Circuit Court for Wicomico County
Case No. C–22–CR–19–0124

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1190

September Term, 2019

LIONEL CHRISTOPHER WATSON

v.

STATE OF MARYLAND

Reed,
Beachley,
Salmon, James P.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: July 22, 2021

On August 6, 2019, a jury, sitting in the Circuit Court for Wicomico County, convicted Lionel Christopher Watson ("Appellant"), of second-degree assault. The court sentenced him to a term of eight years' imprisonment. In this timely appeal, Appellant presents two questions for our review, which we quote:

> I. Did the circuit court err in denying Appellant's motion to suppress a pretrial identification?
>
> II. Must Appellant's conviction be reversed as a result of improper prosecutorial closing argument?

We answer Appellant's questions in the negative, and will therefore affirm the judgment of the circuit court.

BACKGROUND[1]

On January 24, 2019, Officer Adkins of the Salisbury Police Department responded to 208 Delaware Avenue after receiving a report of an assault.[2] Upon arriving at the scene, he found Tracy Allen, the assault victim in this case. According to Officer Adkins, her jaw "was disfigured, very swollen, swelling." Ms. Allen described her assailant to Officer

[1] As Appellant primarily challenges the court's denial of his motion to suppress, we limit our initial recitation of the facts to those adduced at the hearing on that motion. *See Nathan v. State*, 370 Md. 648, 659 (2002) ("'In our review of the trial court's denial of [a] motion to suppress, we are limited to the record of the suppression hearing.'" (quoting *Wilkes v. State*, 364 Md. 554, 569 (2001))). We present those facts in the light most favorable to the prevailing party—here, the State. *See Nathan*, 370 Md. at 659 ("'In our review of the trial court's denial of [a] motion to suppress … we review the facts found by the trial court in the light most favorable to the prevailing party.'" (quoting *Wilkes*, 364 Md. at 569)).

[2] Officer Adkins's first name was not included in the transcript of the suppression hearing.

Adkins as "a black male wearing a gray toboggan and a gray sweatshirt approximately in his 30's," whom she identified by the moniker "C.J." She further informed Officer Adkins that C.J. resided in "the last brown house on the right on Pearl Street near Fitzwater Street," which the police later identified as 606 Pearl Street. A subsequent search of the Salisbury City Police Department's database revealed that Appellant lived at that address and that he was also known as "C.J."

Officer Adkins relayed the above information to Detective Underwood, who assembled a photographic array of six black males, including Appellant.[3] The men depicted in the array appeared to have been of approximately the same age, with comparable facial characteristics, and similarly styled facial hair. All but one of them, moreover, had closely cropped hair.[4] Appellant, however, was the sole person in the array with a facial scar.[5] When Detective Underwood presented the photo array to Ms. Allen, she selected Appellant's picture, circled it, and initialed below.

Appellant filed a motion to suppress Ms. Allen's extrajudicial identification, in which he claimed that the photo array had been unduly suggestive. At the hearing on that motion, Officer Adkins identified Appellant as the individual depicted in the photograph

[3] Detective Underwood's first name was not included in the transcript of the suppression hearing.

[4] Although one of the individuals featured in the array had slightly longer, braided hair, he was nevertheless similar in appearance to the other men featured in the array.

[5] In Ms. Allen's description of her assailant, she made no mention of a facial scar.

that Ms. Allen had circled. The defense, in turn, argued that the array had been impermissibly suggestive because Appellant's picture was the only one depicting an individual with a facial scar. The court denied Appellant's motion. Ruling from the bench, it reasoned:

> I've been sitting here looking at the photos. To me, it looks like a very good photo array as far as six individuals with similar characteristics of facial hair. There is a scar apparently in photograph number 3 which was identified. However, it is certainly not a very prominent scar in the photograph. It might be more prominent on him, personally. But as far as the photo array is concerned, there is a scar, not prominent. I do not think it makes it unduly suggestive or impermissibly suggestive. So, the [c]ourt is going to deny the motion to suppress.

We shall include additional facts as necessary to our discussion of the questions presented.

DISCUSSION

I

Appellant contends that the court erroneously denied his motion to suppress Ms. Allen's pre-trial identification. He argues that "because no other photograph depicted an individual with a facial scar, the array was impermissibly suggestive, and the State failed to demonstrate that the resulting identification was reliable and therefore admissible." The State counters that Appellant failed to satisfy his burden of demonstrating that the array was impermissibly suggestive, arguing that the scar was not prominent. The State further stresses that Ms. Allen "did not tell the police officer who interviewed her that her assailant had a scar before she looked at the array." That omission, the State asserts, indicates that Ms. Allen either "did not notice the scar … or did not deem it significant enough to

describe[.]" Even if the photo array had been unduly suggestive, the State maintains, Ms. Allen's prior familiarity with Appellant rendered her identification reliable.

Standard of Review

We defer to the suppression court's factual findings, and will not disturb them unless clearly erroneous. *See Small v. State*, 464 Md. 68, 88 (2019) ("We accept the suppression hearing court's factual findings and determinations regarding the credibility of testimony unless they are clearly erroneous."). "'A factual finding is clearly erroneous if there is no competent and material evidence in the record to support it.'" *Anderson v. Joseph*, 200 Md. App. 240, 249 (2011) (quoting *Hillsmere Shores Improvement Ass'n, Inc. v. Singleton*, 182 Md. App. 667, 690 (2008)). When reviewing whether incriminating evidence was obtained in violation of an accused's constitutional rights, however, we conduct an independent *de novo* review of the record, applying the law to the facts contained therein. *Small*, 464 Md. at 88.

Due Process Challenges to Extrajudicial Identifications

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights protect criminal defendants from "'the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *Id.* at 82–83 (citation omitted). An extrajudicial identification procedure is impermissibly suggestive when the police "give[] the witness a clue about which photograph the[y] believe the

witness should identify as the perpetrator[.]"[6] *Id.* at 88 (citation omitted). The presentation of a photo array may be rendered unduly suggestive either by "the manner itself of presenting the array to the witness" or when "the makeup of the array indicates which photograph the witness should identify." *Smiley v. State*, 442 Md. 169, 180 (2014). In this case, we are clearly concerned with the latter form of suggestiveness. As the Court of Appeals has repeatedly held, although an array ought to be composed of individuals who are similar in appearance, "'it need not be composed of clones'" in order to comply with due process. *Small*, 646 Md. at 89 (quoting *Smiley*, 442 Md. at 181).

When challenging the admissibility of an extrajudicial identification procedure on due process grounds, the defendant bears the initial burden of "making a *prima facie* showing of suggestiveness." *Id.* at 83 (citation omitted). Should he or she fail to do so, "the inquiry ends and evidence of the procedure is admissible at trial." *Id.* If, however, the requisite showing is made, the burden shifts to the State. *Id.* at 84. In order to satisfy that burden, and thereby defeat the defendant's motion to suppress, the State must "show that the identification was reliable by clear and convincing evidence." *Id.* (citation omitted). Ultimately, in determining whether the State has satisfied its burden, a suppression court must assess whether, under the totality of the circumstances, the reliability of the identification outweighs "the 'corrupting effect' of the suggestiveness." *Id.* (citation omitted).

[6] "An extrajudicial identification procedure is one that is made outside of the courtroom." *Id.* at 83 n.15.

In support of his assertion that the identification procedure at issue was impermissibly suggestive, Appellant relies on *Small, supra*. Following an assault and an attempted robbery, the victim in that case described his assailant to the police as "'a light brown, black male, 5'8", regular sized, with a scraggly beard, [and] a tattoo on his neck.'" *Id.* at 76. He further described his attacker's neck tattoo as "[b]lock styled cursive script, bold, not dull, containing multiple letters and at least one of them was an 'M.'" *Id.* (some internal quotation marks omitted). Thereafter, the victim was presented with two photo arrays, both of which included the defendant's picture. In the first array, the defendant was the only person with a visible neck tattoo. The "fillers" in the second array all had neck tattoos, although the defendant was the only person whose tattoo included the letter "M."[7] The Court of Appeals held that the second array was impermissibly coercive, reasoning that "[b]y emphasizing [the defendant's] photo in the first array, and then repeating [the defendant's] photo in the second array, law enforcement implicitly suggested to [the victim] that he should identify [the defendant] as the assailant." *Id.* at 92.

Appellant's reliance on *Small* is misplaced, as that case is readily distinguishable from the instant matter. When describing her assailant, Ms. Allen made no mention of a facial scar, suggesting that it was not a significant identifying characteristic. There is, therefore, no indication that by omitting similarly scarred individuals from the array, the police emphasized Appellant's photo. *See Harris v. United States*, 375 A.2d 505, 509 (D.C.

[7] "A filler in the context of a photo array, is 'a photograph of a person who is not suspected of an offense and is included in an identification procedure.'" *Small*, 464 Md. at 76 n.3.

1977) (holding that the presentation of a photo array was not unduly suggestive where "the witness did not inform the police about the [defendant's] scar until after the identification," thereby indicating that the "scar was apparently not an important identifying characteristic."). *Small* is further distinguishable from the present case in that Ms. Allen was presented with a single array. The police did not, therefore, implicitly suggest that Ms. Allen identify Appellant as her attacker by presenting two arrays in which he was "the only person from the first array who was repeated in the second array." *Small*, 464 Md. at 91.

The scar on Appellant's left cheek, though visible, is neither prominent nor conspicuous. While none of the five "fillers" featured in the array bore facial scars, they were otherwise similar in appearance to Appellant. Accordingly, we hold that Appellant failed to make a *prima facie* showing that the extrajudicial identification at issue was induced by an impermissibly suggestive procedure. We need not, therefore, address the reliability of Ms. Allen's extrajudicial identification. *See People v. Clarke*, 55 A.D.3d 1447, 1449 (N.Y. App. Div. 4th Dept. 2008) ("Although defendant was the sole person in the photo arrays with a facial scar, the scar was not prominent and the other individuals depicted in the photo arrays were otherwise sufficiently similar in appearance to defendant." (citation omitted)); *People v. Jamison*, 291 A.D.2d 298, 299 (N.Y. App. Div. 1st Dept. 2002) ("Since our review of the photo array establishes that defendant's facial scar is barely visible, we reject defendant's claim that his scar rendered the array unduly suggestive."); *State v. Adams*, 91 Wash. 2d 86, 92 (1978) ("While appellant may have been the only individual in the lineup with a facial scar, his scar does not appear so prominent

on his face as would sustain a charge that the lineup was unduly suggestive because of the scar.").

II

Appellant further asserts that the court abused its discretion by permitting the State to make improper and prejudicial remarks during its rebuttal closing argument. He claims that the State repeatedly attacked Appellant and his attorney, "culminating in assertions that defense counsel was lying and manipulating the evidence." The cumulative effect of those purportedly improper remarks, Appellant maintains, deprived him of a fair trial.

The State rejoins that because defense counsel "objected to only one remark that he now characterizes as improper," Appellant's "appellate claim is preserved ... only as to that remark." It further contends that the remark to which the defense objected was properly directed at defense counsel's analysis, and neither disparaged his integrity nor denigrated his professionalism. Alternatively, the State argues that reversal is unwarranted because the statements at issue neither misled the jury nor unfairly prejudiced Appellant.

The Closing Argument at Issue

On direct examination, Ms. Allen admitted to having been convicted of theft of an amount less than $100 in 2007. She further acknowledged that, at the time of the assault, she used cocaine and marijuana on a weekly basis and drank "a couple of beers" daily. Finally, according to Ms. Allen's medical records (introduced by the State to illustrate the severity of the injuries sustained during the assault), at 3:55 p.m. on the date of the

assault—less than one hour after it had occurred—Ms. Allen's blood alcohol concentration was .08.

Citing the evidence above, in his closing argument, defense counsel attempted to cast doubt on Ms. Allen's credibility, arguing, in part:

> You would not take the word of an individual who comes before you, an admitted longtime marijuana user, that's one thing. Not significant necessarily into and of itself, but on top of that a longtime cocaine user, a frequent user of alcohol, who on the day in question at 3 o'clock in the afternoon when she interacts with law enforcement is under the influence of alcohol.
>
> Now, you can do some math. Hopefully, one of you is sort of mathy like that. And if you do the math, you will come to discern that January the 24th was a Thursday. So on Thursday, January the 24th at 3 o'clock in the afternoon, [Ms. Allen] is already under the influence.
>
> Now, how do we know she is under the influence? We know she is under the influence of at least alcohol because when she goes to Peninsula Regional Medical Center –

The State objected. During an ensuing bench conference, the State argued: "Unless the defense has someone who can translate whole blood alcohol into whether that means someone is impaired, I don't believe that –" The court overruled the State's objection, saying: "Well, it's closing argument. He can refer to it." Thereafter, defense counsel resumed his attack on Ms. Allen's credibility, arguing, in pertinent part:

> [DEFENSE COUNSEL] As I was saying, we know she is impaired at 3:08 because she goes to Peninsula Regional Medical Center, and this will be page 49 of the medical records that you have a chance to look at. A full 45 minutes later, she is at .08. In other words, she is over the legal limit to drive a motor vehicle, 45 minutes after she is interacting with police at 3 o'clock in the afternoon.

* * *

> If you believe her, they are acquaintances at best. She doesn't even really claim to know him. The allegation is that he is breaking her jaw because she, the 50-year-old, four foot eleven inch lady is requesting money from him. It makes no sense. You can disagree with all of that. You can say for whatever reason, and I don't know why it is the convicted thief, cocaine-addicted [victim], you can say you believe her.

During its rebuttal closing, the State accused defense counsel of "blaming the victim for what happened to her," a strategy that it characterized as "offensive and abhorrent."[8] Thereafter, the State made the following argument, the challenged portions of which we have italicized:

> There is a story that there is a woman and she is in the pouring rain, pouring rain. She is under a light post looking frantically for something. And there is a guy who [is] driving down the road and he sees her, and he is like, it's dark, it's raining, let me stop and see if I can help her.
>
> He stops, he gets out. He says, how can I help you? She was like -- my car is down the block, and I lost my key, and I need my key to get my car, and I can't find it. And he helps her, and they start looking for this key.
>
> They can't find the key. And after about five minutes, the pouring raining, they're drenched. They're wet. They're cold. He says, are you sure the key is here? She is like, no, my car not here, but the light is here, so I figure I should look here. That's what [defense counsel] is asking you to do. Ignore where the evidence is. Ignore where the evidence of this assault is and focus on the things under the light. *Focus on the things that have nothing to do with the actual assault. He is trying to distract you from the evidence*.
>
> Yes. Ms. Allen previously used marijuana regularly, which explains why she would ask for someone to give her marijuana and give them $10 for it. Yes, she used cocaine. It tells you she is telling the truth because that's not a proud thing to mention. Yes, she uses alcohol on occasion.

[8] Although he did not object at trial, Appellant challenges the propriety of these remarks on appeal.

> Those medical records, I hope you do flip through them. I hope you do see, there is -- it shows that she has a whole blood alcohol, and I don't know if any of you are nurses, I didn't tend to look or if any of you have a medical degree. Whole blood alcohol is different than your breath. It's more concentrated.
>
> So when this shows .08, it's probably more like a .05. 06, maybe. So she actually, *what [defense counsel] told you is a lie*. *She isn't above the influence to drive a vehicle, but he wants you to believe that*[.] [*H*]*e is manipulating the evidence* because he thinks you are not going to know the truth about what a whole blood test is.
>
> *He wants you to look past the truth, and that is just a microcosm for what he is doing in this entire case*.

(Emphasis added). Defense counsel objected to the lattermost remark, which objection the court overruled, saying: "It's closing argument."

Preservation and Plain Error

We begin by addressing the State's contention that because Appellant objected to only one of the State's remarks, he "preserved his claim of improper argument only as to the remarks arising out of the alcohol concentration results in the medical records."

Appellant clearly failed to object to the State's claim that the defense was "trying to distract the jury from the evidence" with "things that have nothing to do with the actual assault." Nor did defense counsel object to the State's accusation that "the defendant is blaming the victim for what happened to her" or its characterization of that tactic as "offensive and abhorrent." Absent objections to the above-referenced remarks, a request for a curative instruction, or a motion for mistrial, these allegedly improper remarks were never presented to the court for its consideration, and are not, therefore, preserved for our review. *See* Maryland Rule 8–131(a) ("Ordinarily, the appellate court will not decide any

[non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

Appellant further challenges the State's allegations that defense counsel had told the jury a lie and had manipulated the evidence. Although defense counsel objected shortly after these accusations were made, the timing of his objection, coupled with his failure to indicate that he was objecting to an earlier remark, lead us to conclude that these purportedly improper remarks were not properly presented to the court. Accordingly, this alleged error is likewise unpreserved. *See Greater Metropolitan Orthopedics, P.A. v. Ward*, 147 Md. App. 686, 698 (2002) (holding that the defendant failed to preserve its objection to the plaintiff's allegedly improper comments where the defendants "did not object immediately after the allegedly improper comments were made, nor did they object immediately after appellee concluded her closing argument."), *cert. denied*, *Ward v. Greater Metro Ortho*, 373 Md. 408 (2003); *Shelton v. State*, 207 Md. App. 363, 383–85 (2012) (holding that the defendant failed to preserve his claim that the State made an improper remark during closing argument when, rather than objecting immediately, the defense objected to another statement made three sentences after the purportedly improper statement); *Grier v. State*, 116 Md. App. 534, 545 (1997) ("We shall continue to hold that objections to improper argument are timely if interposed either (1) immediately after the allegedly improper comments are made, or (2) immediately after the argument is completed."), *rev'd on other grounds*, 351 Md. 241 (1998).

Acknowledging that the above-referenced remarks were not preserved for our review, Appellant asks that we exercise our discretion to notice "plain error." Although "we possess plenary discretion to notice plain error material to the rights of a defendant, even if the matter was not raised in the trial court," *Danna v. State*, 91 Md. App. 443, 450, *cert. denied*, 327 Md. 627, 612 (1992), our exercise of that discretion is a "rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003), *cert. denied*, 380 Md. 618 (2004). *See also Yates v. State*, 429 Md. 112, 131 (2012) ("Th[e] exercise of discretion to engage in plain error review is 'rare.'"). Rather, plain error review "is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of a fair trial." *Hallowell v. State*, 235 Md. App. 484, 505 (2018) (quoting *Newton v. State*, 455 Md. 341, 364 (2017)). "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002), *cert. denied*, 376 Md. 545 (2003).

We decline Appellant's invitation to notice plain error. Although at times inartful and arguably improper, the cumulative prejudicial effect of the State's remarks was not so staggering as to deprive him of a fair trial, nor did the court's failure to intervene *sua sponte* rise to the level of a "blockbuster error" of such magnitude as to "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Newton v. State*, 455 Md. 341, 364 (2017). *See also Martin v. State*, 165 Md. App. 189, 196 (2005) "[P]lain error review tends to afford relief to appellants only for 'blockbuster []' errors." (quoting *United States v. Moran*, 393 F.3d 1, 13 (1st Cir. 2004)), *cert. denied*, 391 Md. 115 (2006).

We turn now to the purportedly improper remark that has been preserved for our review, to wit, "He wants you to look past the truth, and that is just a microcosm for what he is doing in this entire case."

The Bounds of Permissible Argument

The propriety of closing argument "'depends on the facts in each case,'" *Degren v. State*, 352 Md. 400, 430–31 (1999), and must, therefore, be determined "contextually, on a case-by-case basis[.]" *Mitchell v. State*, 408 Md. 368, 381 (2009). "Generally, the trial court is in the best position to determine whether counsel has stepped outside the bounds of propriety during closing argument." *Whack v. State*, 433 Md. 728, 742 (2013). We will not, therefore, disturb a trial court's ruling on the permissibility of a closing remark absent "'a clear abuse of discretion that likely injured a party.'" *Id.* (quoting *Ingram v. State*, 427 Md. 717, 726 (2012)). An abuse of discretion occurs when the court's decision is "'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Moreland v. State*, 207 Md. App. 563, 569 (2012) (quoting *Gray v. State*, 388 Md. 366, 383 (2005)).

The State is "afforded great leeway in presenting closing arguments to the jury." *Pickett v. State*, 222 Md. App. 322, 329 (2015) (quoting *Degren*, 352 Md. at 429). It is "'free to use the testimony most favorable to [its] side of the argument …, and the evidence may be examined, collated, sifted, and treated in [its] own way[.]'" *Cagle v. State*, 462 Md 67, 75 (2018) (quoting *Mitchell v. State*, 408 Md. 368, 380 (2009)). The State may, moreover, "'indulge in oratorical conceit or flourish and in illustrations and metaphorical

allusions.'" *Anderson v. State*, 227 Md. App. 584, 589 (2016) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)). The State's oratorical liberty is not, however, absolute. It is prohibited from misleading the jury, making comments calculated to inflame the passions thereof, or otherwise unfairly prejudicing the accused. *Wilson v. State*, 148 Md. App. 601, 654 (2002), *cert. denied*, 374 Md. 84 (2003). As is pertinent here, it is likewise improper for the State to "impugn the ethics or professionalism of defense counsel in closing argument," *Smith v. State*, 225 Md. App. 516, 529 (2015), or denigrate counsel's role as a defense attorney. *Beads v. State*, 422 Md. 1, 11 (2011). On rebuttal, it may, however, properly respond to, comment on, or refute defense counsel's closing argument, provided that such statements do "not impute impropriety or unprofessional conduct to defense counsel." *Smith*, 225 Md. App. at 529. *See also Degren*, 352 Md. at 433 ("[P]rosecutors may address during rebuttal issues raised by the defense in its closing argument[.]") (citing *Blackwell v. State*, 278 Md. 466, 481 (1976)).

"Not every improper remark … necessitates reversal." *Lee v. State*, 405 Md. 148, 164 (2008). *See also Wilhelm v. State*, 272 Md. 404, 431 (1974) ("[T]he mere occurrence of improper remarks does not by itself constitute reversible error."). Rather, reversal is required only if the State's comments "actually misled the jury or were likely to have misled the jury or influenced the jury to the prejudice of the accused." *Degren*, 352 Md. at 431. In determining whether an improper closing remark warrants reversal, we consider "'the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *Donaldson v. State*, 416 Md. 467, 488 (2010).

On these facts, the State's remark was not directed at defense counsel, but rather at its trial tactics and closing argument, neither of which denigrated counsel's ethics nor disparaged his professionalism. *See Smith*, 225 Md. App. at 529 ("[T]he State's closing argument was not improper—the 'smoke and mirrors' comments were clearly directed to defense counsel's argument and did not impute impropriety or unprofessional conduct to defense counsel."); *Warren v. State*, 205 Md. App. 93, 138 (2012) (holding that the State's description of defense counsel's closing as "a tale told by an idiot full of sound and fury signifying nothing" constituted a permissible commentary on counsel's argument), *cert. denied*, 427 Md. 611 (2012); *Purvey v. State*, 129 Md. App. 1, 25 (1999) (holding that the State's closing argument asserting that defense counsel "was merely 'blowing smoke' to 'divert [the jury's] attention from the facts'" was "an acceptable characterization of [defense counsel's] efforts to undermine the credibility of the State's evidence"), *cert. denied*, 357 Md. 483 (2000). The State did not, moreover, disparage the defense bar in general.

For the foregoing reasons, we affirm the judgment of the circuit court.

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