appellant usually dropped her off and picked her up from work in her 2010 silver Honda Accord. On the night of the shooting, Ms. Henson left work and walked to Ms. Mack's car to obtain some CDs. She had seen her vehicle parked by the school's gate, so she knew appellant was waiting for her.

As she got into the passenger seat of her vehicle, she realized that appellant had seen Mr. Boyd in the parking lot. Appellant told her, "bitch, get out of the car, kiss [him] now, you know, you kiss him behind my back, kiss him now in front of my face." Appellant then opened the driver's side window and fired several shots from a gun, which she assumed had been in his lap.

Ms. Henson was concerned for Mr. Boyd, but from her vantage point, he did not appear to be injured. Appellant turned the car around and exited the parking lot. Ms. Henson expressed shock at his behavior, to which appellant responded: "That bitch better be lucky. That's a warning."

When she and appellant arrived at their home, Ms. Henson was distraught about the shooting and worried that she would lose her job. Appellant assured her no one would find out. Ms. Henson did not call the police because she was afraid of what appellant would do if she called.

Maryland State Troopers arrived at her apartment at approximately 5:00 a.m. the next morning.[3] Ms. Henson was arrested as an accessory after the fact. She provided a

[3] The State Police had reviewed the school's security video, which showed what appeared to be a muzzle flash from a firearm being discharged inside a car with its headlights turned off. The Troopers recovered six spent shell casings from (continued . . .)

statement to the police, in which she denied any knowledge of the shooting the night before, stating it was a "normal night." She conceded at trial that her initial statement was not truthful. After remaining in jail for four days and retaining a lawyer, Ms. Henson gave a recorded statement, which she said was truthful. She testified that her arrest led to dismissal from her job at the Hickey School, eviction from her apartment, and repossession of her car.

Appellant testified on his own behalf, stating that, prior to May 8, 2014, he had never picked Ms. Henson up from work at the Hickey School, and he had driven her to work on perhaps two occasions (although he later claimed that his Maryland driver's license had been revoked and he did not drive at all). On May 8, 2014, he said, she took her car to work. He believed she had another boyfriend named Justin who sometimes drove her to work in her car.

Appellant denied ever discussing Mr. Boyd with Ms. Henson, and he claimed that he had not seen Mr. Boyd prior to trial. He believed that Ms. Henson leveled false charges against him because she wanted to hurt him after he advised her, during the last week of April 2014, that he planned to break up with her. He said that she told him she would make his life "a living hell." At the time, he did not take her seriously.

(. . . continued) the area of the shooting, all of which were determined to have been fired from the same weapon.

After speaking with the witnesses, the Troopers were able to identify the suspect vehicle as belonging to Ms. Henson. The vehicle was located at Ms. Henson's apartment in Rosedale, Maryland on May 9, 2014. After appellant and Ms. Henson were taken to the State Police Barrack, police executed search warrants of the apartment and the silver Honda. The search yielded phones and mail with appellant's identifying information on it, but no gun.

When Ms. Henson came home from work on the evening of May 8, 2014, her demeanor was the same as always. She went with him to his cousin's house, and upon their arrival home in the early morning hours of May 9, 2014, she made no mention of anything unusual that had happened the day before. When the police arrived at their home a few hours later, he had no idea why they were there. He denied ever striking or abusing Ms. Henson and further denied possessing a gun.

DISCUSSION

I.

Appellant contends that the trial court erred in limiting his cross-examination of Mr. Boyd. Specifically, he contends that the court erred in preventing his counsel from questioning Mr. Boyd regarding whether he filed a Worker's Compensation claim, asserting that this questioning was relevant to whether Mr. Boyd's testimony was motivated by a pecuniary interest.

The State argues that the issue is not preserved for review because appellant did not proffer the content of Mr. Boyd's expected answer. In any event, the State argues that the circuit court properly limited cross-examination, asserting that any response to the question would have been irrelevant, and therefore, the court acted within its discretion in excluding the evidence.

During direct-examination by the State, Mr. Boyd testified that, after the shooting, he was unable to sleep or "function." He stated that he had nightmares and suffered from Post-Traumatic Stress Disorder. Although he believed himself ready to return to work two

weeks later, he suffered anxiety from returning to the scene of the shooting. Within twenty minutes of his return to work, he was fired for an improper restraint of a juvenile.

During cross-examination, defense counsel elicited from Mr. Boyd that he was then "doing warehouse work." Counsel continued his questioning, as follows:

> [DEFENSE COUNSEL]: Okay, very well. Are you still in therapy?
>
> MR. BOYD: Yes, sir.
>
> [DEFENSE COUNSEL]: Where are you in therapy, what kind of place are you in therapy?
>
> MR. BOYD: Mental health therapy, sir.
>
> [DEFENSE COUNSEL]: Is it a business?
>
> MR. BOYD: Yes, sir.
>
> [DEFENSE COUNSEL]: Okay. How often do you go?
>
> MR. BOYD: I go, for now I'm only going once a week, sir.
>
> [DEFENSE COUNSEL]: That's how you're dealing with the stress you described, is that correct?
>
> MR. BOYD: No, actually, actually, I'm sorry, I go Wednesdays and Fridays. I'm sorry.
>
> [DEFENSE COUNSEL]: Okay. Have you made a Workers' Comp claim on this, Workers' Compensation claim?
>
> STATE: Objection.
>
> [THE COURT]: The objection is sustained.

Defense counsel did not make further comment, and he declared that he had no further questions of the witness.

We address first the State's argument that appellant has not preserved this issue for our review. When a trial court excludes evidence, the proponent of the evidence is required to make a proffer of substance and relevance in order to preserve the issue for appeal. *Conyers v. State*, 354 Md. 132, 164, *cert. denied*, 528 U.S. 910 (1999). As the State notes, there was no proffer here.

To be sure, there is an exception to the principle that the record must contain a "'proffer to show precisely what the testimony, if admitted, would have established,'" i.e., "'the tenor of the questions and the replies they were designed to elicit is clear.'" *Mills v. State*, 310 Md. 33, 46 (1987) (quoting *Peregoy v. Western Md. R.R. Co.*, 202 Md. 203, 209 (1953)), *vacated on other grounds*, 486 U.S. 367 (1988). *Accord Clermont v. State*, 348 Md. 419, 443, *cert. denied*, 523 U.S. 1141 (1998). The record here, however, does not qualify for this exception. It is not clear what relevance there was to whether Mr. Boyd had filed a Workers' Compensation claim. As the State notes, such a claim does not necessarily show bias or a motive to testify falsely because such a claim would not depend on a finding that appellant was at fault for Mr. Boyd's injuries. *See* Md. Code (2014 Supp.) §§ 9-501, 9-509 of the Labor and Employment Article. Accordingly, because appellant failed to make the required proffer, this issue is not preserved for this Court's review.

Even if the issue were preserved, we would find it to be without merit. "The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a criminal defendant the right to confront the witnesses against him." *Pantazes v. State*, 376 Md. 661, 680 (2003). Critical to the right of confrontation is the opportunity to cross-examine witnesses, as cross-

examination is one of the most effective means of attacking the credibility of a witness. *Id*. A cross-examiner "must be given wide latitude in attempting to establish a witness' bias or motivation to testify falsely." *Merzbacher v. State*, 346 Md. 391, 413 (1997).

Nevertheless, a defendant's constitutional right to cross-examine witnesses is not boundless, and managing the scope of cross-examination is a matter that lies within the sound discretion of the trial court. *Simmons v. State*, 392 Md. 279, 296 (2006). Trial courts have "wide latitude to establish reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Pantazes*, 376 Md. at 680. A trial court does not abuse its discretion when it excludes irrelevant cross-examination. *Simmons*, 392 Md. at 296. *See also* Md. Rule 5-402 ("Evidence that is not relevant is not admissible."); Md. Rule 5-403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of . . . waste of time."); Md. Rule 5-611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.").

In reviewing a trial court's evidentiary rulings, "we recognize that the court has broad discretion in the conduct of trials, and we will not disturb that exercise of discretion unless the court has clearly abused it." *Churchfield v. State*, 137 Md. App. 668, 682, *cert. denied*, 364 Md. 536 (2001). The appropriate test to determine abuse of discretion in limiting cross-examination is "whether, under the particular circumstances of the case, the limitation inhibited the ability of the defendant to receive a fair trial." *Martin v. State*, 364

Md. 692, 697-99 (2001). Whether there has been an abuse of discretion depends on the particular circumstances of each individual case. *Pantazes*, 376 Md. at 681.

We perceive no abuse of discretion here. Defense counsel conceded, in his opening statement, that it was uncontroverted that shots were fired on the night in question by a person in Ms. Henson's car, and the only dispute was whether it was appellant or another man who had fired them. Thus, an answer to defense counsel's cross-examination question about whether Mr. Boyd had filed a Workers' Compensation claim from which he might have gained a monetary benefit was irrelevant to the only fact at issue, i.e., whether it was appellant who fired the shots. It would not have supported appellant's later claim that Ms. Henson made up the accusation that appellant fired the shots in an attempt to retaliate against him for breaking up with her. As such, appellant was not denied a fair trial by the court's limitation upon defense counsel's cross-examination of Mr. Boyd, and the circuit court did not abuse its discretion in controlling the scope of cross-examination.

II.

Appellant next contends that the trial court erred in permitting the prosecutor to make improper and prejudicial comments during his closing argument. Specifically, he asserts that the prosecution incorrectly referred to facts not admitted into evidence and argued the law. Conceding that he failed to object during the State's closing argument, appellant seeks plain error review. The State contends that the prosecutor's argument was proper, and therefore, "there was no error, much less 'plain' error."

A.

Proceedings Below

Appellant's contentions involve two portions of argument. The first, in which appellant contends that the prosecutor argued a fact not in evidence, was as follows:

> I mean, Mr. Boyd said it himself, he's, I think he's firing in the air, (inaudible) above me, but he [was] still was frozen in fear and its [sic] really affected his life. I mean, some people could maybe just get over it, maybe some people could just move on, horrible situation but it really affected his life. . . . But I mean, I . . . know you watched him testify. He's a big man. It's kind of a contradiction. It's this really giant like guy who, who comes in and everyone testified, you know, how great of a worker he is, how nice of a guy he is and he works with the kids and all this, and he comes in, this big strapping guy, and he sits here and he's like frozen. I mean . . . it was, I thought it was pretty compelling. He, he's sitting there and, you know, it's the first time seeing the Defendant, it's the first time re [sic], not the first time, but he's reliving it all over again and at the end of the day, this is a guy who has devoted his life to helping kids, that's what he does. He's worked in the system, he's a mentor to kids, married for ten years, he's got five daughters, lives at home with them, involved in their lives. And it has really affected him. He testified that for weeks he didn't go out, he was scared about anything, trouble going back to work, *I mean, he lost his job over this*. His life is completely different over something so stupid and childish, childish and dangerous, because he wants to send a message? Because he wants to be a tough guy? Come on. And Mr. Boyd, unfortunately, his life is different, it just is. And it's a shame.

(Emphasis added). Although appellant did not object below, he asserts on appeal that the emphasized statement was erroneous because no evidence had been presented that Mr. Boyd lost his job as a result of the shooting.

The second portion of the argument to which appellant objects, on the ground that the prosecutor argued the law, in contradiction to the trial court's instruction to the jury, was as follows:

> So as reckless endangerment, when you think about what the Defendant did, what crime was committed, by taking a handgun in a public area and whether he's trying to scare the guy, whether he's trying to send a message, whatever he's tried to do, by firing that weapon six times, bullets go up and bullets come down and let's all be thankful that two hundred yards a way [sic], a mile down the road, however far bullets go, it didn't come down on somebody. We'd be here for a whole nother reason [sic]. *It is reckless to fire in a public area with people around openly a handgun. Her Honor told you that the conduct that creates a substantial risk of death or serious bodily injury when those bullets come down, God forbid they hit somebody, that is definitely a risk of serious bodily injury.* A reasonable person would not engage in such (inaudible).

(Emphasis added).

Again, defense counsel made no objection to either allegedly improper comment during the prosecutor's closing argument.

B.

Plain Error 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). Thus, the failure to object to closing argument generally waives any complaint on appeal. *See Icgoren v. State*, 103 Md. App. 407, 442 (objection to prosecutor's closing argument not preserved for appellate review where no objection made at trial), *cert. denied*, 339 Md. 167 (1995). 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 in the first instance 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).

Recognizing the failure to object below, appellant requests that we exercise our discretion to review the argument for plain error. 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)). This Court has noted that "[w]e 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). This case is not one that we will review for plain error.

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