UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1511

September Term, 2014

NOEL A. TREJOS

v.

STATE OF MARYLAND

Meredith,
Hotten,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: December 21, 2015

A jury in the Circuit Court for Prince George's County convicted Noel Trejos of first- and second-degree assault for choking his girlfriend, Flor Cruz, and for shooting his sister, Sonia Mendoza, after a night of heavy drinking, heated argument, and physical altercations. This case centers around two contradictory versions of the night's events provided by Ms. Mendoza—*first*, a written statement she provided to police that implicated her brother in the crimes, and *second*, her testimony at trial, which painted a more favorable (for him) picture. The trial court ultimately instructed the jury not to consider Ms. Mendoza's written statement as substantive evidence of Mr. Trejos's guilt, but counsel for the State referred in her closing argument to Ms. Mendoza's statement, describing it as the true narrative of the alleged assaults. Mr. Trejos failed to object at the time, but he asks us to invoke the "plain error" doctrine and reverse the circuit court's decision because this amounted to an "exceptional error which undoubtedly affected [his] right to a fair trial." We disagree and affirm.

I. BACKGROUND

The incident took place at Mr. Trejos's home in the early morning hours of November 16, 2013. At approximately 8:00 pm on November 15, Mr. Trejos and Ms. Cruz arrived at his home and began drinking. About an hour later, Ms. Mendoza and her 13-year-old son arrived. By the time she joined the group, Ms. Mendoza had consumed several drinks as well. After several more hours of drinking together, Mr. Trejos, Ms. Cruz, and Ms. Mendoza began a verbal and physical altercation. Initially, Ms. Cruz and Mr. Trejos were involved; according to Ms. Cruz, Mr. Trejos initiated the verbal argument, and at

some point strangled her.[1] Ms. Mendoza, on the other hand, testified at trial that Ms. Cruz initiated the physical fighting and that Mr. Trejos simply tried to defend himself. Ms. Mendoza left the house, then returned to check on Mr. Trejos. She testified at trial that she found Mr. Trejos walking around his apartment with a hunting rifle, talking in a way that led her to believe he thought he was out hunting. When she tried to get the gun from him—again, according to her trial testimony—the gun fell on the floor and a small "BB bullet" hit her in the leg.

Because this version of the story directly contradicted the account provided in Ms. Mendoza's prior written statement, the prosecutor requested *first* that the court enter that statement into the record as a prior inconsistent statement, pursuant to Md. Rule 5-802(a), and *second* that the court allow the jury to consider that statement as substantive evidence of Mr. Trejos's guilt. Although the court did have Ms. Mendoza read her statement from the witness stand and entered it into evidence, the court deferred its ruling on whether the statement should be considered impeachment evidence or substantive evidence until later in the trial.

The version of events in Ms. Mendoza's statement differed from her verbal testimony in two critical ways. *First*, the statement supported Ms. Cruz's testimony that Mr. Trejos strangled Ms. Cruz during their verbal argument. *Second*, as described in the

[1] Ms. Cruz alleged that Mr. Trejos grabbed her by the neck and pushed her up against a wall.

statement, Ms. Mendoza's shooting was not the accident she portrayed in her oral testimony. In the statement, Ms. Mendoza claimed that Mr. Trejos blocked her from leaving the house, threw her to the floor, aimed his gun at her and purposely shot her in the leg, stating, "He didn't let me leave the house . . . And he aim the gun at me . . . He didn't let me leave. He threw me on the ground. He shot at me."

The court ultimately instructed the jury to consider Ms. Mendoza's statement only as impeaching her in-court testimony and not as substantive evidence of Mr. Trejos's guilt or innocence:

> [THE COURT]: . . . and in that regard, there was testimony by one witness and then a written statement made by the witness to the police earlier. The testimony in court is the substantive evidence. *The out-of-court testimony would be used for impeachment only. It is not, in this case, substantive evidence.*

(Emphasis added.)

During closing argument, counsel for the State disregarded this portion of the court's jury instructions. Instead of referencing the statement as evidence of Ms. Mendoza's reliability, counsel framed Ms. Mendoza's statement as the definitive narrative of the incident, then asked the jury to convict Mr. Trejos based on that version of the story:

> [COUNSEL FOR THE STATE]: A second degree assault on Sonia Mendoza . . . *He shot her in the legs.* This was certainly a reckless act, running around after drinking, having a loaded shotgun on you, pointing it at people. Clearly, that was acting recklessly. But, as I will discuss a little later, *this was an intentional act. He got upset. He was in a fight with his girlfriend. His sister, she's supposed to be on his side. She intervened, took the girlfriend's side. When she came back, he was mad. You're not my sister.*

> *As she told the police to her name, he threw her to the floor and shot her.* This was not a consented contact and there was no justification. Ms. Mendoza wasn't coming out and Ms. Mendoza wasn't trying to hide or shoot at him. There's no justification. There's your second degree assault for Ms. Mendoza.
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> Once you find him guilty of that, you only have one question left. Did he commit that assault on her using a firearm? That one is pretty easy. He most certainly did. . . . Accordingly, is he guilty of first degree assault on Sonia Mendoza? Yes, the defendant is guilty of first degree assault. *He had all the actions, all the evidence leads to the evidence you will have back with you in that jury room*.

(Emphasis added.)

Mr. Trejos did not object to the closing argument or in any way preserve this issue for appeal. The jury convicted him of first- and second-degree assault and acquitted him of a different charge of second-degree assault. The trial court sentenced him to fifteen years in prison with all but eight years suspended for the combined assaults. He filed a timely notice of appeal.

II. DISCUSSION

Mr. Trejos's appeal raises one legal question: whether or not the prosecutor's reference to Ms. Mendoza's written statement in his closing argument constitutes "plain error" that warrants reversal.[2] The State argues that Mr. Trejos's plain error claim fails to meet the high burden adopted by the Court of Appeals in *State v. Rich*, 415 Md. 567 (2010), that the prosecutor's reference to Ms. Mendoza's statement was but a small part of the closing argument that did not have the disproportionate effect on the trial that Mr. Trejos suggests. Indeed, the jury convicted Mr. Trejos based on the entirety of the evidence presented at trial, not on the facts alleged in the statement alone. We agree with the State that no plain error occurred—and in fact that *no* error occurred. Although the contested portion of the closing argument may have improperly skirted the court's instruction to the jury that the statement could be considered only for impeachment, this did not substantially alter the fairness of Mr. Trejos's trial or conviction because the statement was admissible as substantive evidence in any event.

An appellate court generally will not consider issues on appeal that the appellant failed to preserve at trial. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not

[2] Mr. Trejos phrased the question differently in his brief:

> Did the trial court err in allowing the State to make improper and prejudicial statements at closing argument that deprived [Mr. Trejos] of a fair trial?

decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ."). It follows, then, that when a party fails to object to an improper or prejudicial remark during closing argument, he may not raise its impropriety on appeal. *See Mouzone v. State*, 50 Md. App. 81, 91-92 (1981), *rev'd on other grounds*, 294 Md. 692 (1982) (finding that "[t]he failure to object" to remarks in a prosecutor's closing statement will not preserve the "issue for appellate review"). This preservation rule prevents unfairness by "requiring that all issues be raised in and decided by the trial court." *Rich*, 415 Md. at 574 (quoting *Conyers v. State*, 354 Md. 132, 150 (1999)); *Yates v. State*, 202 Md. App. 700, 720 (2011), *aff'd*, 429 Md. 112 (2012).

We do, however, recognize one legitimate exception to this general rule: plain error. *See e.g., Lawson v. State,* 389 Md. 570, 589-605 (2005) (finding plain error when the State made numerous inflammatory remarks, referenced facts not entered as evidence, and invoked the "Golden Rule" argument in its closing statement). The plain error doctrine is based on the premise that some mistakes at trial are so obvious, so egregious, and so greatly affect the fairness of a trial that it would be unjust to deny the party an appeal.

The standard for when we may grant plain error review is extremely high, and therefore that review is rarely granted. *See Hammersla v. State,* 184 Md. App. 295, 306 (2009) (holding that our use of plain error review "1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon" (quoting *Morris v. State,* 153 Md. App. 480,

507 (2003))).[3] We only grant a plain error claim if the mistake "'vitally affect[ed] a defendant's right to a fair and impartial trial,'" *Diggs v. State*, 409 Md. 260, 286 (2009) (quoting *State v. Daughton*, 321 Md. 206, 211 (1990)), which we usually limit to those circumstances that are "compelling, extraordinary, exceptional or fundamental to assur[e] the defendant a fair trial." *State v. Hutchinson*, 287 Md. 198, 203 (1980).

In this case, though, we don't even reach the question of whether the alleged error qualifies as plain error. Although counsel for the State's reliance on Ms. Mendoza's written statement might have qualified as an error if the trial court's underlying ruling had been correct, that wasn't the case. Because the trial court should have characterized Ms. Mendoza's statement as a "prior inconsistent statement" under Maryland's "modern standard" for probative evidence (and therefore should have instructed the jury to consider it as substantive evidence), the State did not err when it asked the jury to do exactly that. And this alone tells us that even the error as alleged was not a plain one.

Md. Rule 5-802.1 provides exceptions to the general rule precluding juries from considering the substance of hearsay evidence. Under the "prior inconsistent statement"

[3] As the Court of Appeals explained in *Chaney v. State*, plain error review "is a discretion that appellate courts should rarely exercise, as considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court," thereby ensuring "that (1) a proper record can be made with respect to the challenge, and (2) the other parties and the trial judge are given an opportunity to consider and respond to the challenge." 397 Md. 460, 468 (2007).

exception, a jury may weigh the substance of certain statements made and endorsed by a witness prior to her testimony. Md. Rule 5-802.1(a) provides that such an inconsistent statement may be admitted as substantive evidence if the statement was "(1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and . . . signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement." *Id*.

In *Nance v. State*, the Court of Appeals formally adopted a "modern" approach to this inquiry, holding that we no longer require the declarant to be under oath or otherwise subject to penalties of perjury for her prior statement to qualify for this exception, if "the declarant is present at trial and subject to cross-examination." 331 Md. 549, 568 (1993). As we clarified in *Poe v. State*,

> the factual portion of [such] an inconsistent out-of-court statement may be offered as substantive evidence of guilt when the statement (1) is based on the declarant's own knowledge of the facts, (2) is reduced to writing and signed or otherwise adopted by him, and (3) he is subject to cross-examination at trial where the prior statement is introduced.

103 Md. App. 136, 155 (citing *Nance*, 331 Md. at 569), *aff'd*, 341 Md. 523 (1995).

Ms. Mendoza's out-of-court statement meets this evidentiary standard. Through her statement, Ms. Mendoza offered a factual account of the assault as she experienced it. The facts alleged in the statement contradicted her in-court testimony, she took the time to write the statement in her own hand, and she fully adopted it as her own by signing the statement.

Furthermore, the trial court provided Mr. Trejos with ample opportunity to refute the statement during Ms. Mendoza's cross-examination. Because the statement was admissible as substantive evidence in the first place, there was no error—plain or otherwise—when the prosecutor invoked the statement as substantive evidence in closing argument.

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