UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0187

September Term, 2015

JAMOL KINGSBOROUGH

v.

STATE OF MARYLAND

Leahy,
Friedman,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: March 24, 2016

Around 10:20 p.m. on August 27, 2013, Dr. Egbert Hoiczyk, a microbiologist, was the victim of an armed robbery as he was leaving his office on the John's Hopkins medical campus. The assailant knocked Dr. Hoiczyk to the ground, and ran off with Dr. Hoiczyk's backpack. The backpack contained Dr. Hoiczyk's laptop computer, his cell phone, and two notebooks that documented the results of two years of his professional research and experiments. Approximately one month after the incident, Dr. Hoiczyk identified Jamol Kingsborough, appellant, in a photo array as the man who had robbed him. Kingsborough was subsequently arrested.

Following a two-day jury trial in the Circuit Court for Baltimore City, on January 16, 2015, Kingsborough was convicted on charges of armed robbery, robbery, second-degree assault, and felony theft. The court sentenced Kingsborough to twenty years incarceration for armed robbery, all but thirteen years suspended, and two concurrent terms of five years each for the assault and felony theft.

In his timely filed appeal, Kingsborough raises two issues for our consideration, which we have rephrased as follows:

> 1. Whether there was sufficient evidence to support Kingsborough's conviction for felony theft.
>
> 2. Whether the trial court erred by failing to strike improper remarks made by the State during closing argument.

Because we conclude that neither of the issues presented in Kingsborough's appeal were properly preserved for appellate review and discerning no plain error, we shall affirm the judgments of the circuit court.

DISCUSSION

I. Sufficiency of the Evidence of Felony Theft

At the close of the State's case at Kingsborough's trial, defense counsel made a motion for judgment of acquittal and argued:

> Mr. Kingsborough would argue that there's been no evidence of a firearm admitted or connected with Mr. Kingsborough as to the robbery. Although Mr. Kingsborough acknowledges the eyewitness identification of Dr. Hoiczyk that that would be a matter for the jury, but he would argue that even in the light most favorable to the State that there are issues that do not link Mr. Kingsborough to as [*sic*.] evidence on that count.
>
> And I would argue the same, make the same arguments as to the third and fourth counts that are before this jury, and I would submit on that.

At the close of all evidence, defense counsel renewed Kingsborough's motion, submitting on his previous arguments.

Kingsborough now contends that the State failed to present sufficient evidence of the value of the items that were stolen from Dr. Hoiczyk to support his conviction for felony theft, which requires that the stolen items have a value of more than $1,000.

Generally, a non-jurisdictional issue is not preserved for appellate review if it was not raised in or decided by the lower court. Md. Rule 8–131(a). Under Rule 4–324(a), a defendant who moves for judgment of acquittal must "state with particularity all reasons why

the motion should be granted." *Id*. It is well established that this Court will review a question of legal sufficiency of the evidence only "'for the reasons given by [the defendant] in his motion for judgment of acquittal.'" *Taylor v. State*, 175 Md. App. 153, 159 (2007) (quoting *Whiting v. State*, 160 Md. App. 285, 308 (2004)).

Here, the record reflects that defense counsel did not, at any time, argue that the evidence presented was insufficient to prove that the items stolen from Dr. Hoiczyk were worth more than $1,000. "The issue of sufficiency of evidence is not preserved when appellant's motion for judgment of acquittal is on a ground different than that set forth on appeal." *Anthony v. State*, 117 Md. App. 119, 126, *cert. denied*, 348 Md. 205, 703 A.2d 147 (1997). Because defense counsel failed to state with particularity the manner in which the evidence was insufficient to support the charge of felony theft, Kingsborough's current argument was not properly preserved for appellate review. We need not, therefore, consider it any further.

II. Plain Error in Closing Argument

At his trial, Kingsborough presented two alibi witnesses, Nate Whitworth and Shamera Morrison, who testified that Kingsborough was at their home on the evening the robbery occurred, Tuesday, August 27, 2013, playing video games with his best friend, Whitworth's younger brother. Whitworth and Morrison both testified that their point of reference was a birthday party for a four-year-old nephew that they recalled occurred either on the same day, or the next day. Both witnesses were discredited on cross-examination,

however, admitting that they could not remember what day the birthday party occurred, but that it was probably on a weekend. Whitworth further recanted her direct testimony, acknowledging that her "date of reference" was "somewhat off," and, although she recalled that Kingsborough was "around there around that time," she did "not necessarily" know what Kingsborough was doing on that "exact day."

The prosecutor did not refer to Whitworth's or Morrison's testimony during the State's closing argument. During the State's rebuttal argument, however, the prosecutor explicitly and repeatedly stated that Whitworth and Morrison were not credible:

> Again you're looking at credibility of witnesses. They were wholly not credible. Why? Because they came in here and they lied. They had no idea where Mr. Kingsborough was that evening. They had no idea where they were that evening. They picked it out of a hat . . . Wholly not credible. Their motivation is to lie, ladies and gentlemen, and they did.

Kingsborough now asserts that he was deprived of a fair trial when the trial court failed to act *sua sponte* to curtail the prosecutor's improper and prejudicial statements.

It is clear from the record, and appellant acknowledges, that defense counsel did not interpose any objections to the prosecutor's comments when they were made, nor after the prosecutor concluded his argument. Because defense counsel raised no objection to the allegedly improper statements, there is no ruling of the circuit court before this Court to review. We must, therefore, conclude that Kingsborough's contentions were not properly preserved. *See* Md. Rule 8-131(a) ("the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court");

Jones-Harris v. State, 179 Md. App. 72, 102, *cert. denied*, 405 Md. 64 (2008) (holding that complaints regarding improper remarks in closing arguments are waived if "the improper argument alleged was not brought to the attention of the trial judge either when the argument was made or immediately after the prosecutor's initial argument was completed"); *Bates v. State*, 127 Md. App. 678, 703 (1999), *overruled on other grounds*, *Tate v. State*, 176 Md. App. 365, 933 A.2d 447 (2007) (argument about prosecutor's improper comments not preserved for appellate review when "counsel neither objected when the argument was made nor at any later point [and] did not request a mistrial or a curative instruction").

On appeal, Kingsborough urges this Court to exercise its discretion and undertake plain error review of the allegedly improper comments in the prosecutor's rebuttal closing argument. Appellant contends that the prosecutor interfered with the jury's function to determine the credibility and the weight to give each witness by characterizing Kingsborough's alibi witnesses as liars and their testimony as "wholly not credible." Kingsborough points out that defense counsel had no opportunity to address the prosecutor's prejudicial comments as they were made during the State's rebuttal argument and were, therefore, "the last thing the jury heard before deliberations." Kingsborough also suggests that in this close case where there was not "an overwhelming amount of evidence against the defendant" and in the absence of a proper curative instruction "to prevent the jury members from improperly adopting the prosecutor's assertion of the witnesses' credibility as their

own," there is a real danger that the prosecutor's comments misled or improperly influenced the jury.

This court may undertake plain error review to evaluate whether "the cumulative effect of the prosecutor's remarks was likely to have improperly influenced the jury[.]" *Lawson v. State*, 389 Md 570, 604 (2005). The power to decide issues not raised below is "solely within the court's discretion and is in no way mandatory." *Conyers v. State*, 354 Md. 132, 148, *cert. denied*, 528 U.S. 910 (1999) (citing *State v. Bell*, 334 Md. 178, 187–88 (1994)). This Court reserves such gratuitous exercises of discretion for those cases where the "'unobjected to error [is] compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Smith v. State*, 64 Md. App. 625, 632 (1985) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)); *see also State v. Daughton*, 321 Md. 206, 211 (1990) (plain error is "error which vitally affects a defendant's right to a fair and impartial trial.").

When an individual requests that this Court undertake plain error review, there are several factors we consider, among them are: 1) "the opportunity to use an unpreserved contention as a vehicle for illuminating an area of law"; 2) "the egregiousness of the trial court's error"; 3) "the impact of the error on the defendant"; and 4) the degree of lawyerly diligence or dereliction." *Steward v. State*, 218 Md. App. 550, 566 (2014) (citing *Morris v. State*, 153 Md. App. 480, 518-24 (2003)). The mere fact that a comment made by the prosecutor may have been prejudicial is not sufficient to compel this Court to undertake plain error review. *See, e.g., Morris v. State*, 153 Md. App. 480, 511-12 (2003)("If every material

(prejudicial) error were *ipso facto* entitled to notice under the 'plain error doctrine,' the preservation requirement would be rendered utterly meaningless. . . . The fact that an error may have been prejudicial to the accused does not, of course, *ipso facto* guarantee that it will be noticed." (emphasis omitted)).

While prosecutors are afforded "wide latitude" in closing arguments, "a defendant's right to a fair trial must be protected." *Lee v. State*, 405 Md. 148, 164 (2008). It is improper for a prosecutor to make "remarks calculated to unfairly prejudice the jury against the defendant." *Reidy v. State*, 8 Md. App. 169, 172 (1969). Prosecutors must also refrain from encroaching "on the jury's function to judge the credibility of the witnesses and weigh their testimony [or] on the jury's function to resolve contested facts." *Bohnert v. State*, 312 Md. 266, 279 (1988); *see also Hunter v. State*, 397 Md. 580, 588 (2007) (emphasizing that "the credibility of a witness and the weight to be accorded to that witness's testimony are solely within the province of the jury."); *Brown v. State*, 368 Md. 320, 328-29 (2002) ("There have been numerous cases confirming that in jury trials, the credibility of witnesses is a jury issue.").

When a prosecutor asserts his own personal opinion of a witness's credibility, it poses two dangers: (1) "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government

and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985).

It is not, however, necessarily improper for counsel, in the midst of closing argument, to attack the credibility of a witness. Indeed, during opening and closing arguments, "it is common and permissible generally for the prosecutor and defense counsel to comment on, or attack, the credibility of the witnesses presented." *Spain v. State*, 386 Md. 145, 154 (2005). The key issue is whether the attack on the credibility of the witnesses was based on inferences to be drawn from the evidence. *See Washington v. State*, 180 Md. App. 458, 472 (2008) (argument is not improper if the statements can be construed as comments "fairly deducible from the evidence," even if "'the inferences discussed are illogical and erroneous'") (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)).

In this case, our review of the transcripts persuades us that in his rebuttal argument, the prosecutor's attack on the credibility of Kingsborough's alibi witnesses were, for the most part, based on inferences to be drawn from the evidence presented at Kingsborough's trial. The prosecutor's argument that the witnesses lied and that they were "wholly not credible" was based on the drastic differences between the witnesses' testimony on direct examination and their testimony when cross-examined. On direct, the witnesses attested that Kingsborough was at their house on the night of the robbery. When they were challenged on cross, the witnesses admitted that they were not sure what night the robbery occurred. Moreover, both witnesses testified on direct examination that they recalled that

Kingsborough was at their home either on the night before or the night of a relative's birthday party. On cross-examination, however, they acknowledged that the birthday party most likely occurred on a weekend, while the robbery occurred on a Tuesday night. The prosecutor also suggested during his rebuttal that Kingsborough's close personal relationship with Whitworth's brother gave the two witnesses a motive to lie, in order to protect him. In sum, the prosecutor urged the jury to conclude that, because of their motive to lie and the contradictions in their trial testimony, the witnesses were not worthy of belief. Thus, the prosecutor's attacks were grounded in inferences from the evidence rather than the State's personal assurances.

Though the prosecutor's arguments were, at least, inartfully worded, we discern nothing egregiously improper in the State's arguments. Indeed, they were not so outrageous as to compel defense counsel to object at the time they were made. We are not persuaded that the circumstances of Kingsborough's case are sufficiently compelling to justify plain error review. We, therefore, decline to discuss this unpreserved issue any further.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.