Circuit Court for Baltimore City
Case No. 118218019

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 947

September Term, 2019

EDWARD CAPERS

v.

STATE OF MARYLAND

Meredith,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: August 25, 2020

Appellant Edward Capers was convicted by a jury in the Circuit Court for Baltimore City of first-degree assault and carrying a dangerous weapon openly with intent to injure. He presents the following questions for our review:

> "I. Did the trial court err by permitting the medical examiner to testify that injuries to the victim's mouth were consistent with being struck by a chair?
>
> II. Was Capers' conviction for wearing or carrying a dangerous weapon supported by sufficient evidence?"

We shall hold that the trial court did not err or abuse its discretion in permitting the medical examiner to answer the question propounded by the State. The issue of the sufficiency of the evidence is not preserved for our review. Accordingly, we shall affirm.

I.

Appellant was indicted by the Grand Jury for Baltimore City of first-degree assault and wearing or carrying a dangerous weapon openly with intent to injure. The jury convicted him of both, and the court sentenced him to a term of incarceration of twenty-five years for first-degree assault and three years for the weapon charge, to be served consecutively.

In the evening on July 4, 2018, a group of people were drinking and socializing, as they did almost every day, at a residence located at 1936 West North Avenue in Baltimore City. Shortly after midnight, Shennika Floyd[1] and her friend Ronald Hawkins accused

[1] The State charged Ms. Floyd with first-degree murder and wearing or carrying a dangerous weapon openly with intent to injure. Appellant and Ms. Floyd were tried jointly. The jury found Ms. Floyd guilty of second-degree murder and (footnote continued . . .)

some people of cheating during their card game, in which Ms. Floyd lost ten dollars. They became entangled in a physical altercation with David Daye. Subsequently, Ms. Floyd and Mr. Hawkins left the residence in a vehicle. About thirty minutes later, appellant, Ms. Floyd's cousin, arrived at the residence, walked up to Mr. Daye, who was sitting on the stoop with his brother, and hit him. In response, Mr. Daye produced a knife and tried to fight back. Ms. Floyd reappeared with Mr. Hawkins and a dagger that she kept in her vehicle, and they joined the pursuit against Mr. Daye, who was running away.

Mr. Capers chased Mr. Daye down a street wielding a chair that he came across near the residence and struck him with it numerous times. Ms. Floyd then chased and fatally stabbed Mr. Daye with her dagger. Mr. Daye collapsed, and appellant beat him with the chair several more times. At trial, the State offered, and the court admitted into evidence, a neighbor's home surveillance system that captured these events occurring outside the residence. Wiley Daye, Mr. Daye's brother, testified that he witnessed Ms. Floyd and appellant attacking his brother and identified them in the surveillance video but stated that he did not see the stabbing or "everything that happened because all these people were all around [him]."

Dr. James Locke, a pathologist with the Office of the Chief Medical Examiner who had performed the autopsy on Mr. Daye, was admitted at trial as an expert in forensic pathology. Dr. Locke testified that Mr. Daye's cause of death was a four-inch stab wound near his heart. He further testified to other injuries noted during the autopsy as follows:

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the weapon charge. Ms. Floyd's appeal is separately before this Court. *See Floyd v. State*, No. 880, Sept. Term, 2019.

> "DR. LOCKE: On reflecting the upper lip, it was noted that there was a laceration or a tear or break in the skin of his upper lip. It was also noted that the two front teeth, his central incisors had been broken off. Presumably the injury noted to the inside of the lip was as a result of the fractured teeth.
>
> [THE STATE]: *And the injury that we're looking at, would that be consistent or inconsistent with being struck with a chair?*
>
> DR. LOCKE: It would be consistent.
>
> [DEFENSE COUNSEL FOR APPELLANT]: Objection.
>
> THE COURT: Come on up."

A bench conference ensued with defense counsel for appellant and the State as follows:

> "[DEFENSE COUNSEL]: Your Honor, I think asking if it was struck with a chair is leading. I think it is definitely steps above and beyond what the prosecutor could ask him at this point. Being struck with an instrument, yes, but not the chair.
>
> [THE STATE]: Your Honor, he is an expert. They agreed he is an expert. And he can draw conclusions that a lay witness wouldn't be able to. He is a seasoned medical examiner. And I can ask him if it is consistent or inconsistent with it. He could easily have said it was inconsistent with it.
>
> [DEFENSE COUNSEL]: But chair, Your Honor.
>
> [THE STATE]: He is an expert.
>
> [DEFENSE COUNSEL]: I don't care. He is not an expert in instrumentality. He is an expert in forensic science, not how those wounds were—
>
> [THE STATE]: They can certainly ask him on cross-examination is it consistent with being struck with a brick. Is it consistent with whatever. I mean, that is a matter for cross-examination, the State would contend.

> THE COURT: *The objection is overruled. First, it is untimely. You have to object before he answers. Second, as an expert, he can say whether it is inconsistent with or consistent with. . . . [T]here is only one of two ways to go with that kind of question. So I don't consider it leading. Overruled.*"

Subsequently, defense counsel for appellant cross-examined Dr. Locke as follows:

> "[DEFENSE COUNSEL]: In your opinion, could these abrasions to the head, and his upper lip, and the top of his head have been made with almost any instrument?
>
> DR. LOCKE: Yes.
>
> [DEFENSE COUNSEL]: So it could have been a brick?
>
> DR. LOCKE: Yes.
>
> [DEFENSE COUNSEL]: Or a lamp?
>
> DR. LOCKE: Yes.
>
> [DEFENSE COUNSEL]: Or an ice chest?
>
> DR. LOCKE: Yes.
>
> [DEFENSE COUNSEL]: What about a bottle?
>
> DR. LOCKE: Some of the injuries sure. Yes."

At the end of the State's case, defense counsel moved for judgment of acquittal, and the Court denied the motion as follows:

> "[DEFENSE COUNSEL]: . . . Your Honor, I do make a motion for judgment of acquittal on behalf of Mr. Capers as to the . . . first-degree assault on Mr. Daye, and as to the use of a weapon with the intent to injure.
>
> *And in view of the fact that you're looking at it in the light most favorable to the State, I will submit.*

> THE COURT: All right. The motion is denied. Viewing the evidence in the light most favorable to the State, a jury could find that Mr. Capers is guilty of the crimes with which he is charged.
>
> There is testimony from a witness that Mr. Capers came up roughly a half hour after Ms. Floyd left, punched the victim. And there is evidence that Mr. Capers is the person who picked up a chair and was hitting the victim with the chair.
>
> For those reasons, the motion is denied."

At the close of all of the evidence, defense counsel renewed the motion for judgment of acquittal without raising any new argument. Counsel stated merely, "I will rely on my previous argument if the Court so allows."

The jury convicted appellant, the court imposed sentence, and this timely appeal followed.

II.

Before this Court, appellant argues first that the trial court erred in overruling appellant's objection to the State's question to its witness Dr. James Locke, the medical examiner, because the question was impermissibly leading and Dr. Locke lacked an adequate factual basis to express any opinion as to the instrumentality involved in causing the damage to the victim's teeth. Second, appellant argues that the evidence was insufficient as a matter of law to support his conviction for wearing or carrying the chair openly with intent to injure because his use of the chair was incidental to the first-degree assault. He concedes, as he must, that his claim is not preserved for our review because he failed to challenge the sufficiency of the evidence on this ground in his motion for judgment

of acquittal. As support for our consideration, appellant argues plain error or, in the alternative, that he was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of rights.

The State maintains that the trial court did not abuse its discretion in permitting Dr. Locke to express an opinion to the question, "And the injury that we're looking at, would that be consistent or inconsistent with being struck with a chair?" The State argues, first, that the question was not a leading question and, second, that Dr. Locke, recognized by the trial court as an expert in forensic pathology, had an adequate basis to express an opinion. As to appellant's sufficiency-of-the-evidence argument, the State argues that it is not preserved for our review, that it is not plain error, and that we should not consider effective assistance of counsel on direct appeal.

III.

Maryland Rule 5-611(c) addresses leading questions during a trial and provides as follows:

> "(c) **Leading questions.** The allowance of leading questions rests in the discretion of the trial court. Ordinarily, leading questions should not be allowed on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be allowed (1) on cross-examination or (2) on the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party."

A leading question is one "that suggests the answer to the person being interrogated."

Black's Law Dict. (9th ed. 2009); *see also* 6 Lynn McLain, *Maryland Evidence*, § 611:3(a) (2019) ("The gravamen of a leading question is that it suggests to a witness the specific answer desired by the questioner."). The general rule under the common law and Maryland Rule 5-611(c) is that, ordinarily, leading questions should not be used on the direct examination of one's own witness. *See Lee v. Tinges*, 7 Md. 215, 216 (1854). The inquiry at issue in the present case arose during the State's direct examination of its witness.

This brings us to the core question in the first issue: Was the question "And the injury that we're looking at, would that be consistent or inconsistent with being struck by a chair" a leading question? In other words, did the question suggest a specific answer to Dr. Locke or did the question put the answer into the mind of Dr. Locke?

The answer is no—the State's question was not a leading question. Asking whether a certain injury sustained by a victim was consistent or inconsistent with being hit by a certain object is not a leading question because the prosecutor did not suggest a particular answer or response. No particular response was suggested by the State.

Appellant argues that the State did not lay a proper foundation to permit Dr. Locke to express an opinion as to an instrumentality of injury. After ruling properly that defense counsel's objection was untimely because counsel did not object *before* the witness answered, the court ruled that the question was not leading and that as an expert, the witness can say "whether it is inconsistent with or consistent with." On cross-examination, in response to defense counsel's questions, Dr. Locke responded that the victim's wounds were consistent with almost any instrument, including a brick, a lamp, an ice chest, or a bottle.

We hold that the trial court did not err or abuse its discretion in permitting the witness to answer the State's question. It is within the sound discretion of the trial court to determine the admissibility of expert testimony. *Sippio v. State*, 350 Md. 633, 648 (1998); Md. Rule 5-702.[2] Dr. Locke was recognized by the court as an expert in forensic pathology. He performed the autopsy on the victim and noted the injuries to the victim. He was permitted to state whether the injuries were consistent with a particular instrumentality. Simply because injuries might be consistent with another instrumentality does not make the testimony improper, speculative, or unhelpful as appellant suggests.

We turn next to appellant's sufficiency-of-the-evidence argument. We hold that this issue is not preserved for our review, and we decline to address the effectiveness of appellant's counsel in this direct appeal.

Maryland Rule 4-324(a) requires, as a prerequisite for appellate review of the sufficiency of the evidence, that an appellant move for judgment of acquittal specifying the grounds for the motion. *Whiting v. State*, 160 Md. App. 285, 308 (2004). Our cases reiterate that "[t]he language of the rule is mandatory, and review of a claim of

[2] Rule 5-702 states as follows:

> "Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony."

insufficiency is available only for the reasons given by [the] appellant in his motion for judgment of acquittal." *Id.* (internal citations omitted). An appellant may not raise grounds on appeal that were not raised in support of the motion for judgment of acquittal below. *Jones v. State*, 213 Md. App. 208, 215 (2013).

Here, the record is clear that appellant did not raise below, as a basis for his motion for judgment of acquittal, that appellant's use of the chair was incidental to the assault and was insufficient as a matter of law to support the conviction for wearing or carrying the chair openly with intent to injure. In fact, appellant submitted his motion and renewed motion without specifying any ground. The Rule is not satisfied, and the issue is not preserved for our review.

Plain error review is not a way to circumvent the requirements of Rule 4-324. Plain error, rare indeed, is reserved for those errors that are "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Yates v. State*, 429 Md. 112, 130–31 (2012). The trial court did not err in denying the motion for judgment of acquittal when the issue now raised was never presented to the trial court.

Ordinarily, a claim of ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding pursuant to the Maryland Uniform Post Conviction Procedure Act. *See* Md. Code, Criminal Procedure, § 7; *Mosley v. State*, 378 Md. 548, 558–59 (2003). Under the Act, a defendant has the possibility of an evidentiary hearing and the opportunity to develop a full record for our review. *Mosley*, 378 Md. at 560. It is preferable to raise ineffective assistance of counsel claims at post-conviction proceedings because "the trial record [on direct appeal] rarely reveals why counsel acted or omitted to

act, and such proceedings allow for fact-finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Id.* As noted in *Mosley*, "[u]nless the trial record clearly shows why counsel's actions were ineffective, the appellate court risks getting 'entangled in the perilous process of second-guessing without the benefit of potentially essential information.'" *Id.* at 561 (internal citations omitted). We entertain a claim for ineffective assistance of counsel on direct appeal only in limited circumstances and in the exceptional case where the trial record reveals counsel's ineffectiveness to be "so blatant and egregious" that review on appeal is appropriate. *Id.* at 562. The instant case is not such a case.

Appellant argues that his case is comparable to *Testerman v. State*, 170 Md. App. 324 (2006), in which this Court found that it was appropriate to review the appellant's claim for ineffective assistance of counsel where defense counsel failed to move for judgment of acquittal. In *Testerman*, this Court concluded that the critical facts were not in dispute and that the record was sufficiently developed because the issue was aired fully at trial. The Court considered the issue on direct appeal and held that defense counsel's failure to move with particularity for a judgment of acquittal on that charge fell below an objective standard of reasonableness. *Id.* at 343. The State distinguishes *Testerman* and the other cases appellant relies upon, maintaining that whether appellant carried or wore the weapon, *i.e.*, the chair, is a fact-intensive matter and not as clear-cut as appellant argues. We agree with the State that appellant's claim of ineffective assistance of counsel is best left to post-conviction proceedings, where a full record can be developed.

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