UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1194

September Term, 2015

ROBERT JONATHAN SYPOLT

v.

STATE OF MARYLAND

Meredith,
Leahy,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 11, 2016

Following his conviction by a jury in the Circuit Court for Garrett County of two counts of counterfeiting, two counts of issuing a counterfeit document, and one count of theft under $1,000, Robert Jonathan Sypolt was sentenced to five years' imprisonment, all but three years suspended, and three years' probation to follow.[1]

In his timely appeal, Sypolt, poses the following question for our review:

> Did the trial court commit plain error when it allowed the prosecutor to comment on his failure to testify and to introduce evidence?

We decline to review for plain error, and shall affirm the trial court's judgment.

BACKGROUND

Dorothy Weeks, a resident of Oakland, Garrett County, walked her dog for approximately 30 minutes to an hour each morning, often leaving her front and back doors unlocked and, at times, ajar. Near her back door, she usually left her purse, in which she kept her wallet and checkbook. In late May or early June, 2014, Weeks was paying her bills and noticed that two checks were missing from the checkbook. When she received her subsequent bank statement, Weeks realized that someone had written and cashed the two missing checks, without her authorization.[2] Weeks also noticed that about $40 in cash was missing from her wallet. Weeks reported the missing checks to her niece's husband, Captain J.D. Murphy of the Garrett County Sheriff's Office, at a family event later that summer.

[1] Sypolt's motion for judgment was granted as to a charge of burglary.

[2] The two, non-consecutively numbered checks were written out to cash, for $120 each. The first was dated May 29, 2014, and the second June 7, 2014.

Murphy viewed the surveillance video from the two bank branches where the checks had been cashed, and identified Sypolt as the individual who presented the checks. After being advised of his *Miranda* rights, Sypolt denied stealing the checks, but told Murphy that he received the checks from his friend Troy Townsend, saying that he had asked Sypolt to cash them because Townsend lacked a valid ID. Sypolt told Murphy that Townsend had done some work for Weeks, and she had paid him with the checks.

At trial, Weeks testified that she did not write the checks, and Townsend denied that he had received the checks from Weeks and given them to Sypolt. Townsend further denied having written the checks to himself or even having ever seen them prior to trial. The State called Weeks, Murphy, and Townsend to testify, as well as a representative of the bank, another investigating officer, and a forensic document specialist. The forensic document specialist testified that it was "virtually certain" that it was Sypolt's handwriting on the two checks. Sypolt chose not to testify, and presented no evidence on his behalf.

The court gave the following instruction:

> In this case, the issue of an inference from exclusive unexplained possession of recently stolen goods was exposed. Exclusive possession of recently stolen property, unless reasonably explained, may be evidence of theft. If you find that the Defendant was in possession of property shortly after it was stolen and the Defendant's possession is not otherwise explained by the evidence, you may, but are not required to, find the Defendant guilty of theft.

The court likewise instructed the jury that Sypolt had an "absolute constitutional right not to testify," and that the jurors should not consider his decision not to testify in any way. Sypolt's counsel did not object to any of the instructions.

In closing, the State reviewed the evidence and commented, "And the only thing[s] we know from the Defendant are, essentially, the lies that he told Captain Murphy, and the only thing he admits to is he's the person that passed the checks at the bank." In rebuttal to Sypolt's closing argument, the State remarked of Sypolt, "He's in possession of the checks without any good other explanation of how he came to be in possession of them, and we know he's in possession of them." These comments drew no objection.

As we have noted, the jury found Sypolt guilty of theft less than $1,000, two counts of counterfeiting, and two counts of issuing a counterfeit document.

DISCUSSION

Conceding that the lack of objection acts to limit preservation of his appellate issues, Sypolt asks us to review for plain error, asserting that the prosecutor's remarks during closing and rebuttal violated his constitutional right to remain silent. Sypolt argues that "[t]he remarks touched on such vital constitutional protections that the trial court had a duty to take curative action *sua sponte* to overcome the likelihood of unfair prejudice."[3]

[3] Sypolt refers to the protections of the Fifth Amendment of the Constitution of the United States, Article 22 of Maryland Declaration of Rights, and section 9-107 of the Courts and Judicial Proceedings Article of the Maryland Code, which provide that a defendant may (continued...)

Sypolt, like many defendants before him, misconstrues the essence of plain error review. It is not, as he seems to assert, a substitute for collateral post-conviction review based on ineffective assistance of counsel. Rather, plain error review is an extraordinary remedy wholly within the appellate court's discretion. *Austin v. State*, 90 Md. App. 254, 261-64 (1992).

Maryland Rule 8-131(a) provides that we will not decide any issue aside from jurisdiction of the trial court "unless it plainly appears by the record to have been raised in or decided by the trial court," but affords us the discretion to consider unpreserved issues "if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." The "rule of contemporaneous objection applies even to errors of constitutional dimension." *Yates v. State*, 429 Md. 112, 130 (2012) (citing *Savoy v. State*, 420 Md. 232, 241-42 (2011)) (discussing plain error review of an unobjected-to jury instruction).

"[A]n appellate court should consider exercising discretion to take cognizance of plain error . . . when the error is 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Savoy*, 420 Md. at 243 (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). "Among the factors the Court considers are 'the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical,

[3](...continued)
not be compelled to testify against himself, and that choosing not to testify creates no presumption against him.

the product of conscious design or trial tactics or the result of bald inattention.'" *Yates*, 429 Md. at 131 (quoting *Savoy*, 420 Md. at 243, and *Hutchinson*, 287 Md. at 203).

Other such reasons for exercising this type of extraordinary discretion may include: (1) the opportunity to use the error as a vehicle for considering an unexplored area of the law; (2) the finding of a flagrant, egregious, outrageous, or extraordinary error; (3) whether the moral impact of the error is so great as to require intervention, such as the erroneous conviction of a factually innocent person; and (4) there being ample good reason why defense counsel failed to preserve the issue. *Morris v. State*, 153 Md. App. 480, 518-524 (2003). However, even if any – or all – of these reasons exist, "[t]he touchstone remains, as it always has been, ultimate and unfettered discretion." *Austin*, 90 Md. App. at 268.

Here, we are not convinced of clear error. A prosecutor has "wide latitude to draw reasonable inferences from the evidence, and discuss the nature, extent, and character of the evidence," *Smith v. State*, 367 Md. 348, 354 (2001), but may not make comments "susceptible of the inference by the jury" that they are to consider the defendant's decision not to testify as indicative of guilt, *id.* (quoting *Smith v. State*, 169 Md. 474, 476 (1936)) (emphasis omitted). Further, "our cases have long held that a criminal defendant's rights under Article 22 of the Maryland Declaration of Rights and § 9-107 of the Courts and Judicial Proceedings Article preclude comment by a prosecutor on a defendant's decision not to testify." *Marshall v. State*, 415 Md. 248, 261 (2010). The propriety of comments made

in closing must be determined by reviewing them in context. *Clermont v. State*, 348 Md. 419, 455-56 (1998).

Prosecutors may argue that the unexplained possession of recently stolen goods permits the inference that the possessor was the thief. *Smith v. State*, 367 Md. at 359. In *Smith*, the defendant, accused of burglary and theft where the only evidence was his possession of the goods after the theft, did not testify or offer any evidence. *Id.* at 351-52. The prosecutor asked the jury, "What explanation has been given to us by the Defendant? Zero, none." *Id.* at 352 (emphasis omitted). The Court of Appeals distinguished between commenting upon "the defendant's failure to present witnesses or evidence" and "the failure of the defendant alone to provide an explanation," finding that comments like that made by the prosecutor – alluding to the defendant alone – would be susceptible of the inference by the jury that they should consider the defendant's silence an indication of guilt. *Id.* at 358. "A majority of courts have held that prosecutors may comment on the uncontradicted nature of the prosecution's evidence *unless* the only person who could have contradicted, denied, rebutted or disputed the evidence was the defendant himself." *Id.* at 359-60 (emphasis in original).

The context here allows for reasonable dispute as to the existence of error. The State's comment in closing, "And the only thing we know from the Defendant are, essentially, the lies that he told Captain Murphy, and the only thing he admits to is he's the person that passed the checks at the bank," was made during a review of the evidence.

The body of evidence supported the inference that Sypolt's explanation for having the checks was untruthful. Murphy testified that Sypolt had told him in their interview that Sypolt was the one who cashed the checks, but had done so for his friend, Townsend. Townsend denied ever having possession of the checks, much less giving them to Sypolt to cash on his behalf. The State's reference to "the only thing we know from the Defendant" was not a comment on Sypolt's decision not to testify, but, taken in context, an observation that the State's evidence was not contradicted in any way, even by the friend whom Sypolt claimed would contradict it.[4]

The second comment of which Sypolt complains was made in rebuttal: "He's in possession of the checks without any good explanation of how he came to be in possession of them, and we know he's in possession of them." That comment, as well, is subject to a reasonable dispute as to whether it was susceptible of the inference by the jury to consider Sypolt's silence as an indication of guilt. The court, just prior to closing arguments, instructed the jury, "If you find that the Defendant was in possession of property shortly after it was stolen and the Defendant's possession is not otherwise explained by the evidence, you may, but are not required to, find the Defendant guilty of theft."[5] In the second comment,

[4] Sypolt's own counsel also made reference to this interview in closing, in the context of the charge for theft of the $40 in cash from the victim's wallet: "No one asks Robert Sypolt about it. Robert Sypolt never says anything about it."

[5] Immediately prior to this, there was a discussion on the record of the possession of stolen property instruction, which Sypolt's counsel reviewed and stated, "It's okay with the (continued...)

the prosecutor merely repeated the legal standard in the context of the evidence adduced during trial. A reasonable explanation regarding the possession of recently stolen property can come from testimony by the defendant, but it can also come in through testimony by other witnesses, and through cross-examination of those witnesses. Sypolt was not required to testify or even to produce evidence in order to provide a reasonable explanation for his possession of the stolen checks. We do not see the State's comment as drawing the jury's attention to his decision not to do either; rather, as an argument that it had satisfied the legal standard of proof, and encouraging the jury to make the inference that Sypolt's possession of the checks meant he had stolen them.

Even were we to acknowledge these comments as violating Sypolt's rights under the Fifth Amendment and Article 22 of the Maryland Declaration of Rights, we decline to exercise our discretion to recognize plain error. Sypolt offers no compelling reasons for us to do so. He does not, for instance, present any novel arguments regarding the use of the phrase "reasonably explained" in the jury instruction as violating his right not to testify. Nor does he demonstrate how, on these facts, he was erroneously convicted of a crime he did not commit.

[5](...continued)
Defense, Your Honor." This appears to be an affirmative waiver of the putative error underlying this second statement, which would fail the first prong of the plain error analysis. *See Rich*, 415 Md. at 578.

Finding no clear error, we shall affirm.

JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.