UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2418

September Term, 2014

DAVAUGHN TYRONE GREEN

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Leahy,

JJ.

Opinion by Nazarian, J.

Filed: February 22, 2016

Davaughn Green was accused of attacking a passenger on the Washington Metro (while it traveled in Prince George's County) and stealing his money. After a jury trial in the Circuit Court for Prince George's County, Mr. Green was convicted of second-degree assault, theft, and robbery. He challenges the sufficiency of the evidence to support the robbery and theft convictions, claiming that the victim's testimony—which was the only eyewitness testimony—was speculative and inconclusive as to whether the attackers ever seized his wallet, let alone took the money out of it. Mr. Green also challenges, as plain error, part of the State's closing argument for improperly minimizing the "beyond a reasonable doubt" standard, an argument that he claims resulted in his denial of a fair trial. We disagree with both contentions and affirm.

I. BACKGROUND

On the night of his birthday, August 9, 2013, Clovist Arryendip arrived at the Largo Metro Station to board a train home. Walking through the station, he noticed two men behind him, one of whom asked him for a cigarette while they stood on the platform, and Mr. Arryendip handed over his last one. He recalled that both men were African-American with dreadlocks, one with long dreads, a white t-shirt, and "military" pants, and the other with short dreads, a black t-shirt, and brown pants. Mr. Arryendip later identified Mr. Green as the man with the long dreads.

Mr. Arryendip boarded the train and sat toward the rear of the car. Mr. Green then boarded and sat about two feet to Mr. Arryendip's left, while Mr. Green's companion paced back and forth. The passenger behind Mr. Arryendip asked to use his cell phone to make a call, and he obliged. When the passenger handed back the phone, and as Mr. Arryendip

was putting it back in his pocket, Mr. Green said to Mr. Arryendip, "do you know you just got yourself in trouble," and punched him in the face.

Mr. Green's companion blocked the aisle while Mr. Green repeatedly punched Mr. Arryendip in the face and tried to reach into his pockets. When Mr. Arryendip tried to fight back, Mr. Green began punching him "back and forth," and his companion also began punching him and trying to get into his pockets. Throughout the attack, which lasted about four minutes, Mr. Arryendip maintained control of his cell phone, and none of the other train passengers attempted to help him. He testified that the attack stopped when the train arrived at the Capitol Heights Metro Station. Initially, Mr. Green and his companion tried to jump off the train at Capitol Heights, but instead stayed on the train, so Mr. Arryendip got off to report the incident.

Mr. Arryendip immediately reported the attack to the train operator, and she stopped the train while police responded to the scene. When the officer arrived, Mr. Arryendip described his attackers, and then Mr. Arryendip drove with the officer to the next station, Eastern Market, and waited outside to observe the passengers coming out of the station. Mr. Arryendip saw police officers escort both attackers up the escalator and out of the metro station, and he positively identified the men as his assailants. Mr. Arryendip was then transported by ambulance to the hospital where he was treated for his injuries. While at the hospital, Mr. Arryendip realized that he was missing his money.

After a jury trial in the Circuit Court for Prince George's County on September 4-5, 2014, the jury found Mr. Green guilty of theft, robbery, and second-degree assault. The theft and assault counts merged into the robbery conviction, and he was sentenced to fifteen

years in prison, all but five years suspended, and five years of probation. Mr. Green filed a timely Notice of Appeal.

II. DISCUSSION

Mr. Green raises two issues on appeal.[1] *First*, he argues that the evidence on which the jury relied was not legally sufficient to prove that he actually took anything from Mr. Arryendip, and therefore cannot support his convictions of theft and robbery. *Second*, he complains that the State attempted, improperly, to redefine the burden of proof in its rebuttal closing argument. He asserts that the jury's altered perception of this lower standard invited convictions for which there was already minimal evidence, and thus deprived him of a fair trial. The State responds that there was sufficient evidence to support the convictions and that the disputed rebuttal closing argument was an appropriate response to an analogy the defense raised in its closing. We agree with the State on both points.

A. The Evidence Sufficed To Convict Mr. Green Of Robbery And Theft.

Mr. Green's insufficiency argument focuses on the "taking" element of theft and robbery.[2] He argues that the only evidence offered to show that Mr. Green took anything

[1] His brief phrased the issues as follows:

> 1. Was there insufficient evidence of any taking to sustain the convictions for robbery and theft?
>
> 2. Was [Mr.] Green denied a fair trial by the State's improper rebuttal closing argument?

[2] For both robbery and theft, an essential element is "taking" another's property. Because this element is identical in each crime, and because the theft conviction merged with the robbery conviction, *see Oliver v. State*, 53 Md. App. 490, 506-07 (1983) (continued…)

from Mr. Arryendip was Mr. Arryendip's own testimony, which Mr. Green characterizes as speculative and circumstantial. In Mr. Green's view, this evidence, standing alone, cannot prove beyond a reasonable doubt that Mr. Green accessed Mr. Arryendip's wallet or removed money from it.

The State recounts the evidence: Mr. Green told Mr. Arryendip that he was "in trouble" after seeing his cell phone, Mr. Green attacked him while trying to reach into his pockets, and Mr. Arryendip testified that the cash from his wallet was missing. From this, the State maintains that a reasonable juror could have inferred that Mr. Green took Mr. Arryendip's money.

When reviewing a conviction for evidentiary sufficiency, we do not decide whether we agree with the jury's verdict, but rather

> whether any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. We view the evidence in the light most favorable to the prosecution. We give due regard to the [trial court's] findings of facts, its resolution of conflicting evidence, and significantly, its opportunity to observe and assess the credibility of witnesses. Although our analysis does not involve re-weighing of the evidence, we must determine whether the jury's verdict was supported by either direct or circumstantial evidence by which any rational trier of fact could find [appellant] guilty beyond a reasonable doubt.

Brice v. State, 225 Md. App. 666, 692-93 (2015) (citations and internal quotation marks omitted).

(vacating a misdemeanor theft conviction that should have merged with the robbery conviction), we will address this argument in terms of the robbery conviction, but our analysis applies equally to the theft conviction.

The essential elements for robbery are "the felonious taking and carrying away of the personal property of another, from his person or in his presence, by violence or putting in fear." *West v. State*, 312 Md. 197, 202 (1988). Mr. Green contends that the "only such evidence [of a taking] was [Mr.] Arryendip's testimony that before being accosted he had $100 in his wallet whereas sometime later at the hospital he discovered that this money was gone." During that testimony, Mr. Arryendip recounted Mr. Green's (and his companion's) repeated attempts to reach into his pockets, but Mr. Green points out that Mr. Arryendip never said that either assailant actually removed his wallet from his pocket. From this, Mr. Green argues, any conclusion that there was any "taking" is too speculative.

The State cites *Maine v. Trask*, 223 A.2d 823 (Me. 1966), *Conyers v. State*, 345 Md. 525 (1997), and *Jones v. State*, 217 Md. App. 676, *cert. denied*, 440 Md. 227 (2014), and argues that a rational juror could have inferred from this record that Mr. Green took Mr. Arryendip's money. Although the State's reliance on *Trask* and *Conyers* is misplaced,[3] we find the analogy to *Jones* persuasive.

[3] The State points to a rule discussed in *Trask*, but the Court in that case ultimately declined to adopt the rule. *Trask*, 223 A.2d at 826. *Trask* cites a string of California cases, *see, e.g.*, *People v. Dodson*, 175 P.2d 59 (Cal. 1946), that deal with situations in which a robbery victim is rendered unconscious during the commission of the crime and awakens in a short time, only to then realize that property is missing, a fact pattern distinguishable from this case. *See Trask*, 223 A.2d at 825-26.

The State asserts that "*Conyers* stands for the proposition that evidence of missing property at the scene of a violent assault is sufficient for a reasonable jury to infer that the victim was robbed by the perpetrator of the assault," but we disagree that *Conyers* should be read so broadly. There, witnesses testified that the victim always kept money in her wallet, which was always kept in her purse, and that on the day of her murder, the victim told her daughter that she had cash in her wallet. *Conyers*, 345 Md. at 535, 558. That testimony, coupled with finding the victim's purse ransacked and without (continued…)

In *Jones*, two men were robbed and shot inside a car. 217 Md. App. at 687. When investigators arrived on the scene, they found two cell phones and five dollars, among other items, in the back seat of the car, as well large amounts of blood and a dead body in the front passenger's seat. *Id.* A blood trail leading from the front driver's seat led to the nearby hospital; there, the surviving victim identified the defendant as his assailant. *Id.* at 687-88. At trial, both the surviving victim and the defendant testified, and their testimony greatly conflicted.

The surviving victim explained that the defendant was in the back seat of a car when he furnished a gun and demanded that the two front-seat passengers toss their cell phones and cash into the back seat, and that after doing so, the defendant shot both victims and fled. *Id.* at 684. The surviving victim stated that he threw about sixteen dollars into the backseat, and that the deceased threw a couple dollars back. *Id.* at 702. To the contrary, the defendant testified that he engaged in a five-minute drug deal inside the car before going back into his home. *Id.* at 685-86. He denied any involvement in or knowledge of the shootings. *Id.* at 686.

No physical evidence connected the defendant to the murder, so the case turned on the credibility of these two witnesses. *Id.* at 689. On appeal, the defendant argued that there was insufficient evidence to prove that he actually took any of the items thrown into the back seat, and that such an inference was mere speculation. *Id.* at 699, 702. We

money at the scene of the murder, permitted a rational inference that the murderer also took the money. *Id.* at 558. The case before us lacks the same link between the testimony and crime scene.

disagreed, holding that "[i]f the State introduced evidence showing that [the victims] threw money and/or items into the back seat in excess of that recovered, it follows logically that a rational juror could have found that the alleged robber took their property." *Id.* at 702.[4]

Here, and likewise, both sides offered an account of what happened to Mr. Arryendip's money. The State claimed that Mr. Green and his companion took it during the assault. Mr. Green questions whether the money was even there, but if it was, he argues, medical attendants could have taken it *en route* to or at the hospital. The jury was entitled to believe either or neither account. And since no physical evidence was offered, the jury was left to arrive at a conviction solely by way of believing (or not) Mr. Arryendip's testimony, *see Branch v. State*, 305 Md. 177, 183-84 (1986) (testimony of a single eyewitness is enough evidence to support a conviction), that his assailants repeatedly went for his pockets and that he had $100 in his wallet before the attack and no money by the time he reached the hospital. *See Veney v. State*, 251 Md. 182, 201 ("Circumstantial evidence is sufficient to sustain a conviction in this State."), *cert. denied*, 394 U.S. 948 (1969). The jury chose to believe that Mr. Green took the money, and viewing the evidence in a light most favorable to the State, we find sufficient evidence of the taking to support the jury's decision to convict Mr. Green of robbery (and, for the same reason, theft).

B. The State's Closing Argument Was Not Plain Error.

Mr. Green complains that the State's description of its burden of proof during its rebuttal closing argument invited the jury to convict him on speculation rather than the

[4] The conviction in *Jones* was reversed for unrelated reasons. *Id*. at 709.

evidence. Mr. Green concedes that trial counsel failed to object when the comment was made, but urges us to review the remark under the plain error doctrine. This is not a proper case for plain error review. The Court of Appeals has set forth "the circumstances under which an appellate court should consider exercising discretion to take cognizance of plain error: '[A]n appellate court should take cognizance of unobjected-to error' when the error is 'compelling, extraordinary, exceptional, or fundamental to assure the defendant a fair trial.'" *Savoy v. State*, 420 Md. 232, 243 (2011) (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)).

Before closing arguments, the judge instructed the jury that "[p]roof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact, to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs." (quoting Maryland Criminal Pattern Jury Instruction ("MCPJI") § 2:02). During his closing argument, *defense* counsel reread this instruction to the jury, then continued:

[DEFENSE COUNSEL]:	Would you send your child—
[THE STATE]:	Objection.
[DEFENSE COUNSEL]:	—to a doctor based on the testimony.
THE COURT:	Overruled.
[DEFENSE COUNSEL]:	Thank you. Based on the testimony of that man and of the scant evidence presented by the State?
	Would you choose a surgeon—

[THE STATE]: Objection, Your Honor.

[DEFENSE COUNSEL}: —based on the evidence—

THE COURT: Overruled.

[DEFENSE COUNSEL]: —presented in this case? I'm sorry you keep getting interrupted, ladies and gentlemen, but *that is, in effect, what this instruction means*.

(Emphasis added.) In rebuttal, the State addressed the concern at the heart of its objection:

> Defense counsel was very struck by the presumption of the innocence and reasonable—would you take your child to a surgeon? And let me read to you one part of the presumption statute: "The State is not required to prove guilt beyond all possible doubt or to a mathematical certainty nor is the State required to negate every conceivable circumstance of innocence."
>
> Well, let me tell you, ladies and gentlemen, if you're taking your little baby boy or baby girl to the surgeon or you're taking them to the doctor, you're going to go for a way higher burden than reasonable doubt. You will want all of the possible doubt gone.
>
> And that's—but this isn't it. This isn't what it is. This isn't my child, my health, my life. This is reasonable doubt. And you can't bring children because, Lord knows, people get unreasonable when it comes to their children. It gets unreasonable.
>
> Why? Because that's your flesh and blood. So don't allow yourself to be tricked by the idea that the way you think about your family, your child, your baby, is what this is. This is reasonable doubt.
>
> That's why it's reasonable doubt and impartiality in consideration. That's why when—when closing arguments come in, those are the kind of arguments that are made because they are made to your emotion. And you're not supposed to be

> using your emotion. You're supposed to be thinking about the facts. And you're supposed to be thinking about what they lined up.

Mr. Green argues that the State's remarks categorically exclude analogies of personal or family health matters, and that arguing to the jury that family health decisions are so "very different from the reasonable doubt decision with which the jury was faced served to lower the reasonable doubt standard to the level of an everyday decision where the consequences are not so serious for the decision-maker or her family." But even if we assume he is right, the State's arguments came only in response to an analogy Mr. Green offered in the first place. Under the circumstances, the resulting error (which, for present purposes, we assume without finding) does not rise to a level that justifies plain error review.

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