UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1449

September Term, 2014

MILTON DAVID RANDALL

v.

STATE of MARYLAND

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: August 18, 2015

On May 22, 2014, the State's Attorney for Washington County filed a criminal information charging Milton David Randall with possession of a weapon in a place of confinement and possession of contraband in a place of confinement, in violation of Md. Code (2002, 2012 Repl. Vol.), §§ 9-414(a)(4) and 9-412(a)(3) of the Criminal Law Article. These charges were tried to a jury in the Circuit Court for Washington County, after which Randall was found guilty of possession of a weapon in a place of confinement. On August 18, 2014, the trial court imposed a sentence of five years' imprisonment and Randall brought this appeal.

Randall complains of prosecutorial misconduct, alleging that the trial court erred by permitting the prosecutor's improper comments on the presumption of innocence and the standard for reasonable doubt. He also contests the trial court's refusal to dismiss count 1. For the reasons set forth below, we shall affirm.

BACKGROUND

This case arises out of an incident that took place on January 29, 2014, at the Maryland Correctional Institution ("MCI-H") of Hagerstown in Washington County. Viewing the evidence in the light most favorable to the verdict, a reasonable jury could have found the following facts.[1]

[1] Because we write for the parties and Appellant does not challenge the sufficiency of the State's evidence, a full recitation of the evidence is unnecessary to address the issues before us. *See Hill v. State*, 418 Md. 62, 66 (2011).

Brandon Roy serves as a correctional officer at the MCI-H. He recalled that, on the day in question, he was watching the recreation hall, which at that time was populated by about 120 inmates. When the officer first noticed Randall, who stood about "eight to 15 feet away," Randall was "talking with anther inmate." Officer Roy noticed Randall "reach down into his pants and pull out a, what seemed to be a makeshift weapon." Randall then placed the object into the "right hip pocket" of another inmate, Bryant Anderson. Seeing this, Roy summoned both inmates over to his station and told them that he was taking them to the sergeant's office. Anderson responded by throwing the object into the "officer's trashcan." Anderson was about three feet away from Roy when he jettisoned the object.

Roy described the object as a "weapon about approximately five to seven inches in length." "It ... had cloth on one end, which was blue and it was sharpened to a point on the opposite end." Roy was certain that Randall passed the weapon over to Anderson, and was also sure that there were no other items in the trash can that could have been the object in question. He was also certain that the two inmates did not exchange any other contraband. Roy confiscated the object and took it to his supervisor. Detective Sergeant Robert Fagan secured the evidence and interviewed Roy about the incident.

Roy acknowledged on cross-examination that he did not focus on Randall or Anderson during the fifteen minutes they were in the recreation hall, along with about 120 other inmates.

Defense counsel moved for judgments of acquittal, asserting as to Count 1 that the charging document failed to allege an offense, *viz*., that the first count did not allege that the events of this case occurred in a "place of confinement." The trial court denied the motion as to the first count, but granted the defense motion as to the second count, because there was no evidence to support that count without the necessary testimony from a "managing official" that the item in question was "contraband."

The defense called Bryant Anderson to the stand. Anderson had given a statement in which he took responsibility for the weapon. Anderson was a reluctant witness, but he did acknowledge that he received a citation, or "ticket," for possession of a weapon in a place of confinement, and that he wrote the statement claiming responsibility. Anderson otherwise could not recall the events at issue. The defense reiterated its motion for judgment of acquittal, which the trial court denied.

We shall recite additional facts as necessary to address the issues at hand.

DISCUSSION

I. Closing Argument

Standard of Review

Control of the scope and duration of closing argument is entrusted to the trial court's broad discretion. *Ingram v. State*, 427 Md. 717, 727 (2012) (citing *Wilhelm v. State*, 272 Md. 404, 413 (1974) (Citation omitted)). We review the trial court's ruling on objections to closing argument for an abuse of discretion. *See Degren v. State*, 352 Md. 400, 431 (1999);

Wilson v. State, 148 Md. App. 601, 653 (2002), *cert. denied*, 374 Md. 84 (2003). *See also Lee v. State*, 193 Md. App. 45, 77, *cert. denied*, 415 Md. 339 (2010).

Presumption of Innocence

Randall first complains of the trial court's decision to overrule his objection to the State's rebuttal argument pertaining to the presumption of innocence. After the trial court instructed the jury, including the pattern charges on the presumption of innocence and the State's burden to establish every element of the offenses beyond a reasonable doubt, counsel presented their respective summation.

The prosecutor opened his summation by reminding the jurors that, "[u]ltimately you guys are the ones that need to decide whether or not he's guilty or not guilty." The prosecutor also reminded the jurors that they were the "arbiters of truth" and were entrusted to "make the final decision."

Defense counsel opened his summation by reminding the jury that "this is a relatively simple case[.]" Counsel later reminded the jurors of the presumption of innocence:

> So keep in mind making your decision that this man is presumed to be innocent. Every reasonable presumption of innocence, that is every conclusion or inference that you could draw in Mr. Randall's favor should be drawn in his favor.
>
> [PROSECUTOR]: Objection. Incorrect statement of the law.
>
> [DEFENSE COUNSEL]: I think its fair argument.
>
> THE COURT: It's argument. I'll let you rebut that [Mr. Prosecutor].

With respect to reasonable doubt, defense counsel argued:

> And so when you are evaluating the evidence, in trying to determine whether the State has met their burden of proof, what the Court told you is something is proven to you beyond a reasonable doubt if for instance it's been proven to you to the extent that you would be willing to act on it in an important matter in your own personal affairs. Should I move across the country based upon the job offer I had gotten, I received? Should I marry somebody? What's an important matter in somebody's personal affairs? Because that's the level that I'd be willing – You have to be convinced of something to the extent that you would be willing to act on it in an important matter in your affairs.

During rebuttal argument, the prosecutor's comments prompted an objection from defense counsel;

> Now defense counsel also is commenting on the presumption of innocence. And he's absolutely right about one thing, right now at this very second, the defendant is presumed to be innocent. However, he only carries that presumption until you guys make your determination. Nothing about the presumption of innocence states that you are required to find every inference in his favor or presume everything that (unintelligible) goes his way. What the presumption of innocence means is that until you guys find him guilty, we as a society can't believe he's guilty.
>
> [DEFENSE COUNSEL]: That is an incorrect statement of the law.
>
> THE COURT: [Defense counsel].
>
> [DEFENSE COUNSEL]: Yes your Honor.
>
> THE COURT: This is argument. I allowed you to argue. I'm allowing [the prosecutor] to argue. I did not cut you off, I'm not cutting him off.

Asserting that the trial court "erred in permitting the prosecutor to comment on the meaning of the presumption of innocence," Randall specifically complains of the prosecutor's comment "[w]hat the presumption of innocence means is that until you guys find him guilty, we as a society can't believe he's guilty." The State, in response, urges, first, that the prosecutor's rebuttal constituted a "fair response" to defense counsel's summation, and further contends that the rebuttal argument, while "somewhat inartful," was not error in any event. The State emphasizes that the disputed comment "essentially conveyed the proper standard," *viz*. "that the jury must be convinced of the defendant's guilt before he can be found guilty."

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down.
>
> * * *
>
> To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence.

Holbrook v. Flynn, 475 U.S. 560, 567-68 (1986) (Citation omitted). The "presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the

evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial." *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (collecting cases). The "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

Our Court of Appeals has often recognized the primacy of the presumption of innocence and has emphasized that the "principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[2] *Williams v. State*, 322 Md. 35, 38-39 (1991) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

No party argues with this principle, and we do not read the State's closing and rebuttal argument as urging a departure from this precept. We instead parse the State's rebuttal argument differently than does Randall. As we read the transcript, and viewing the

[2] That the "accused is presumed innocent until proved guilty by the State by evidence beyond a reasonable doubt" ranks foremost among "bedrock characteristics" of our criminal justice jurisprudence. *Montgomery v. State*, 292 Md. 84, 91 (1981), *overruled on other grounds by Unger v. State* , 427 Md. 383 (2012). Randall, citing to *Montgomery*, asserts that "lawyers may not make arguments about the presumption of innocence before the jury." We have no quarrel with the aphorisms set forth by the *Montgomery* Court. But we do not interpret the Court's statement, 292 Md. at 91, that "they cannot be the subject of debate before the jury[,]" to mean that the Court in *Montgomery* forbade counsel from drawing the jury's attention to fundamental principles such as the presumption of innocence or the standard of proof beyond a reasonable doubt, as long as the "substance of the instructions" on reasonable doubt are not in dispute. *See Ingram v. State*, 427 Md. 717, 728 (2012).

arguments as a whole, we do not interpret the prosecutor's summation as urging the venire to render its decision, or gauge Randall's guilt or innocence, on the basis of prevailing social values or societal expectations. Although unwieldy and ill-advised, the prosecutor's comment as to how society may view Randall's status *after* the jury has decided his guilt or innocence, does not dilute the presumption of innocence. Years ago, Judge Marvin H. Smith wrote for the Court of Appeals:

> [W]hen the defendant is found guilty his presumption of innocence dissipates. While he awaits sentencing he may still be under a cloud, but it is not a cloud of "public accusation," but a cloud of public guilt generated by the finding beyond a reasonable doubt that he did commit the wrongs alleged.

Erbe v. State, 276 Md. 541, 555 (1976) (citation omitted).

We are unable to conclude that the trial court abused its discretion by rejecting the defense objection to the prosecutor's rebuttal argument.

Reasonable Doubt

Randall asserts that the trial court "erred in permitting the prosecutor to comment on the meaning of reasonable doubt." Randall did not object to the disputed comment, so our review is for plain error.

This issue arose in the following context, during the closing arguments of counsel, and after the trial court overruled the State's objection to part of defense counsel's summation:

> [DEFENSE COUNSEL]: Thank you your Honor. And so when you are evaluating the evidence, in trying to determine whether the State has met their burden of proof, what the Court

> told you is something is proven to you beyond a reasonable doubt if for instance it's been proven to you to the extent that you would be willing to act on it in an important matter in your own personal affairs. Should I move across the country based upon the job offer I had gotten, I received? Should I marry somebody? What's an important matter in somebody's personal affairs? Because that's the level that I'd be willing – You have to be convinced of something to the extent that you would be willing to act on it in an important matter in your affairs.

Randall complains of the following remarks made by the prosecutor during his rebuttal argument, and is specifically unhappy with the emphasized passage:

> [PROSECUTOR:] And defense counsel says "Well what is a matter in your own personal affairs?" An important matter in your own personal affairs. Say your wife cheating. All right. If you see your wife pass a note to somebody else, another man? Or if you are a woman if you see your husband pass a note to another woman. And then when you go to confront that woman, she throws the note in the trashcan or confront that man, he throws the note in the trashcan. And you recover that note and that note says " had a great time last night. When does your wife go out of town so we can do it again." Is that enough evidence for you to believe that your wife or husband has been cheating on you? Because you saw her or him pass a note to somebody else and you saw that person throw the note away and you found the note, would you act on that? **Is that good enough evidence for you to act it? I would.** And that's an important matter in your own personal affairs.

Plain Error

As the State points out, defense counsel did not object to the above passage. Seeking to avoid the strictures of plain error review, Randall maintains that any objection would have been futile, and also avers that counsel's objection to the prosecutor's argument with respect

to the presumption of innocence likewise embraces the State's objectionable remarks on reasonable doubt. Although the issue of preservation is close, the trial court permitted both sides to argue freely and we are unable to conclude that defense counsel, who was not shy about objecting to the State's summation and thereby building a record, decided to remain mute during the above-quoted rebuttal argument. We are mindful of cases where procedural default was avoided where a further objection would necessarily have been futile, but, on the extant record, are not persuaded that the same result would obtain here.[3] Further, while the concepts of "presumption of innocence" and "reasonable doubt" are closely intertwined, we do not agree that counsel's objection to a statement with respect to the former apply as well to the prosecutor's comments on reasonable doubt. In sum, Randall's complaint has not been preserved.

"Plain error is error that is so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App. 550,

[3] For example, in *Johnson v. State*, 325 Md. 511, 514-16 (1992), defense counsel objected to what the Court characterized as the prosecutor's "harangue" in midsentence. The trial court overruled the objection and permitted the prosecutor to continue. On the record before it, the Court of Appeals had no difficulty in thinking that the "objection went not only to what was said but also what was obviously to come." *Id*., 325 Md. at 514. "In the circumstances," the Court added, "the absence of a further objection did not constitute a waiver." *Id*. Similarly, the trial court in *Hagez v. State*, 110 Md. App. 194, 224-25 (1996), allowed the prosecutor to continue argument that was interrupted by defense counsel, and the defense did not renew its objection. We concluded that, in that case, the challenge to the argument was preserved. In the case before us, the comments regarding reasonable doubt were made at the close of the State's rebuttal argument, after nearly three pages of the transcript following the prior, unsuccessful, objection.

565 (Citation and internal quotation marks omitted), *cert. denied*, 441 Md. 63 (2014). *Malaska v. State*, 216 Md. App. 492, 524-25, *cert. denied*, 439 Md. 696 (2014), *and cert. denied*, 135 S. Ct. 1162 (2015). The Supreme Court has set forth the protocol for plain error review:

> [P]lain-error review involves four steps, or prongs. First, there must be an error or defect – some sort of [d]eviation from a legal rule – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error – discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

Puckett v. United States, 556 U.S. 129, 135 (2009). *See State v. Rich*, 415 Md. 567, 578 (2010) (quoting *Puckett*, 556 U.S. at 135).

On this record, we discern no basis for plain error review of the circuit court's decision not to intervene *sua sponte* during the State's rebuttal argument. Assuming that the prosecutor's comment on the evidence and reasonable doubt was erroneous and plain, we find no reason to apply plain error review to overturn Randall's conviction on this basis. Randall has failed to demonstrate how, any error in the trial court's failure to intervene, if plain, adversely affected his substantial rights.

Randall cites to our decision in *Himple v. State*, 101 Md. App. 579 (1994) to illustrate that this Court has noted plain error in a trial court's flawed jury instruction on reasonable doubt. Although we noted that the omission of the "without reservation" language from the instruction was problematic, we concluded that the "failure [to include that language] by itself would not necessarily constitute 'plain error.'" *Himple*, 101 Md. App. at 583. It was the omission of the "without reservation" qualifier *and* the trial court's equation of "moral certainty" with "a certainty based upon a convincing ground of probability" that led to our conclusion that the trial court plainly erred, and that Himple was entitled to a new trial. *Id*., 101 Md. App. at 582-83.

In *Savoy v. State*, 420 Md. 232 (2011), the Court of Appeals overturned convictions for involuntary manslaughter and related offenses because of a similar, erroneous, jury instruction on reasonable doubt. The trial court's reasonable doubt instruction included the following:

> After the jury has fairly and carefully reviewed all the evidence in this case, if you feel that the prosecution has failed to prove beyond a reasonable doubt **and to a moral certainty** all of the evidence necessary to convict, then you must acquit the defendant.
>
> The test of reasonable doubt is that the evidence that the State has produced must be so convincing that it would enable you to act on an important piece of business in your every day life. **The words "to a moral certainty" do not mean an absolute or mathematical certainty but a certainty based upon convincing grounds of probability.** The phrase "beyond a reasonable doubt" does not mean beyond any doubt or all

> possible doubt. But as the words indicate, beyond a doubt that is reasonable.

Savoy, 420 Md. at 236 (emphasis in original).

The Court of Appeals concluded that the instruction, taken as a whole, was erroneous and constituted structural error. As such, the instruction justified plain error review. With respect to the exclusion of the "without reservation" language, the Court emphasized that the omission of that language was not reversible error *per se*: "We hew to our holding in *Merzbacher* [*v. State*], 346 Md. [391,] 399–400 [(1997)] that the omission of the 'without reservation' language is alone not fatal."[4] In the final analysis, Randall does not persuade us why any error of the magnitude he claims "seriously affect[s] the fairness, integrity or

[4] The decision in *Wills v. State*, 329 Md. 370, 385-88 (1993) and this Court's decisions in *Himple v. State*, 101 Md. App. 579 (1994) and *Joyner-Pitts v. State*, 101 Md. App. 429 (1994), cited by Randall, are inapposite. The jury instructions at issue in those cases involved more than the isolated omission of the phrase "without reservation."). Moreover, Randall further ignores the distinction between an erroneous jury instruction and prosecutorial misconduct during summation. We disagree with Randall's apparent implication that we should equate the misstatements of a prosecutor during rebuttal argument with the erroneous jury instructions from a trial court. We concur with the following emphatic pronouncement from the United States Court of Appeals for the Seventh Circuit:

> We flatly reject Gonzalez' argument that a misstatement of the law by a prosecutor should be treated the same way as a misstatement of law by the judge. No juror would mistake a prosecutor for a judge. Our law assumes that the jurors follow jury instructions and thus that they followed the judge's, not counsel's, definition of reasonable doubt.

United States v. Gonzalez-Gonzalez, 136 F.3d 6, 9 (1st Cir. 1998).

public reputation of judicial proceedings" so as to cause us to exercise remedial discretion to review it. We decline to review the trial court's inaction in this instance.

II. Denial of Randall's Motion to Dismiss Count I

We come to Randall's complaint that the circuit court erred by denying his motion to dismiss the first count of the information. That count relevantly provided that

> Milton Randall, on or about the 29th day of January, 2014, in Washington County, did knowingly possess a weapon, to wit: a 6 inch metal rod sharpened to a point at one end, while confined in the Maryland Correctional Institution, against the peace, government, and dignity of the State.[5]

Moving to dismiss this count at the eve of trial, Randall asserted that the charge failed to alleged that he possessed the weapon "in a place of confinement." The circuit court denied Randall's motion to dismiss, and explained its ruling as follows:

> Clearly the information charges not only possession of a weapon while confined in the Maryland Correctional Institution, I think if we went on to say while confined in a Maryland Correctional Institution, a place a confinement, that would be surplusage. I think the defendant is clearly on notice as to what the charges are and therefore the motion is denied.

Randall asserts that the State's failure to allege that the MCI is a "place of confinement" undermines the validity of the count and dictates its dismissal because the information omits an element of the offense, *viz.*, that Randall possessed a weapon "in a

[5] Section 9-414(a)(4) of the Criminal Law Article provides: "A person detained or confined in a place of confinement may not knowingly possess or receive a weapon." Md. Code (2002, 2012 Repl. Vol.), § 9-414(a)(4) of the Criminal Law Article.

place of confinement." The trial court, he avers, erred by not dismissing the count. We disagree.

Maryland Rule 4-201 dictates that "[a]n offense shall be tried only on a charging document." Rule 4-202(a) sets forth the general requirements for a charging document, and provides in part:

> A charging document shall contain the name of the defendant or any name or description by which the defendant can be identified with reasonable certainty, except that the defendant need not be named or described in a citation for a parking violation. It shall contain a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred. An allegation made in one count may be incorporated by reference in another count. The statute or other authority for each count shall be cited at the end of the count, but error in or omission of the citation of authority is not grounds for dismissal of the charging document or for reversal of a conviction.

The Court of Appeals has elaborated on the purpose of a charging document as follows:

> A primary purpose of a charging document is to fulfill the constitutional requirement contained in Article 21 of the Maryland Declaration of Rights that each person charged with a crime must be informed of the accusation against him. More particularly, the purposes served by the constitutional requirement include (1) putting the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct; (2) protecting the accused from a future prosecution for the same offense; (3) enabling the accused to prepare for his trial; (4) providing a basis for the court to consider the legal sufficiency of the charging document; and (5)

> informing the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case. We have repeatedly emphasized that every criminal charge must, first, characterize the crime; and, second, it must provide such description of the criminal act alleged to have been committed as will inform the accused of the specific conduct with which he is charged, thereby enabling him to defend against the accusation and avoid a second prosecution for the same criminal offense.

Williams v. State, 302 Md. 787, 790-91 (1985) (Citations and footnote omitted). *See Jones v. State*, 303 Md. 323, 336-37 (1985). The Court added in *Jones* that "[a]ll essential elements of the crime need not, however, be *expressly* averred in the charging document; elements may be implied from language used in the indictment or information." *Id*., 303 Md. at 337 (citing cases).

In any event, the averment that the offense took place at the "Maryland Correctional Institution" is sufficient to allege the disputed element. Section 9-410 of the Criminal Law Article defines "place of confinement" as follows:

> (f) *Place of confinement*. –
>
> (1) "Place of confinement" means:
>
> (i) a correctional facility;
>
> * * *
>
> (vi) any other facility in which a person is confined under color of law.

The term "correctional facility" is, in turn, defined as follows in Section 1-101(d) of the Correctional Services Article: "'Correctional facility' means a facility that is operated for the purpose of detaining or confining adults who are charged with or found guilty of a crime." Md. Code (1999, 2008), § 1-101(d) of the Correctional Services Article.

The criminal information adequately charged Randall with a violation of Crim. Law § 9-414(a)(4). The situs element may be inferred from the language of the first count. The trial court did not err in denying his motion to dismiss.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.