Circuit Court for Montgomery County
Case No. 135558C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1720

September Term, 2019

QUINTELL RAYSHAUN GORDON

v.

STATE OF MARYLAND

Berger,
Arthur,
Gould,

JJ.

Opinion by Arthur, J.

Filed: February 17, 2021

A jury in the Circuit Court for Montgomery County convicted appellant Quintell Rayshaun Gordon of robbery with a dangerous weapon and first-degree assault. The court sentenced Gordon to a term of 20 years for the robbery conviction, with all but eight years suspended, followed by five years of supervised probation. For sentencing purposes, the assault conviction was merged with the conviction for armed robbery.

Gordon appeals his convictions, presenting the following questions, which we have reordered:

1. Did the trial court abuse its discretion in admitting irrelevant and prejudicial evidence?

2. Did the trial court commit plain error in taking no curative action when the prosecutor engaged in improper closing argument?

3. Did the trial court impermissibly restrict [defense counsel's] closing argument?

Gordon waived his objection to the admission of the evidence that he challenges on appeal, so we shall not address the issue. We shall decline Gordon's request to engage in plain-error review of his unpreserved challenge to the prosecutor's closing argument. To the extent that the court placed any restrictions on defense counsel's closing argument, we shall conclude that the court did not abuse its discretion. Accordingly, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gordon was charged with robbing a taxi driver at gunpoint. The driver, Claudia Reyes, identified him at a lineup.

Gordon filed a pre-trial motion to suppress evidence of the out-of-court identification, as well as any in-court identification, on grounds that defense counsel was not present during the lineup. Gordon did not assert that there was anything suggestive about the lineup procedure, which had been recorded on video.

In accordance with *Webster v. State*, 299 Md. 581 (1984), the court granted the motion to suppress evidence of the out-of-court identification, but denied the motion to suppress any in-court identification of Gordon by Ms. Reyes. In reaching its decision, the court found that because there was no evidence that the lineup was impermissibly suggestive, there was no substantial likelihood of misidentification.

At trial, Ms. Reyes testified, through an interpreter, that she is employed as a driver by El Raitero, a rideshare or taxi company that is used almost exclusively by Spanish speakers. Unlike Uber, which uses a mobile app, El Raitero required customers to request a ride by placing a telephone call or sending a text message to the company. The company would then dispatch one of its employees to the pickup point. Payment is accepted in cash only.

At 2:47 p.m. on February 12, 2019, El Raitero received a text message, written in English, requesting a ride from a location in Rockville. Ms. Reyes was dispatched to that location, where she picked up a passenger, whom she identified at trial as Gordon.

Ms. Reyes observed Gordon as he walked to her car. Gordon had the hood of his sweater pulled up over his head, but Ms. Reyes could see his face.

Gordon sat in the back seat of Ms. Reyes's car, directly behind the driver's seat. According to Ms. Reyes, Gordon did not speak Spanish. He told her where he wanted to

go, but she did not understand him. She gave Gordon her cell phone, and he entered the address into the navigation app. The address that Gordon entered, 12803 Hawkshead Terrace in Silver Spring, was about 30 minutes away.

Gordon kept the hood of his sweater pulled up over his head during the drive and did not speak. Ms. Reyes felt "nervous" and "afraid" because it was "very unusual" for a person who does not speak Spanish to request transportation from El Raitero.

Shortly before she reached the destination, Ms. Reyes looked at Gordon in her rearview mirror and said that the fare would be $38. She looked at him again as they arrived at the address because he did not appear to be taking out cash for the fare.

When Ms. Reyes pulled into the driveway at 12803 Hawkshead Terrace, she heard Gordon loading a gun. Gordon put the gun to her back and said, "[G]ive me your money." Ms. Reyes told him that she did not have any money. Gordon leaned into the front seat and started rummaging through a box. At that point, Gordon was about eight inches from Ms. Reyes. She was able to see his face despite his attempts to conceal it with his sweater. She observed a black gun in his hand.

Gordon took $100 in cash, along with Ms. Reyes's phone and company radio. He got out of the car and began to walk away slowly, as though "nothing ever happened."

Ms. Reyes flagged down a passing car and asked its occupants to call 911. Gordon turned around, witnessed this interaction, and ran into a wooded area.

Ms. Reyes described her assailant to the responding police officers as a skinny, Black man, 20 to 25 years old, and between 5'6" and 5'9" tall, wearing a gray hooded sweatshirt with the hood up, blue jeans, and black tennis shoes. Ms. Reyes's cell phone

and company radio were later located on the floor of the back seat of her car, apparently having been discarded there by Gordon.

The police investigated the cell phone number from which the request for the ride had originated. But because the message had been sent through a text-messaging app, the number could not be traced to an individual. No fingerprints were recovered from Ms. Reyes's telephone, other than her own.

Detective Brian Dyer, the lead investigator, learned that Dominic Simms, a person with whom the detective was familiar "from previous contacts," lived several houses away from 12803 Hawkshead Terrace. According to Detective Dyer, Simms was associated with a "group of people" who were "known to the police for various criminal activities." In the two months preceding the robbery, El Raitero had received requests for rides from both Simms's house and 12803 Hawkshead Terrace. Because those ride requests were also made using a text-messaging app, they could not be traced to a particular phone or person.

While investigating an unrelated matter, Detective Dyer executed a search warrant for Simms's social media account. The detective discovered two photographs in which both Simms and Gordon appeared. One of the photographs was dated February 7, 2019, five days before the robbery. Both photographs were admitted into evidence, over defense counsel's relevance objection.

On March 2, 2019, three weeks after the robbery, the police conducted a traffic stop of a car in which Gordon was a passenger. The police found a loaded handgun, different in color from the gun that Ms. Reyes saw on the day of the robbery, underneath

a rug where Gordon had been sitting. Gordon was later arrested and charged with the robbery of Ms. Reyes.

During the booking process on the robbery charges, Gordon provided the number of the telephone that he had on his person. Detective Scott Sube, who testified on behalf of the State as an expert in the area of forensic analysis and cellular telephone tracking and technology, plotted call-detail records for that phone number. According to Detective Sube's analysis, calls to or from Gordon's phone "touched" a cell phone tower located within a mile of 12803 Hawkshead Terrace at 1:00 a.m., 5:45 p.m. and 7:39 p.m. on the day of the robbery. This evidence indicated that the phone had been used in that area at those times.

On direct examination, the prosecutor asked whether Ms. Reyes had ever seen a photograph of Gordon. Ms. Reyes stated that, approximately one month before trial, Ricardo Diaz, the owner of El Raitero, had shown her a photograph of Gordon that he had seen in an online news article. Ms. Reyes had told Mr. Diaz that she was certain that Gordon was the person who had robbed her. In response to the prosecutor's questions, Ms. Reyes stated that her memory of the assailant's appearance was not influenced by the photograph that she had been shown. Ms. Reyes maintained that she was "already sure of how his face looked[,]" and that she would "never forget the face."[1]

[1] We surmise that the State introduced this testimony on direct examination because it anticipated that defense counsel would cross-examine Ms. Reyes about the photograph and suggest that it had influenced her in-court identification of Gordon. The State intended to "draw the sting" by coming forward with evidence about the photograph and allowing Ms. Reyes to explain why it did not affect her testimony.

The State introduced recorded telephone conversations in which Gordon is heard saying, "Come on, mom. I'm not scared. I did what I did. . . . [N]obody put no gun on my head and made me do[] any of that[.] . . . I got to man up. If I do got to go up the road, I'm going to do what I got to do, stay out of the way, do my time. . . . They already caught me."

The jury convicted Gordon of robbery with a dangerous weapon and first-degree assault. We shall introduce additional facts in the discussion, as they become relevant.

DISCUSSION

I. "Simms-related evidence"

On appeal, Gordon focuses on the evidence of his relationship with Simms. Gordon claims that the "limited" probative value of the "Simms-related evidence" was "overwhelmed by unfair prejudice." He asserts that the photographs showing him with Simms, as well as the accompanying testimony regarding Simms's "relationship with the police and the sketchy character of his associates," were "completely extraneous." The State responds that Gordon has not preserved this issue for appellate review. We agree.

To establish Gordon's presence at the scene of the robbery, the State proved, through the testimony of Detective Dyer, that Gordon was an acquaintance of Simms, who lived nearby. Gordon did not object to Detective Dyer's testimony regarding Simms's contacts with police and the criminal activities of his known associates.

The prosecutor showed two exhibits to Detective Dyer. The detective identified the exhibits as the photographs that were recovered during the execution of the search

warrant for Simms's social media account. Detective Dyer described the contents of the photographs:

> [PROSECUTOR]: Showing you first State's Exhibit No. 19. Can you please identify that item for the record?
>
> [DETECTIVE DYER]: So, this is a screenshot of an Instagram picture[.]
>
> [PROSECUTOR]: All right. And was that found on Mr. Simms'[s] telephone during the search warrant that you previously mentioned?
>
> [DETECTIVE DYER]: Yes, I believe so.
>
> * * *
>
> [PROSECUTOR]: Okay. And are both Mr. Simms and Mr. Gordon depicted in that photograph?
>
> [DETECTIVE DYER]: Yes.
>
> * * *
>
> [PROSECUTOR]: All right, State's Exhibit No. 20, please [will] you identify that document?
>
> [DETECTIVE DYER]: The same Instagram account, and a screenshot from that, that account.
>
> [PROSECUTOR]: And what is the date of this photograph?
>
> [DETECTIVE DYER]: February 7th.
>
> [PROSECUTOR]: Okay. And are both Mr. Simms and [Gordon] depicted in that photograph?
>
> [DETECTIVE DYER]: Yes.

When the State offered the photographs into evidence, the court asked if there was any objection. Defense counsel responded, "Yes. I think that it's a picture of a group of

young men. . . . That's all it is." The court overruled the objection, stating, "I think it's tangibly relevant to the case, so, based on your objection as to relevance, I'll admit it[.]" Defense counsel did not dispute that the objection was to the relevance of the photographs.

Under Maryland Rule 8-131(a), an appellate court ordinarily will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" To preserve an evidentiary issue for appeal, Maryland Rule 4-323(a) requires a party to "object[] to the admission of evidence . . . at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent." "Otherwise, the objection is waived." *Id.*

Gordon did not object during Detective Dyer's testimony that Simms was known to police or that he was associated with criminals. Nor did Gordon object and move to strike that testimony, or request any other relief, when the court admitted the photographs of him in the company of Simms. Consequently, Gordon waived any objection to the testimony about Simms's relationship with the police and the criminal character of his associates.

At trial, the only objection about Simms was a challenge to the admission of the photographs, but that ruling is not before us for review. Gordon challenged the relevancy of the photographs at trial, but he asserts a different theory of inadmissibility on appeal. He now concedes that "perhaps five percent of the Simms-related" evidence was relevant, but claims that the "limited" probative value was outweighed by unfair prejudice.

"[W]hen particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review of those grounds, and will be deemed to have waived any ground not stated.'" *State v. Jones*, 138 Md. App. 178, 218 (2001) (quoting *Leuschner v. State*, 41 Md. App. 423, 436 (1979)). "An objection to the admission of evidence on the ground of irrelevance is by no means the same thing as an objection to evidence on the ground of unfair prejudice." *Jeffries v. State*, 113 Md. App. 322, 342 (1997). Therefore, Gordon waived his appellate claim that the photographs were improperly admitted.

Even if Gordon had objected at trial to the admission of the photographs on grounds of unfair prejudice, he would not be entitled to relief from this Court. "Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008); *accord Benton v. State*, 224 Md. App. 612, 627 (2015). By the time the photographs were offered into evidence, Detective Dyer had already testified, without objection, that the photographs showed Gordon with Mr. Simms. Accordingly, Gordon has not preserved his objection that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. *See Vandegrift v. State*, 82 Md. App. 617, 637-38 (1990) (holding that "because evidence of the contents of the chemist's report had already been admitted, without objection, appellant's complaint as to the admissibility of that report has not been preserved for appellate review").

II. State's Closing Argument

On appeal, Gordon claims that the court failed to take curative action when, during closing argument, the prosecutor made two allegedly improper statements.

In the first statement, the prosecutor told the jury, "As [the court] just instructed you the State, [sic] and I represent you. I represent our community." Gordon contends that this statement was both incorrect and "extraordinarily misleading," as it implied that the prosecutor and the jury were "members of the same team." In addition, Gordon observes that the statement was inaccurate in that the court had not instructed the jurors that the prosecutor represented them or the community.

In the second statement, the prosecutor said that the court had instructed the jury that the identification of the defendant by a single eyewitness, if believed, was sufficient to support a conviction. In fact, the court had given no such instruction. Gordon maintains that "the false statement that the [court] had propounded this instruction" deprived him of a fair trial.

Because Gordon did not object to either of the prosecutor's allegedly improper statements, he has not preserved his claims for appellate review. *Shelton v. State*, 207 Md. App. 363, 385 (2012) (stating that, "pursuant to Rule 8-131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal") (citations omitted).

Recognizing that he did not preserve his challenge to the prosecutor's closing argument, Gordon requests that we exercise our discretion to review the court's failure to take curative action under the doctrine of plain error. We decline his request.

Rule 8-131(a) vests appellate courts with discretion to decide an issue that was not raised in or decided by the trial court "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." The discretion to review conduct that was not challenged in the trial court may be exercised where the court's conduct amounts to "plain error," which is "'error which vitally affects a defendant's right to a fair and impartial trial.'" *Pietruszewski v. State*, 245 Md. App. 292, 323 (2020) (quoting *Richmond v. State*, 330 Md. 223, 236 (1993)).

"'Appellate invocation of the "plain error doctrine" 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon.'" *Winston v. State*, 235 Md. App. 540, 567 (2018) (quoting *Morris v. State*, 153 Md. App. 480, 507 (2003)). Before an appellate court will reverse for plain error, four conditions must be met:

1. There must be a legal error that has not been intentionally relinquished or abandoned by the appellant.

2. The error must be clear or obvious, and not subject to reasonable dispute.

3. The error must have affected the appellant's substantial rights, which in the ordinary case means that it affected the outcome of the proceedings.

4. If the previous three parts are satisfied, the appellate court has discretion to remedy the error, but it should exercise that discretion only if the error affects the fairness, integrity or reputation of judicial proceedings.

Winston v. State, 235 Md. App. at 567 (citing *Newton v. State*, 455 Md. 341, 364 (2017)) (additional citations omitted).

"Meeting all four conditions is, and should be, difficult." *Winston v. State*, 235 Md. App. at 568 (citing *Givens v. State*, 449 Md. 433, 469 (2016)). "The appellate court may not review the unpreserved error if any one of the four [conditions] has not been met." *Id.* at 568.

To say that the trial court committed plain error in this case is essentially to say that the court had an obligation to correct the prosecutor's remarks on its own motion, without any objection from Gordon. *See Clermont v. State*, 348 Md. 419, 452-53 (1998). On this record, we have little difficulty concluding that the court had no such obligation.

The prosecutor's brief and isolated remark, that she represented the jurors and the community, was not so misleading and prejudicial that it affected the outcome of the trial. This case is worlds apart from a case like *Lawson v. State*, 389 Md. 570, 596-605 (2005), where the Court of Appeals invoked the plain-error doctrine to consider the propriety of a prosecutor's suggestion that the defendant was a "monster" who would continue to sexually abuse children unless the jury sent him to prison.

Nor were Gordon's substantial rights affected by the prosecutor's statement that "[t]he identification of the defendant by a single eyewitness . . . as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant." Although the prosecutor was wrong in stating that the court had given that instruction to the jury, the instruction is nonetheless an accurate statement of the applicable law. *See, e.g.*, *Reeves v. State*, 192 Md. App. 277, 306 (2010) (reiterating

"the well-established rule in Maryland that the testimony of a single eyewitness, if believed, is sufficient to support a conviction"). And, contrary to Gordon's assertion that the proposition applies only to appellate review of sufficiency of the evidence, the prosecutor's statement is similar to the language found in Maryland Criminal Pattern Jury Instruction 3:30 (Identification of the Defendant). The State appears not to have requested the instruction, but the court could have given it had it been requested, because it was generated by the evidence.[2]

In summary, the prosecutor's comments did not, in our judgment, deprive Gordon of a fair trial. Consequently, we decline to consider Gordon's unpreserved objections to them.

III. Defense Counsel's Closing Argument

Gordon contends that the court improperly restricted defense counsel's argument on two occasions. We shall address each contention separately.

1. "Implicit" restriction

In the middle of the State's case, the prosecutor asked the court to reconsider its ruling granting Gordon's motion to suppress evidence that Ms. Reyes had identified Gordon in a lineup. The prosecutor expressed concern that the jury was being "left with

[2] The pattern jury instruction reads as follows:

> The identification of the defendant, by a single eyewitness, as the person who committed the crime, if believed beyond a reasonable doubt, can be enough evidence to convict the defendant. However, you should examine the identification of the defendant with great care.

the incorrect implication" that Ms. Reyes had identified Gordon at trial only because Mr. Diaz had shown her a photograph of Gordon a month before trial. The prosecutor suggested that, if the court did not admit evidence of the identification at the lineup, the defense should be precluded from arguing to the jury that Ms. Reyes's identification of Gordon was influenced by the photograph.

The court denied the motion to reconsider at that point, but commented that it would create a "fairness issue" if defense counsel were to make such an argument. The court added that the State might have grounds to reopen its case and to introduce evidence of the lineup for "rehabilitative purposes" if defense counsel suggested to the jury that the identification was prompted by the photograph. The court told defense counsel, "I'm not telling you what to do or not do. I'm just letting you know . . . what my thinking is so that you can make a reasonable decision on behalf of your client."

After the State rested its case, but before closing argument, the court revisited the issue. The court stated that, if defense counsel called Ms. Reyes's identification of Gordon into question by suggesting that she had been improperly influenced by the photograph of Gordon that Mr. Diaz had shown her, it would be inclined to grant a motion to reopen the State's case and to introduce evidence of the previously suppressed lineup. The court also stated that defense counsel was "certainly entitled" to argue that Ms. Reyes had been influenced by the photograph, but that if he did, the court would permit the State to put on evidence of what occurred at the lineup. The court later reiterated to defense counsel, "[i]f you want to make the argument, and you think it's

important to make, then you can make it. I'm just letting you know what the consequence of that would be."

Defense counsel did not try to persuade the jury in closing argument that Ms. Reyes identified Gordon only because of the photograph Mr. Diaz had shown her. Consequently, evidence of the lineup was never introduced.

On appeal, Gordon asserts that the trial court improperly restricted defense counsel's closing argument. Our review of the record, however, shows that the court imposed no restriction, much less an improper restriction. Indeed, the court denied the State's request for a ruling restricting defense counsel's closing argument on the subject of the identification. Moreover, the court repeatedly said that defense counsel was free to argue that the in-court identification was influenced by the photograph and that the court was only predicting what action it would take in that event, if requested by the State.

To the extent that Gordon asserts error in the court's preliminary ruling that certain arguments might merit reopening the State's case to introduce evidence that Ms. Reyes identified appellant in a lineup, that issue was never generated for purposes of appellate review, because evidence of the lineup was never introduced. *See Jordan v. State*, 323 Md. 151, 156 (1991) (stating that "[w]e are not inclined to review a trial court's decision authorizing the State to use particular evidence when, as a result of a tactical decision by the defendant, the State ultimately was precluded from utilizing that same evidence[]").

2. "Negative" Evidence

In closing argument, defense counsel suggested that there was no evidence tying Gordon's phone to the robbery and implied that police had searched the phone:

> [DEFENSE COUNSEL]: So, now we go back to this investigation that had to do with all this telephone stuff. There's zero evidence that connects his phone, Mr. Gordon's phone which the police got from Mr. Gordon. Detective Dyer got his phone number, his address, and his phone. **Nothing on the phone connects him to any of these activities.**

(Emphasis added.)

The prosecutor objected, and the court convened a bench conference. At the bench, the prosecutor asserted that defense counsel's argument was "factually inaccurate." He explained that the police had never accessed the data on Gordon's phone because Gordon refused to share his password. He added that there was "nothing in evidence about the phone," except for the phone number.

The court noted the absence of any evidence of any attempt to access the data on the phone. Accordingly, the court sustained the objection "as to the statement that implies that [the State] somehow looked into [Gordon's] phone." The court then instructed the jury that the objection was sustained "with respect to . . . what was done with the phone, because there was no evidence in the record as to what that was." The court also instructed the jury to "disregard that statement."

Gordon contends that the court's ruling was erroneous because the defense has the right to argue negative evidence, or what the State did not prove, in closing. The State responds that the court did not abuse its discretion in restricting defense counsel's closing argument, because the argument implied a fact not in evidence: specifically, that the

police had access to Gordon's phone and had conducted a search of it that yielded no evidence tying Gordon to the robbery. The State is correct.

"'The regulation of argument rests within the sound discretion of the trial court.'" *Paige v. State*, 222 Md. App. 190, 210 (2015) (quoting *Grandison v. State*, 341 Md. 175, 224 (1995)). "Generally, the parties are permitted 'liberal freedom of speech' and 'may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Id.* (quoting *Whaley v. State*, 186 Md. App. 429, 452 (2009)) (in turn quoting *Spain v. State*, 386 Md. 145, 152 (2005)). "If the State fails to produce evidence that is reasonably available to it or fails to explain why it has not produced the evidence, a defendant is permitted to comment about the missing evidence in his or her closing argument to the jury." *Patterson v. State*, 356 Md. 677, 682 (1999) (citations omitted). "It is well established, however, that counsel is not permitted to 'comment on facts not in evidence or . . . state what he or she would have proven.'" *Paige v. State*, 222 Md. App. at 210 (quoting *Mitchell v. State*, 408 Md. 368, 381 (2009)); *accord Lee v. State*, 405 Md. 148, 166 (2008) ("comments made during closing argument that invite the jury to draw inferences from information that was not admitted at trial" are "improper").

Here, the court did not preclude defense counsel from arguing that there was "zero evidence" connecting Gordon's phone with the robbery. But the subsequent comment that elicited the objection – that there was "nothing on the phone" that incriminated Gordon – went beyond pointing out what the State failed to prove. It improperly suggested a fact that was not in evidence: that the police had conducted a search of

Gordon's phone. Accordingly, the court did not abuse its discretion in sustaining the objection.

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