

Circuit Court for Anne Arundel County
Case No. C-02-CR-21-001879

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1029

September Term, 2022

BRANDON TYRELL HARDY

v.

STATE OF MARYLAND

Nazarian,
Tang,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: September 8, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Brandon Tyrell Hardy was convicted in the Circuit Court for Anne Arundel County for multiple possession, vehicular, and disorderly conduct violations after he crashed his vehicle at an intersection and fled the scene. At his trial in July 2022, one of the State's expert witnesses, an undercover detective, testified while wearing a headscarf and face mask that concealed everything except her eyes. The jury ultimately found Mr. Hardy guilty on thirteen counts. On appeal, Mr. Hardy claims that his Sixth Amendment rights to confront the detective physically were violated and that the judge relied on an impermissible consideration when imposing his sentence. We affirm.

I. BACKGROUND

A. The Incident And Arrest.

At approximately 11:00 a.m. on September 3, 2021, Mr. Hardy drove a silver Honda Civic through a red light at the intersection of Mountain Road and Route 10 in Glen Burnie and crashed into two other vehicles. The car Mr. Hardy drove was registered to Morgan Swan, who was the sole passenger in the vehicle at the time of the accident. After the initial collision, Mr. Hardy grabbed Ms. Swan's phone and fled on foot while Ms. Swan remained at the scene of the accident.

At 11:10 a.m., Officer Michael Shortt of the Anne Arundel County Police Department responded to the scene. Because Ms. Swan's vehicle was damaged, Officer Shortt conducted an inventory search of the car in preparation for the tow. During the search, Officer Shortt recovered Mr. Hardy's driver's license in the center console, along with drugs and paraphernalia stored in the driver's side door.

Shortly after the search, Detective Katarina Brummitt and Ms. Swan's mother arrived at the scene. The officers used a GPS tracking app on Ms. Swan's mother's cell phone and located Ms. Swan's phone (and, because he still had it, Mr. Hardy) at a Burger King in the nearby Southdale Shopping Center. Detective Brummitt, accompanied by Officers Saifedlin Hussain and Ming Yee, approached and questioned Mr. Hardy inside the Burger King. The officers asked Mr. Hardy to identify himself but he refused. The officers then noticed he was carrying a bag containing a cell phone and a charger, and they took possession of the phone and asked Ms. Swan's mother to call it to verify ownership. Officer Hussain searched Mr. Hardy, recovered a scale from the waistband of his shorts, handcuffed him, and took him outside to his patrol vehicle in the parking lot. In the meantime, Officer Brummitt transported Amanda Jara, the victim in the original accident, to the Burger King to identify Mr. Hardy. Once Ms. Jara identified Mr. Hardy as the driver of the vehicle that hit hers, Officers Hussain and Yee placed Mr. Hardy under arrest for a hit-and-run.

While placing Mr. Hardy under arrest, Officer Hussain searched him again and uncovered money, a key fob, and a plastic box with several pills that Mr. Hardy claimed were his medical THC pills. While the search was under way, Mr. Hardy struggled with the two officers and attempted to run away into oncoming traffic. The officers chased after him for a short distance until Mr. Hardy went down on one knee. The officers then forced him to the ground until back-up arrived. While on the ground, Mr. Hardy began to resist arrest and fought with the officers. The officers placed him in leg shackles and a spit hood

after he attempted to kick and bite them. Eventually, the officers subdued Mr. Hardy and transferred him to Central Booking. Forensic chemist Angela Ellis determined later that the drugs found in the Honda Civic and the shopping center parking lot included twenty-nine grams of fentanyl, over forty grams of cocaine, fifteen grams of marijuana, and thirty strips of Buprenorphine. Mr. Hardy was indicted by a grand jury on seventeen counts that included drug offenses, traffic offenses, and assault.

B. The Trial.

The case was tried before a jury on July 5–7, 2022, and the facts discussed above were adduced via witness testimony and other evidence. During the second day of trial, the State called an expert witness, Detective Brittany Hyers of the Anne Arundel County Police Department Southern District Tactical Narcotics Team, to testify about the appearance, packaging, pricing, and methods of street-level sales of controlled dangerous substances. Detective Hyers testified that in her opinion, multiple factors indicated the drugs Mr. Hardy had were for distribution, including the amount and weight of the drugs, the array of drugs collected, the size of the bags the drugs were in, the lack of paraphernalia associated with personal use, and the quantity of cash found on Mr. Hardy. While she testified, Detective Hyers wore a head scarf, similar in appearance to a hijab,¹ and a mask of the type typically

¹ At the outset of the second day of the trial, the court opined on the detective’s attire outside the presence of the jury:

For the record, the detective is an expert sitting in the courtroom and has a mask on and has what appears to be a head scarf. In many countries it would appear to be a h[i]j[a]b, I

Continued . . .

worn during the COVID-19 pandemic, making her eyes and forehead the only visible features on her face.

Before Detective Hyers testified, the defense made a motion to have her remove the mask and headscarf. The State argued that the disguise was necessary “for her own safety” because Detective Hyers was an “undercover officer” who was part of “ongoing investigations.” Mr. Hardy countered that “the jury [should] have the opportunity to view a full-face” and that the court should consider closing the courtroom to the public as an alternative means of protecting the witness’s identity. After hearing argument from both parties, the court declined to close the courtroom and ruled that Detective Hyers could testify in her mask and headscarf:

THE COURT: [W]hat do you want to tell me about Detective Hyers and what do you want to have happen?

[THE STATE]: Yes, Your Honor. So she is an expert witness. She is an undercover officer. Based on safety concerns and ongoing investigations we would like her to be able to keep her

think which is what the Islamic culture calls it. It’s very similar to that.

The question is whether or not the detective would be allowed to testify wearing the headgear and the mask over the face where just the eyes are visible. The Court indicated that I would consider that issue out of the presence of the jury and that I would address that after we get some more testimony in. All right?

. . . I’m not going to bar the witness at any point in time from sitting in the courtroom. Quite frankly, the expert looks like she’s wearing Muslim religious gear which covers the head and the face except for the eyes. Had I not been told that she was a police officer I would have just assumed that it was religious attire. That’s how I saw it when I first saw it, I just thought it was religious attire.

face mask on for her own safety.

THE COURT: Okay. And in terms of qualifying her as an expert are you going to delve into her current operation?

[THE STATE]: No.

THE COURT: Okay. All right. What's the position of having the detective—who is right behind us—who does have a head covering and a mouth covering, wearing a dark blue or black Anne Arundel County uniform with a sewn-on badge. What's your position, [defense counsel]?

[DEFENSE COUNSEL]: Your Honor, I would ask that if the State calls that witness that she be directed to remove any face covering. I would do the same for any witness who wants to testify with a face mask, et cetera. And the Court has had various work-arounds, the idea being of course that the jury is here to determine a person's demeanor, pay attention to their facial expressions, manner of speaking, manner of responding, and everything about their testimony. That's why we require them to come in in person with exceptions like Officer Hussain due to his medical situation.

But in this case, Detective Hyers is an important witness as far [as] we're concerned. We believe her credibility is a central issue in the case as well as the opinion that she is expected to render. And I would ask that the jury have the opportunity to view a full-face.

I note there don't seem to have been many observers or members of the public coming in. Perhaps to allay some of the State's concerns and the concerns of Detective Hyers and the police department if the courtroom were closed during her testimony, but I would ask that the jury—

THE COURT: I'm not going to close the courtroom.

[DEFENSE COUNSEL]: Right. Just thinking of other options that there would be with these kinds of concerns. But in our view this is a State's witness that should be subject to the same provisions of any other witness, that they come in in person and that the jury be able to see their entire face if requested and judge their manner of testifying and credibility based on factors that cannot be discerned necessarily if someone's face is covered while they're testifying.

THE COURT: So the record is clear, your credibility is not at

issue, [defense counsel]. But there is an irony to your argument because you have a mask on.

[DEFENSE COUNSEL]: There absolutely is. And I regret the call I got from [the] HR head of my agency yesterday about 6:00 p.m. telling me that this was necessary. But I recognize—

THE COURT: Because you didn't have it on yesterday.

[DEFENSE COUNSEL]: Right. I'm not happy about it.

THE COURT: And today you[r] mask goes all the way up on top of your nose and it's about exactly where the detective's mask comes. Maybe it's a little, half an inch shorter, quarter of an inch shorter or not. And you don't have a head covering.

We have plenty of witnesses testify with head coverings. That could be for religious reasons. And that's never been an issue. The mask, I've conducted post-March 2020 ever since Covid hit I've had so many trials with masks both with the attorneys, the Court, court clerk, sheriffs, everyone else and every single witness testified with a mask.

I'm going to deny the Defense request and I'm going to grant the State's request to allow the detective to testify with her mask and the head covering on. And I will accept the State's proffer because I have nothing to refute that she is undercover and wishes to keep her identity secret.

After this discussion, the trial continued without further mention of Detective Hyers's appearance, except that the detective testified that her appearance "reflect[ed] the fact that [she] work[s] undercover[.]"

At the conclusion of the trial, the jury found Mr. Hardy guilty of thirteen counts, including possession of cocaine, possession of cocaine with intent to distribute, possession of fentanyl, possession of fentanyl with intent to distribute, possession of buprenorphine, possession of buprenorphine with intent to distribute, possession of more than ten grams of marijuana, second-degree assault on Officer Yee, second-degree assault on Officer Hussain, disorderly conduct, possession of drug paraphernalia, failure to stop after an

accident, and negligent driving.

C. The Sentencing Hearing.

At his sentencing hearing on August 11, 2022, the court sentenced Mr. Hardy on nine counts² to a total of twenty years' incarceration, all but fifteen years suspended, followed by three years of probation. Before the end of the hearing, the sentencing judge addressed Mr. Hardy directly and noted that the officers might have used deadly force under the circumstances, but hadn't done so:

What happened that day was, with complete indifference to the citizens of Anne Arundel County, you blew through an intersection. You hit a couple cars, and you fled. All right; so, the hit-and-run is bad because people could be killed or injured. But then you flee, and when you flee, you wind up in the Burger King, and the police show up. All they're trying to do is solve a hit-and-run. And the next thing they know, they find you are a walking illegal pharmacy. You've got enough fentanyl and cocaine and Suboxone and marijuana; you have an excessive amount. You don't have a little bit of drugs that you're just getting high on; you've got enough that you could sell and make Seven, Eight Thousand Dollars with. It's an excessive amount of drugs.

And then, the officers, who are just try[ing] to do their job—really, all they wanted to do was process an accident; figure out who hit what, and why and how, so insurance can get it figured out. The next thing you know, you're causing a major disturbance in a parking lot. People are yelling and screaming and taking cell phone videos. And here, the County police simply [needed] to put you in a car and process you for the accident. And the next thing you know, they find all the drugs. And do you cooperate in any way? No. You roll around on the ground; you try and run out into Mountain Road. All I could think of, Mr. Hardy, when I saw that officer's body camera, was *in some parts of this country, they would have pulled out*

² The State *nol prossed* counts ten, eleven, fourteen, and sixteen, lowering the total number of counts at sentencing from thirteen to nine.

a gun and shot you in the back of the head. But not in Anne Arundel County[.] Those professional police officers did what? That officer ran in the middle of the road to stop you from running in the road and getting hurt. He did everything he could to save your life. But we're not these backwater jurisdictions. These are professional police officers, and all they wanted to do was process an accident.

Well, then they found drugs, and then you fought them, and then you fled. *And the officer, instead of shooting you or tazing you or beating you* tried to save your life by running in the road to stop any cars from hitting you. Thank God there weren't any. But he put his life in danger to protect you.

And then what do you do? Over two and a half hours, you roll on the ground; you try and bite them. He struggled; you screamed. And what did these professional police officers do? *Did they hit you; did they beat you; did they strike you; did they Taze you . . . ? No; they give you water.* And it just goes on and on and on. You took a situation that was bad, and you made it a thousand times worse. It was just excessive that day.

(Emphasis added.) After these closing remarks, the court sentenced Mr. Hardy to a total of twenty years' incarceration with all but fifteen years suspended, and three years' probation.³ He filed a timely notice of appeal.

³ On September 8, 2022, Mr. Hardy filed an Amended Application for Review of Sentence under Md. Rule 4-344, claiming that the trial court made an upward departure from the sentencing guidelines range that was too harsh in light of the facts and circumstances of the case. After review, an In Banc Panel found that "the sentencing judge appropriately departed from the Sentencing Guidelines range for the drug-related offenses" but decided to "disturb the sentence for the two counts of Second Degree Assault on the officers" after finding that these "offenses were in essence a part of the larger scheme of the original resisting arrest charge" and that "[t]herefore, . . . the maximum recommended sentence under the Sentencing Guidelines range for the two counts of Second Degree Assault is more appropriate." Accordingly, the panel reduced Mr. Hardy's sentence on both second-degree assault charges from five years consecutive to three years consecutive, and re-sentenced Mr. Hardy to five years of supervised probation rather than three, but did not disturb the sentence for any other counts. That decision has no effect on this appeal.

II. DISCUSSION

Mr. Hardy presents two questions on appeal:⁴ *first*, whether the circuit court erred when it permitted Detective Hyers, the State’s expert witness, to testify while wearing a mask concealing her mouth and nose and a headscarf covering her head; and *second*, whether the circuit court relied on an impermissible sentencing consideration when it stated, among other things, that “in some parts of this country, they would have pulled out a gun and shot you in the back of the head.” The State maintains that neither action was erroneous.

A. The Circuit Court Did Not Err When It Allowed Detective Hyers To Testify With Her Head And Face Covered.

Mr. Hardy argues *first* that by allowing Detective Hyers to testify with her head and face covered, the trial court violated Mr. Hardy’s right to confrontation, as guaranteed by the Sixth Amendment of the United States Constitution and Article 21 of the Maryland

⁴ Mr. Hardy phrased his Questions Presented as follows:

1. Did the trial court err by permitting the State’s expert witness to testify with her head and face covered?
2. Did the trial court err by relying on an impermissible consideration when imposing Appellant’s sentence?

The State phrased its Questions Presented as follows:

1. Was Hardy’s right of confrontation not infringed where a police officer on an undercover assignment testified as an expert witness while wearing a mask covering her nose and mouth and a headscarf covering her hair?
2. If reviewed despite failure to preserve, did the trial court not rely on an impermissible sentencing consideration in discussing the arresting officers’ professionalism and restraint in the face of Hardy’s conduct?

Declaration of Rights. According to Mr. Hardy, allowing a witness to testify in disguise compromises a defendant’s ability to confront their accuser and prevents the jury from judging the witness’s demeanor and credibility on the stand.

When evaluating whether a defendant’s Sixth Amendment rights have been violated, “the reviewing court makes its own independent constitutional appraisal, by reviewing the law and applying it to the peculiar facts of the particular case,” but must “defer to the trial court’s findings of fact ‘unless they are clearly erroneous.’” *Longus v. State*, 416 Md. 433, 457 (2010) (quoting *Jones v. State*, 343 Md. 448, 457–58 (1996)). We consider only the information available to the trial judge, *id.* at 456–57, and apply a *de novo* standard to determine whether the defendant’s right to confrontation was satisfied. *Langley v. State*, 421 Md. 560, 567 (2011).

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” U.S. Const., amend. VI. “The primary object” of this constitutional provision is to give “the accused . . . an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor . . . whether he is worthy of belief.” *California v. Green*, 399 U.S. 149, 157–58 (1970) (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)). But the Confrontation Clause does not “guarantee[] criminal defendants the *absolute* right to a face-to-face meeting [with] the witnesses against them at trial.” *Maryland v. Craig*, 497 U.S. 836, 844 (1990). The Confrontation Clause

“ensure[s] the reliability of the evidence against a criminal defendant” and can be met by other combined elements of confrontation, such as a witness’s physical presence at trial, their agreement to give statements under oath, submitting to cross-examination, and the jury’s ability to observe the witness’s demeanor and thus assess their credibility. *Id.* at 845–46. And although the Confrontation Clause suggests in its title a preference for physical, face-to-face confrontation, it is neither absolute nor “the *sine qua non* of the confrontation right.” *Id.* at 847.

In *Maryland v. Craig*, the Supreme Court of the United States held that the defendant’s Sixth Amendment rights were not violated when, at trial, the court authorized testimony by a child victim via a one-way closed circuit television. *Id.* at 852. The Court reasoned that because the State had a strong public policy interest in protecting child victims from the emotional trauma of testifying in the presence of the defendant, the Sixth Amendment right to confrontation was not violated so long as “the procedure used adequately preserves the other elements of confrontation that establish indicia of reliability.” *Spinks v. State*, 252 Md. App. 604, 615–16 (2021) (citing *Craig*, 497 U.S. at 857). In so holding, the Court articulated a three-prong standard: “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where the denial of such confrontation is [1] necessary [2] to further an important public policy and only where [3] the reliability of the testimony is otherwise assured.” *Craig*, 497 U.S. at 850.

Detective Hyers testified in the courtroom in this case, but courts in Maryland and

elsewhere have applied the *Craig* standard not only to cases in which a testifying witness was absent from the courtroom, but also to cases in which a witness was hidden in some way from full view while testifying in the courtroom, such as testifying behind a shield or in a disguise. *See Romero v. State*, 173 S.W.3d 502, 505 (Tex. Crim. App. 2005) (applying the Supreme Court’s test from *Craig* to determine whether the State’s witness, who was wearing dark sunglasses, a baseball cap pulled over his forehead, and an upturned collar covering the lower half of his face, violated the Confrontation Clause); *State v. Hernandez*, 986 A.2d 480, 488 (N.H. 2009) (indicating that in the future, trial courts should apply the *Craig* analysis when determining whether to allow a State’s witness to testify while wearing a disguise and to “make specific findings that the disguise is necessary to further an important State interest and that the reliability of the evidence is otherwise assured”); *United States v. Crittenden*, No. 4:20-CR-7, 2020 WL 4917733, at *5 (M.D. Ga. Aug. 21, 2020) (finding *Craig* to be controlling when determining whether a witness’s decision to wear face shields or be placed behind plexiglass shields violated a defendant’s Confrontation Clause rights). So because Detective Hyers testified while wearing a face mask and headscarf in this case, we apply the *Craig* standard to determine whether the State demonstrated that her disguise was necessary to further an important public policy interest and whether there were sufficient indicia that her testimony was reliable.

1. *The State demonstrated that Detective Hyers’s disguise was necessary to further the important public policy interest of protecting the safety of an undercover officer.*

The State contends, as it did in the trial court, that protecting an undercover officer’s

safety in ongoing investigations is an important public policy interest, and that having Detective Hyers testify while wearing a mask and headscarf was necessary to further that interest because she is an undercover officer involved in ongoing investigations. Mr. Hardy responds that protecting an undercover officer’s safety is *not* an important public policy interest and that even if it is, having Detective Hyers testify in a mask and headscarf was not necessary to further that interest because Detective Hyers’s testimony was not necessary at all.

We begin with whether the State has identified an important public interest. Mr. Hardy argues that “a police witness’s current duty assignment does not take precedence over a criminal defendant’s constitutional rights at his one trial,” but he has not provided any support for this proposition and courts generally have found otherwise. The case perhaps most on point is *United States v. de Jesus-Casteneda*, in which the United States Court of Appeals for the Ninth Circuit found that the defendant’s rights under the Confrontation Clause were not violated when a confidential informant was allowed to testify while wearing a wig and a mustache.⁵ 705 F.3d 1117, 1120 (9th Cir.), *amended by* 712 F.3d 1283 (9th Cir. 2013). Because the witness was involved in an ongoing drug investigation as an undercover agent, the Court found the disguise “necessary to further an important state interest, namely a witness’s safety, given that the safety concern was so

⁵ Originally, the government asked the Court if the confidential informant could wear a wig, mustache, *and sunglasses* during his testimony. 705 F.3d at 1119. Ultimately, the witness was permitted to testify while wearing only the mustache and wig so that his eyes, a feature the court deemed essential, remained visible to the jury. *Id.*

high and the disguise so minimal.” 712 F.3d at 1283.

Witness safety and well-being has been deemed an important public policy interest in Maryland and elsewhere. *See, e.g., White v. State*, 223 Md. App. 353, 398 (2015) (holding that medically infirm witness’s remote video testimony was justified by “the combined public policy justifications of resolving cold cases and simultaneously protecting the physical well-being of a significant witness”); *People v. Wrotten*, 923 N.E.2d 1099, 1103 (N.Y. 2009) (concluding that protecting the well-being of a witness was a valid public policy justification to require two-way video testimony when a key witness could not physically travel to court in New York); *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (explaining that trial judges retain the ability to impose reasonable limits on cross examination based on concerns about issues such as witness safety); *Wilkerson v. Stallone*, No. 13-CV-3817, 2014 WL 4629671, at *17 (S.D.N.Y. Sept. 17, 2014) (allowing an undercover officer to testify only using his shield number to identify him due to safety concerns); *Washington v. Walsh*, No. 8-CV-6237, 2010 WL 423056, at *7–9 (S.D.N.Y. Feb. 5, 2010) (determining officer’s identity had been properly withheld out of concern for maintaining their safety when it was revealed that the officer was still engaged in undercover operations in the location where the defendant was arrested). If a witness is involved in ongoing undercover investigations—and there is no dispute here that Detective Hyers is—their future safety is at risk if their identity is compromised in a public space. We agree that the State identified an important public policy interest in this context.

Mr. Hardy argues *next* that the State failed to satisfy the necessity prong of the *Craig*

test. He notes that this Court has “emphatically caution[ed]” that there must be “necessity—not simply convenience or expediency—in order to deny a defendant his right to physically confront his adversaries in a court of law,” and that “a court must render an adequate, case-specific finding based on the evidence presented that [the denial of normal face-to-face confrontation] is necessary to further the identified public policy.” *White*, 223 Md. App. at 398. He claims that the State failed to demonstrate necessity here, rather than merely expediency, because Detective Hyers “was not a witness that the prosecution needed to call specifically.” Indeed, he claims that because she “was not a fact witness and had no personal knowledge about the case” but only “an expert witness testifying about street-level drugs sales[,] . . . [t]he State could easily have chosen another officer to testify as an expert” because “[t]he Anne Arundel County Police Department . . . has no shortage of officers qualified to testify on this subject.” In this way, he claims, this case is distinguishable from *de Jesus-Casteneda*, in which the undercover officer that the court allowed to testify in disguise was a fact witness.

We need not determine whether this distinction matters because the argument is not preserved. Mr. Hardy failed to make this argument at trial, which deprived the trial court of the opportunity to make factual findings as to whether another officer was available or qualified to testify as an expert in place of Detective Hyers. We decline to make any such findings now or to find that Detective Hyers’s testimony was unnecessary. And because Mr. Hardy has not made any other argument about the necessity (or not) of the Detective’s

testimony,⁶ we find that the State satisfied the first two prongs of the *Craig* test.

2. *The reliability of Detective Hyers’s testimony was otherwise assured.*

Mr. Hardy argues *second* that the court erred in allowing Detective Hyers to testify while wearing a mask and headscarf because the reliability of her testimony was not otherwise assured, and thus that the third prong of the *Craig* test was not satisfied. To establish the reliability of a witness’s testimony when a defendant has been denied full face-to-face confrontation, courts look to other elements of confrontation, such as a witness’s physical presence, oath, cross-examination, and the jury’s ability to observe the witness’s demeanor and credibility to ensure the “testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.” *Craig*, 497 U.S. at 851. In *de Jesus-Casteneda*, the court found that the reliability of the witness who testified while wearing a wig and mustache as a disguise was otherwise assured because the witness was there in person, sworn, subject to cross, and audible and visible save for the facial disguise:

(1) he was physically present in the courtroom, (2) he testified under oath, thus impressing him with the seriousness of the matter and the possibility of penalty for perjury, (3) he was subject to cross-examination while Appellant could see him, (4) despite his disguise, the jury was able to hear his voice, see his entire face including his eyes and facial reactions to questions, and observe his body language.

⁶ In the trial court, Mr. Hardy argued that Detective Hyers’s mask and headscarf were not necessary to protect her safety because the court could protect her safety by closing the courtroom to the public. The court declined to do so, and Mr. Hardy has not raised this argument again on appeal.

705 F.3d at 1121 (footnote omitted). A jury need not, then, view the witness's full face to assess their credibility, but can rely on the other elements of confrontation and utilize their own knowledge and assessment to draw their own conclusions.

Mr. Hardy likens this case to *Romero v. State*, a case from the Court of Criminal Appeals of Texas in which the court found that the defendant's Sixth Amendment confrontation rights were violated when a prosecution witness was allowed to testify while wearing dark sunglasses, a baseball cap, and a jacket with the collar turned up to obscure his face from the nose down. 173 S.W.3d at 503. Unlike *Romero*, however, the jurors in this case were not "deprived of the ability to observe [Detective Hyers's] eyes and [her] facial expressions." *Id.* at 505. They could see enough of her face and body to judge her credibility, and the trial court made specific findings to this effect:

The Court would note that from the Court's perspective even though her face was covered and her hair was covered she still spoke clearly, answered all questions, and was able to engage with counsel. So what credibility assessment a jury will make will be entirely up to the jury. But from the Court's perspective in terms of allowing her to testify with basically her hair covered and the same type of mask that's been worn by both attorneys, clerks, deputies, police officers, defendants and witnesses in court for the past couple of years was from the Court's perspective really unremarkable. I know, [defense counsel], you may disagree. But the Court found it to basically be another witness with another mask on.

The hijab-like head covering and face mask Detective Hyers wore were not nearly as concealing as the witness's disguise in *Romero* or in *People v. Sammons*, 478 N.W.2d 901, 904 (Mich. Ct. App. 1991), another case on which Mr. Hardy relies. In *Sammons*, the witness's entire face was completely covered by a ski mask and he testified under a

pseudonym, and his identity was never revealed to the jury. *Id.* Here, unlike in *Sammons*, the jury learned Detective Hyers’s name, knew about her role as an expert in the investigation, and could observe her body language, voice inflections, and the top half of her face as she responded to questions. Detective Hyers did not remain anonymous, her disguise was not as concealing, and she was able to interact with counsel during trial, allowing the jury to assess her credibility and assuring the reliability of her testimony.

Indeed, the face mask that Detective Hyers wore was the type of mask worn regularly during the COVID-19 pandemic (and that defense counsel was wearing during the trial as well). Courts addressing Confrontation Clause challenges to witnesses wearing masks to prevent COVID-19 exposure have distinguished *Sammons*, recognizing that unlike ski masks, COVID-19-related masks cover only the nose and mouth and do not “diminish the aspect of personalization’ associated with face-to-face confrontation,” because they “only cover[] part of the witnesses’ faces and [do] not obscure witnesses’ identities.” *State v. Modtland*, 970 N.W.2d 711, 720 (Minn. Ct. App. 2022) (*quoting Sammons*, 478 N.W.2d at 908) (distinguishing *Sammons*); *see also id.* at 720 n.3 (collecting cases from “the majority of courts considering this issue [which] have determined that COVID-19-related masks worn by testifying witnesses do not violate a defendant’s confrontation rights”).

Although her hair and parts of her face were covered, Detective Hyers was present physically in the courtroom, sworn in under oath, cross-examined fully by Mr. Hardy’s counsel, and on display for the jury to hear her voice, observe her body language, see the

reactions in the top half of her face, and, ultimately, assess her demeanor and credibility. The trial court did not err in finding sufficient indicia of the reliability of Detective Hyers’s testimony and allowing her to testify while wearing a facemask and head scarf, and her testimony under those conditions did not violate Mr. Hardy’s Sixth Amendment right to confrontation.

B. We Decline To Exercise Plain Error Review Of The Court’s Remarks During Mr. Hardy’s Sentencing Hearing.

Second, Mr. Hardy argues that the sentencing judge relied on an impermissible consideration when he said, at the sentencing hearing, that “[a]ll I could think of, Mr. Hardy, when I saw that officer’s body camera, was in some parts of this country, they would have pulled out a gun and shot you in the back of the head.” Mr. Hardy claims that the sentencing judge’s comments indicate that he believed Mr. Hardy’s actions “could have provoked—or, perhaps, *justified*—police violence,” and that these remarks reveal that the court unmistakably relied on an impermissible consideration when sentencing him.

Unfortunately, this issue is not preserved for appellate review. Under Maryland Rule 8-131(a), “[o]rdinarily, an 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, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” The second clause in the Rule (beginning with “but the Court may decide”) allows us to review unpreserved issues by exercising what is commonly referred to as “plain error review.” Mr. Hardy acknowledges that his counsel didn’t object to the sentencing judge’s statements during the hearing. Nevertheless, he asks us to

overlook the preservation requirement and to review the issue under the plain error doctrine because, he argues, there would be only *de minimis* prejudice to the State and it presents an opportunity for this Court to “send a clear message to judges that it is unacceptable—and undermines respect for the judiciary—for courts to rely on such considerations in imposing a sentence.”

We decline to exercise plain error review here. The plain error doctrine provides appellate courts with the discretion to review issues that were not preserved at trial, but we exercise that discretion only rarely. *See Garner v. State*, 183 Md. App. 122, 152 (2008) (“[T]he possibility of plain error is out there, and on a rare and extraordinary occasion we might even be willing to go there. One must remember, however, that a consideration of plain error is like a trip to Angkor Wat or Easter Island. It is not a casual stroll down the block to the drugstore or 7-11.”), *aff’d*, 414 Md. 372 (2010). Indeed, “[i]f every material (prejudicial) error were *ipso facto* entitled to notice under the ‘plain error doctrine,’ the preservation requirement would be rendered utterly meaningless.” *Morris v. State*, 153 Md. App. 480, 511 (2003). And this case doesn’t justify plain error review. Although Mr. Hardy notes correctly that the Supreme Court of Maryland has exercised plain error review over an impermissible sentencing consideration, *see Abdul-Maleek v. State*, 426 Md. 59 (2012),⁷ that prior “exercise of discretion, by its very nature, does not establish a precedent.” *Morris*,

⁷ In *Abdul-Maleek v. State*, even though the defendant had failed to preserve his argument, the Supreme Court of Maryland exercised plain error review to vacate the defendant’s sentence and remand the case for resentencing after finding that the sentencing court had impermissibly considered the defendant’s exercise of his right to pursue a *de novo* appeal in the circuit court. 426 Md. at 70.

153 Md. App. at 518. And unlike *Abdul-Maleek*, which presented a novel procedural inquiry involving *de novo* appeals, the issue Mr. Hardy raises is not a novel one. The sentencing judge’s comments were not so egregious as to shock the conscience, if indeed they constituted an error at all, and “[b]y not objecting contemporaneously, [Mr. Hardy] deprived the sentencing judge of the opportunity to correct [Mr. Hardy’s] interpretation of his decision or to clarify his remarks.” We decline to review this unpreserved issue and affirm the circuit court’s ruling.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. APPELLANT TO PAY
COSTS.**