Circuit Court for Prince George's County
Case No. 161346B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 409

September Term, 2018

RALPH EDWARD DAVIS

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Thieme, J.

Filed: March 7, 2019

After a jury trial in the Circuit Court for Prince George's County, Ralph Edward Davis, appellant, was convicted of robbery and conspiracy to commit robbery. The court sentenced appellant as a subsequent violent offender[1] to a mandatory term of 25 years for the robbery and a consecutive term of 10 years, with all but 616 days suspended, for conspiracy to commit robbery. This timely appeal followed.

ISSUE PRESENTED

Appellant presents the following questions for our consideration:

> I. Did the trial judge's comments at sentencing exceed the outer limits of the judge's broad discretion in sentencing and amount to impermissible sentencing criteria?
>
> II. Did the trial court err in permitting the State to make improper comments during closing argument?

[1] The sentencing court determined that appellant was a subsequent violent offender and sentenced him under Md. Code (2012 Repl. Vol., 2017 Supp.), § 14-101(c) of the Criminal Law Article, which provided:

> (c) *Third conviction of crime of violence.* – (1) Except as provided in subsection (f) of this section, on conviction for a third time of a crime of violence, a person shall be sentenced to imprisonment for the term allowed by law but not less than 25 years, if the person:
>
> (i) has been convicted of a crime of violence on two prior separate occasions;
>
> 1. in which the second or succeeding crime is committed after there has been a charging document filed for the preceding occasion; and
>
> 2. for which the convictions do not arise from a single incident; and
>
> (ii) has served at least one term of confinement in a correctional facility as a result of a conviction of a crime of violence.
>
> (2) The court may not suspend all or part of the mandatory 25-year sentence required under this subsection.
>
> (3) A person sentenced under this subsection is not eligible for parole except in accordance with the provisions of § 4-305 of the Correctional Services Article.

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

In July 2016, Goutan Karmakar worked the night shift, from 8 p.m. to 8 a.m., at a 7-11 store on Crain Highway in Upper Marlboro. At about 3:40 a.m. on July 17, 2016, while Mr. Karmakar was waiting on one of his regular customers, two men entered the store. Mr. Karmakar described both of the men as black, with the taller man having dark skin and the other having lighter skin. After Mr. Karmakar's regular customer left the store, one of the men, later identified as appellant, brought a bottle of water and a bag of chips to the counter. After paying for the bottle of water, appellant left the counter to return the bag of chips to the shelf. The second man approached the counter and stood there, in front of Mr. Karmakar. At that point, Mr. Karmakar felt something hard against his back and heard appellant say, "[l]ay down, lay down."

Mr. Karmakar did not lie down, but just stood in place as appellant pulled boxes of cigarettes out of the cigarette case and stuffed them into a trash bag. Appellant took about 200 to 220 boxes of cigarettes. According to Mr. Karmakar, each pack of cigarettes within a box cost about $8. After taking the cigarettes, appellant told Mr. Karmakar to open the cash register and then took about $80 from it. Appellant and the other man then left the store. Mr. Karmakar testified that although the men entered and left the store together, they did not communicate with each other while they were in the store.

After the men left, Mr. Karmakar called the owner of the store and the police. The police responded to the 7-11 store and obtained surveillance video from which they made

still photographs. Two days later, police interviewed Rodney Wormley in regard to an unrelated case. During that interview, Mr. Wormley identified appellant and Adrian Hall as the men in the photographs from the 7-11 store. The lead detective handling the 7-11 store robbery acknowledged that Mr. Wormley reached out to the police and that police did not "go looking" for him to identify either appellant or Mr. Hall. In August 2016, police showed Mr. Karmakar two photographic arrays from which he identified appellant as the man who took the cigarettes and cash and Adrian Hall as the man who stood in front of the counter.

At trial, Mr. Wormley testified for the State. He acknowledged that he had been arrested for "a lot of theft charges," including an arrest on July 19, 2016, for robbery. While at the detention center in Upper Marlboro, Mr. Wormley spoke with appellant, whom he knew as "Abe," who asked him to tell a man named Adrian Hall not to take any pleas because "they don't have no evidence." Appellant also told Mr. Wormley that he had robbed a gas station in Upper Marlboro and that he had taken cigarettes and money. Mr. Wormley entered into a plea agreement with the State pursuant to which he agreed to testify against appellant and the State agreed to "cap itself in the middle of the guidelines" in Mr. Wormley's case, in which he faced a maximum sentence of 15 years. (Tr. 9/13/17 at 13)

We shall include additional facts as necessary in our discussion of the issues presented.

DISCUSSION

I.

Appellant contends that as a result of comments made at his sentencing hearing, the sentencing judge exceeded the outer limit of her broad discretion in sentencing and engaged in impermissible considerations that influenced his sentence. Specifically, appellant argues that the sentencing judge improperly considered the fact that his residence was in the District of Columbia and that he had requested a jury trial, or "at the very least" gave the impression that those impermissible considerations influenced the sentence that was imposed. As evidence that the court's impermissible considerations influenced his sentence, appellant points to the fact that his sentence for conspiracy ran consecutive to the mandatory sentence imposed for robbery. We are not persuaded.

A. Standard of Review

In *Cruz-Quintanilla v. State,* the Court of Appeals explained the standard of review to be employed when considering a challenge to a sentence:

> This Court has long adhered to the general principle that the "sentencing judge is vested with virtually boundless discretion" in devising an appropriate sentence. The sentencing judge is afforded such discretion "to best accomplish the objectives of sentencing – punishment, deterrence and rehabilitation." To achieve those objectives, the sentencing judge is not constrained simply to "the narrow issue of guilt." Rather, "[h]ighly relevant – if not essential – to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." So it is that, in exercising that discretion, the sentencing judge may take into account the defendant's "reputation, prior offenses, health, habits, mental and moral propensities, and social background." "The consideration of a wide variety of information about a specific defendant permits the sentencing judge to individualize the sentence to fit 'the offender and not merely the crime.'" Given the broad discretion accorded the sentencing judge, "generally, this Court reviews for abuse of discretion a trial court's decision as to a defendant's sentence.
>
> The sentencing judge's discretion, although broad, is not without its limits. A given sentence is subject to review on any of three potential

> grounds: "(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits."

Cruz-Quintanilla, 455 Md. 35, 40-41 (2017)(internal citations omitted).

B. Challenged Statements

Appellant's challenge to his sentence is based on the second ground articulated in *Cruz-Quintanilla*, "whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations[.]" In support of his contention that the sentencing judge improperly considered his request for a jury trial, appellant directs our attention to the following portion of the sentencing hearing:

> THE COURT: [T]he Court does remember this trial vividly and I remember the defense and I thought it was quite creative.
>
> But I also watched the video, which was clear as day. I watched you, Mr. Davis, walk up to someone who was working hard and working the midnight shift, and you walked up to him and stuck your finger in his back like it was a gun. And you still – I don't know how many packs of cigarettes, how many cartons of cigarettes you stole.
>
> DEFENDANT: It was a lot.
>
> THE COURT: It was a lot. And you ran out of there. Which then caused Mr. Guptman [sic] and (inaudible) call the police. *And then he had to come here and testify*. And all he's trying to do is his work. (Inaudible). And he now has to worry about – and I don't know if this is the first time this has ever happened to him or the tenth, but that's irregardless [sic].
>
> DEFENDANT: Right.

(Emphasis provided by appellant).

In support of his assertion that the sentencing judge improperly considered his place of residence, appellant points us to the following comments by the prosecutor at the sentencing hearing:

> [PROSECUTOR]: Mr. Davis, when he was arrested didn't confess, showed no remorse. And at the time during plea negotiations, the State did try to negotiate some pleas, knowing and recognizing that the Defendant had a lengthy record. The Defendant opted to go to trial, had the victim come in and relive everything, had the victim actually come in after doing a graveyard shift and come into this courtroom and relive everything.
>
> * * *
>
> There's one other thing that I remember and it stands out in my mind, Judge Wallace always says this, *it's just that when people like Mr. Davis who live in D.C. come into this county and commit crimes*, it makes it harder for people like Mr. Guptman [sic] . . . , and other people who get up and go to work and live in this county to do so free of wondering if they're going to be attacked or robbed of property.
>
> *And for those reasons, the State is asking that you sentence the Defendant to 25 years.*

(Emphasis provided by appellant).

Appellant also directs our attention to the following statements by the sentencing judge pertaining to his place of residence:

> THE COURT: He [the victim] has to worry about people coming into his place of business – and I'm sure he's probably making a little bit more than minimum wage – and he feels somebody stick a finger – he thought it was a gun. And he has to deal with that and that's not fair. *This community and everyone who lives here* deserves to be able to work and do what they want to do without fear of somebody walking in with a gun, albeit it was your finger, but it was thought to be a gun. They shouldn't have to deal with it. And I understand – I also understand, Mr. Davis, your difficulty with drugs. I understand that. But we're talking about third and fourth convictions for crimes of violence. Third and fourth. *And this is my community. I live here. You don't.*

> DEFENDANT: Not any longer. It was my community. I lived here for a lot of years.
>
> THE COURT: Okay. *And then you moved out and you lived in D.C., right? Your last residence was in D.C.?*
>
> DEFENDANT: Yes, ma'am.
>
> THE COURT: *And then you came over here and committed crimes here. This is my community. My kids go to school here. Everybody in this courtroom who lives in this community should not have to worry about people walking around stealing things from them.* It's not fair. Not when they work hard every day.

(Emphasis provided by appellant).

C. Preservation

Under Maryland Rule 8-131(a)[2], "'a defendant must object to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding.'" *Taylor v. State*, 236 Md. App. 397, 451 (2018)(quoting *Sharp v. State*, 446 Md. 669, 683 (2016)); *see also*; Md. Rule 4-323(c)[3]. Indeed, "allegations of impermissible

[2] Maryland Rule 8-131(a) provides, in part, that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"

[3] Maryland Rule 4-323(c) provides:

> **(c) Objections to Other Rulings or Orders**. For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

considerations at sentencing are not 'illegal sentences' subject to collateral or belated review and 'must ordinarily be raised in or decided by the trial court[.]'" *Abdul-Maleek v. State*, 426 Md. 59, 69 (2012)(quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). A defendant "'must object to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding.'" *Taylor*, 236 Md. App. at 451 (quoting *Sharp*, 446 Md. at 683). Appellant acknowledges that defense counsel failed to object to any of the allegedly impermissible sentencing considerations set forth, *supra*. Relying on *Abdul-Maleek*, however, he asks us to exercise our discretion under Maryland Rule 8-131(a) and consider his unpreserved contentions. We decline to do so.

In *Abdul-Maleek*, the Court observed that Maryland Rule 8-131 permits an appellate court to consider issues deemed to have been waived for failure to make a contemporaneous objection. 426 Md. at 68-69. The Court noted that this discretion should be exercised with caution, and only after we consider whether our exercise of this discretion will work unfair prejudice to either of the parties and/or promote the orderly administration of justice. *Id.* at 70.

After reviewing the circumstances of the case before it, the Court in *Abdul-Maleek* decided to review the sentence imposed based on the fact that, at the sentencing hearing, the trial judge commented on appellant's exercise of his right to a *de novo* appeal from his convictions on the same charges in district court. *Id.* at 70. The Court reasoned that further review would not prejudice either party and would give it an opportunity "to comment on the sentencing issue in the context of de novo appeals and thereby promote the 'orderly administration of justice.'" *Id.* at 70 (*quoting Bible v. State*, 411 Md. 138, 152 (2009)).

We are not similarly moved to exercise our discretion to excuse appellant's failure to raise any objection in the circuit court in response to the sentencing judge's comments. It is well-established that an appellate court should review an "unpreserved claim only where the unobjected to error can be characterized as 'compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial' by applying the plain error standard." *Abeokuto v. State*, 391 Md. 289, 327 (2006)(quoting *Richmond v. State*, 330 Md. 223, 236 (1993)). As we have explained, our discretionary exercise of authority under Rule 8-131(a) to address an unpreserved issue "'1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Kelly v. State*, 195 Md. App. 403, 432 (2010)(quoting *Hammersla v. State*, 184 Md. App. 295, 306 (2009)(quoting in turn *Morris v. State*, 153 Md. App. 480, 507 (2003)), *cert. denied*, 409 Md. 49 (2009). Appellant does not meet any of those criteria and, accordingly, we decline to exercise our discretion to overlook the failure to raise the issue at the sentencing hearing. Md. Rule 8-131(a).

Even assuming, *arguendo*, that we were persuaded the trial court committed plain error, we would still affirm the judgment. In reviewing the considerations of a sentencing judge, "we examine the record to determine whether 'the sentencing judge was motivated by impermissible considerations reflecting ill-will or prejudice,' or whether 'his comments might lead a reasonable person to infer that he might have been motivated by ill-will or prejudice.'" *Ellis v. State*, 185 Md. App. 522, 551 (2009)(quoting *Jackson v. State*, 364 Md. 192, 207 (2001)).

Our review of the entire sentencing transcript shows that the trial judge's comment, that Mr. Karmakar had to come to court and testify, was made in the context of the court's

consideration of the impact of the offense on Mr. Karmakar, which was a proper consideration. *See Carter v. State*, 461 Md. 295, 364 (2018)("So long as the sentence is within the constraints set by the Eighth Amendment, the [sentencing court] . . . has its usual broad discretion in selecting an appropriate sentence, taking into account the circumstances of the offenses, their impact on victims . . . ."); *Sharp*, 446 Md. at 690-91 (2016)(statement by sentencing judge that Sharp put the victim and others through trial did not give rise to an inference that the court improperly considered Sharp's decision not to plead guilty). The judge's comment was an isolated reference regarding the victim that does not give rise to an inference that the court improperly considered appellant's election of a jury trial in formulating the sentence.

In support of his challenge to the sentencing judge's observation that he resided in the District of Columbia, appellant relies on the Court of Appeals' decision in *Jackson v. State*, 364 Md. 192 (2001). In that case, during the sentencing phase of a criminal proceeding, the judge commented, in part, as follows:

> Now, unfortunately, a number of communities in the lovely city of Columbia have attracted a large number of rotten apples. Unfortunately, most of them came from the city. And they live and act like they're living in a ghetto somewhere. And [t]hey weren't invited out here to [behave] like animals.
>
> * * *
>
> But roaming around the streets at 3:30 in the morning, going to a WaWa, uh going to somebody – going out of the way to go to somebody else's house and confront people with sawed-off shotguns is what they do in the city. That's why people moved out here. To get away from people like Mr. Jackson. Not to associate with them and have them follow them out here and act like this was a jungle of some kind. So. It's not. And our only chance to preserve it is to protect it.

* * *

> Well, you worked hard to be a bad person and you accomplished it. Civilized people are not on the roads at 3:30 in the morning, confronting other people with sawed-off shotguns. Civilized people don't own sawed-off shotguns. Only criminals. Only criminals looking for no good, that's why a sawed-off shotgun.

Id. at 197-98.

In *Jackson*, the Court of Appeals held that the trial court's comments "exceeded the outer limit of a judge's broad discretion in sentencing and therefore amounted to impermissible sentencing criteria." *Id.* at 208. It concluded that the sentencing judge "gave the impression that he based petitioner's sentence, at least in part, on the improper presumption that petitioner was from Baltimore City, or from a city, rather than Howard County. In other words, he considered petitioner's origins in formulating the sentence." *Id.* In addition, the Court concluded that the judge's statements gave "rise to an inference that race was inappropriately considered at sentencing." *Id.*

In the instant case, the sentencing judge commented only that appellant should not have come to Prince George's County to rob its citizens, who were attempting to work and earn a living. The judge did not cast aspersions on the residents of the District of Columbia, but merely observed that it was unfair for people to come into the county from outside the community for the purpose of robbing its citizens. Moreover, there is nothing in the record to show that the sentencing judge imposed a harsher sentence on appellant because his last residence was in the District of Columbia or as a result of any other impermissible sentencing consideration. In fact, the judge noted that under § 14-101 of the Criminal Law

Article, her hands were tied and she did not have the ability to suspend all or part of the mandatory 25-year sentence for the robbery, and she crafted the sentence for conspiracy so as to permit appellant to get alcohol and drug treatment as a term of his probation, stating:

> THE COURT: But what I am going to do in reference to Count One – there are two counts in this case, there is robbery and then there is conspiracy. And, sir, I want to tell you, I have to sentence you to 25 years. I have to. I have no choice. That is based on the legislature. And because it says "shall" –
>
> * * *
>
> And so you know. But what I [am] going to do, in reference to Count Two, I am going to sentence you to ten years. So Count One is 25 years mandatory. Count Two will be ten years, I'm going to suspend all – what is the credit he has at this point?
>
> * * *
>
> [DEFENDANT]: As of today's date, I've been in jail 616 days.
>
> THE COURT: I'm going to do ten years, suspend all but 616 days credit for time served. I'm going to run that consecutive and the reason I'm doing that is so that I'm going to place you on five years of supervised probation. So when you get out, you're going to get alcohol and drug treatment through parole and probation, okay?

After imposing sentence on another robbery to which appellant pleaded guilty, the sentencing judge again addressed appellant's addiction, stating, "[a]nd I am, again, going to order a drug evaluation so they can see exactly what you need and get you the treatment that you need in order so that you can beat this addiction."

Our review of the entire sentencing proceeding reveals no evidence that the sentencing judge was motivated by ill-will, prejudice, or any other impermissible consideration and there is nothing to suggest that she imposed a harsher sentence as a result

of an impermissible sentencing consideration, such as appellant's decision to elect a jury trial or the fact that his last residence was in the District of Columbia. Thus, even if this issue had been preserved properly for our consideration, we would find no merit in appellant's contentions.

II.

Appellant argues that the trial court abused its discretion when it allowed the prosecutor to make several allegedly improper and prejudicial comments during closing arguments. We disagree.

"The permissible scope of closing argument is a matter left to the sound discretion of the trial court. The exercise of that discretion will not constitute reversible error unless clearly abused and prejudicial to the accused." *Ware v. State,* 360 Md. 650, 682 (2000)(quoting *Booth v. State*, 306 Md. 172, 210-11 (1986), *vacated in part on other grounds*, 482 U.S. 496 (1987)). An abuse of discretion exists "where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles." *Alexis v. State*, 437 Md. 457, 478 (2014)(citations omitted).

As a general rule, counsel are afforded great leeway when presenting their closing remarks. *Degren v. State*, 352 Md. 400, 429-30 (1999)(and cases cited therein). "The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Id.* "There are no hard-and-fast limitations within which the argument of earnest counsel must be confined – no well-defined bounds beyond which the eloquence of an advocate shall not soar . . . . He

may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions." *Id.* Whether counsel's argument is improper rests largely within the broad discretion of the trial court because it is in the best position to determine the appropriateness of the closing argument as it relates to the evidence elicited in the case. *Ingram v. State*, 427 Md. 717, 728 (2012)(citations omitted).

It is well-settled that not every improper remark made by a prosecutor during closing argument necessarily mandates reversal, for "'what exceeds the limits of permissible comment depends on the facts in each case.'" *Beads v. State*, 422 Md. 1, 10-11 (2011)(quoting *Degren*, 352 Md. at 430-31). Even when a prosecutor's remark is improper, it will typically merit reversal only "where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Winston v. State*, 235 Md. App. 540, 573 (2012)(quotations and citations omitted), *cert. denied sub nom*, *Mayhew v. State*, 458 Md. 593 (2018), *cert. dismissed*, 461 Md. 509 (2018).

In the case before us, appellant asserts that the prosecutor improperly (1) argued the law to the jury, (2) argued that appellant had to be guilty of robbery because shoplifting and theft involve concealing stolen property, and (3) argued that any amount of force, no matter how slight, was sufficient to elevate his conduct from theft to robbery.

A. Arguments Concerning the Law and Elements of Shoplifting and Theft

In support of his first two arguments, appellant directs our attention to the following portion of the State's closing argument:

[PROSECUTOR]: *Now, the Judge has instructed you on the law. I want to focus in on a couple of things. Robbery is the taking of property by force or threat of force with the intent to deprive*. Now, in a couple of minutes defense counsel is going to get up and he is going to tell you that this is not a robbery, because it wasn't sufficient force, because it wasn't [sic] a theft or a shoplifting. I'm going to dispel that rumor or myth that he may try to put in front of you right now.

First, this cannot be a shoplifting. When you come into the courtroom, we all know you come with your life experiences and everyday – you don't come in here with no knowledge as to what certain things are. A shoplifting, you some into the store and you just try to conceal it, you don't want to get caught.

[DEFENSE COUNSEL]: Objection.

THE COURT: Approach.

(Counsel and the Defendant approach the bench.)

[DEFENSE COUNSEL]: Counsel is instructing the jury as to the law of shoplifting, which I guess would be theft.

[PROSECUTOR]: I didn't talk to them about the elements. I just said what the characteristic of a shoplifting would be.

THE COURT: Overruled. It's argument.

(Counsel and Defendant return to counsel table. The following is had in open court.)

[PROSECUTOR]: *In a shoplifting you don't want to get caught. In a theft you are doing similar things, taking a property. In this instance, you don't have those things. What you have is force.* When we talk about force in several different ways, force by words and force by just standing in front of the victim. First by words, lay down, open the cash register. These are commands that the Defendant gave to the victim which caused the victim to freeze on the day that the robbery happened.

You also have Mr. Hall and Mr. Davis working together. It's two on one. You also have Mr. Davis coming up to Mr. Goutan Karmakar acting like he had a gun behind him.

> When you are deliberating I ask that you pay attention to what has been admitted into evidence as Exhibit Number 14. These are some of the stills from the video. Exhibit Number 14 shows Mr. Davis going to the back of Mr. Hall – excuse me, of Mr. Goutan Karmakar and putting his hand there like this, saying lay down, that's when the robbery began.
>
> *Now, you also have it doesn't matter how much force was used, because I just want to say that to you at the outset. It doesn't matter how much force was used*. Mr. Davis came in with Mr. Hall and they used force. What was that force, ladies and gentlemen? Standing in front of Mr. Karmakar and being intimidating by size, having two or [sic] one and pretending to have a gun and the commands that you gave Mr. Karmakar. And let's not forget, the fact that you put your hands on him.

(Emphasis provided by appellant).

Contrary to appellant's contention, the prosecutor's statements did not constitute comments on the law of theft, but merely anticipated defense counsel's argument that because there was no force there was no robbery but only, at best, a theft or shoplifting. The prosecutor observed that this case did not involve an attempt to conceal any item and highlighted the evidence that supported the use of force, either by intimidation and the use of words or by the touching of Mr. Karmakar. There was no error in that argument.

Even assuming that the prosecutor's comments about theft and shoplifting were improper, appellant would fare no better because those comments were not likely to have misled the jury. The prosecutor specifically directed the jury to the court's instructions on the elements of robbery and repeated the requirement that the property be taken "by force or threat of force." There is nothing in the record before us to suggest that the prosecutor's comment about concealment as an aspect of theft or shoplifting misled the jury as to the elements of the crime of robbery, which was before the jury and covered in the court's instructions.

B. Arguments Concerning Force

Appellant further contends that the prosecutor improperly argued that any amount of force, no matter how slight, was sufficient to elevate his conduct from theft to robbery. In addition to the portions of the prosecutor's argument referencing force, set forth *supra*, appellant directs us to the following portion of the State's rebuttal closing argument:

> *The definition of what robbery is is the taking of property by force or threat of force. Even defense counsel said, he touched him. Might have said excuse me, sir. It doesn't matter. He touched him.* Then he told him to lay on the ground and he began to take property from the store. That's what's on the video. That is what is seen. *The fact that he didn't have that much contact with him there is [sic] one ounce of force there was a robbery.*

(Emphasis provided by appellant).

This issue was not preserved for our consideration. During the State's closing argument, defense counsel objected to the prosecutor "instructing the jury as to the law of shoplifting, which I guess would be theft." No objection was lodged to the prosecutor's comments on force or the amount of force required to prove a robbery. Contrary to appellant's assertion, the prosecutor's comments about concealing property during a shoplifting or theft were separate and apart from her comments about the use of force required to prove a robbery. It cannot be said that the sole objection lodged was sufficient to bring both issues to the attention of the trial court. We conclude, therefore, that appellant failed to preserve his contention that the prosecutor improperly argued and misstated the law of robbery when she stated that "[i]t doesn't matter how much force was used" and that if "there is one ounce of force there was a robbery."

Acknowledging that his contention might not have been preserved properly, appellant requests that we exercise our discretion to grant plain error review. As we have already noted, Maryland Rule 8-131(a) restricts appellate review generally to matters that "plainly appear[ ] by the record to have been raised in or decided by the trial court." In assessing whether we should address, and perhaps correct, an unpreserved issue, "[t]he touchstone remains our discretion." *Williams v. State*, 34 Md. App. 206, 211 (1976). "[E]ven the likelihood of reversible error is no more than a trigger for the exercise of discretion and not a necessarily dispositive factor." *Morris v. State*, 153 Md. App. 480, 513 (2003). It is only "the extraordinary error and not the routine error that will cause us to exercise the extraordinary prerogative [of reviewing plain error]." *Martin v. State*, 165 Md. App. 189, 195 (2005)(quoting *Williams*, 34 Md. App. at 212). "Plain error is error that vitally affects a defendant's right to a fair and impartial trial." *Hammersla v. State*, 184 Md. App. 295, 306 (2009), *cert. denied*, 409 Md. 49 (2009).

In the instant case, we find no error, much less plain error, with respect to the prosecutor's arguments on the amount of force required to prove robbery. In support of his contention that it was improper for the prosecutor to argue the law, appellant relies on *White v. State*, 66 Md. App. 100 (1986). In that case, over objection, the prosecutor, in closing argument, read to the jury passages from two reported Maryland appellate cases dealing with the legal concepts of reasonable doubt and circumstantial evidence. 66 Md. App. at 116, 120. Neither of those concepts was the subject of dispute with respect to the law of the crime, and the trial court's instructions on those concepts were, therefore, binding. *Id*. We held that the trial court "erred in allowing the prosecutor in closing

argument to argue law explaining the concepts of reasonable doubt and circumstantial evidence," but determined that reversal was not required because the improper argument consisted of correct statements of the law and did not mislead the jury to the prejudice of the defendant. *Id.* at 120-23. We held that "even in the absence of the prosecutor's improper argument, the jury would have returned the same verdict." *Id.* at 123.

In the instant case, the prosecutor made two references to the jury instruction on robbery, which provided, in part:

> Robbery is the taking and carrying away of property from someone else and/or someone's presence and control, by force or threat of force, with the intent to deprive the victim of the property. In order to convict the defendant of robbery, the State must prove that the defendant took the property . . . from the victim and/or his presence and control, took the property by force or threat of force, and that the defendant intended to deprive the victim of the property.

(Tr. 9/13/17 at 65-66)

We find no error in the prosecutor's references to the court's instructions. With respect to the prosecutor's comments that no particular amount of force was required, the court properly instructed the jury that a robbery may be accomplished by either force or the threat of force. *See also, Fetrow v. State*, 156 Md. App. 675, 687 (2004)(discussing constructive force, also referred to as intimidation, and noting that robbery may be accomplished "either [by] a combination of a larceny and a battery or a combination of a larceny and an assault, of the 'putting in fear' variety"). The prosecutor properly noted that there was evidence that the property was taken by means of a battery and by threat of force or intimidation. Initially, when the prosecutor stated that it did not matter how much force was used, she pointed to the fact that one of the men "being intimidating by size,"

stood in front of Mr. Karmakar while the other pretended to have a gun and gave commands to him. She also referred to the surveillance video and argued that it showed appellant putting his hand on Mr. Karmakar.

In his closing argument, defense counsel acknowledged that the video showed appellant touching Mr. Karmakar in the back, but argued that because there was no audio on the video, "[w]e don't know if lay down was said or excuse me, sir, move out of the way or hello, how are you doing." The State attacked that argument in rebuttal by pointing out that even though the video showed that appellant touched Mr. Karmakar, it did not matter because Mr. Karmakar was told to lay down and also to open the cash register, he was seen opening the register, and property was taken. The prosecutor was correct in noting that the required force could be established by either a battery, that is, appellant's use of his hand in the shape of a gun to touch Mr. Karmakar's back, or by the threat of force or intimidation, that is, through the person of intimidating size standing in front of Mr. Karmakar while appellant, pretending to have a gun, gave him commands to lay down and to open the cash register. As none of the prosecutor's comments to the jury were erroneous, plain error review is not warranted.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.