UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2535

September Term, 2014

DAVID B. GOLDBERG

v.

STATE OF MARYLAND

Wright,
Graeff,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: January 7, 2016

David B. Goldberg, appellant, was convicted by a jury sitting in the Circuit Court for Montgomery County of two counts of attempted voluntary manslaughter, five counts of first-degree assault, and two counts of second-degree assault.[1] Appellant asks two questions on appeal:

I. Did the trial court err by allowing the State to extensively argue about appellant's "rage" in closing argument?

II. Did the State's cross-examination of appellant about his failure to present fingerprint evidence to support his version of events and the State's closing argument referring both to that testimony and calling hand prints left on glass "perfect fingerprints" constitute plain error?

For the following reasons, we shall affirm the circuit court's judgments.

FACTS

The State's theory of prosecution was that on the afternoon of November 14, 2013, appellant attempted to run over Rachel Peterson and her fiancé, Clifton Botts, in an act of "road rage" at the Montgomery County Mall, after which appellant attacked them with a knife, seriously injuring both. Peterson, Botts, and several eyewitnesses and police officers testified for the State. The theory of defense was that appellant acted as he did because he felt threatened and he was trying to protect himself and his young daughter, who was in his car. Appellant was the sole witness for the defense. Viewing the evidence in the light most favorable to the State, the following was elicited at appellant's trial.

[1] After merging appellant's assault convictions into his attempted voluntary manslaughter convictions, the court sentenced appellant on the latter convictions to two concurrent sentences of ten years of imprisonment, all but eight years suspended, and five years of supervised probation upon his release from prison.

On the afternoon of November 14, 2013, Peterson drove to the Montgomery Mall with her fiancé, Botts; her mother, Victoria Kirkland; and her and Botts' two-year-old daughter. Botts sat in the front passenger seat; Kirkland and the child were in the back seats. They were going to a store in the mall to purchase a money order. Peterson stopped the car at a four-way stop outside the Mall and, as she started to proceed left through the stop, appellant drove through the intersection from the right, forcing her to brake. Appellant yelled, "[B]ack the fuck up before I fuck you up[.]" He then proceeded straight through the intersection.

Peterson turned left, as she had planned, and drove into the Mall behind appellant, who after a short distance slammed on his brakes and then stopped. Peterson stopped behind him and put her car in park. Both Peterson and Botts exited their car and approached appellant's car to speak to him. Before either approached the driver's side window, he sped off. Both denied speaking to appellant or touching his car.

Peterson and Botts returned to their car, and Peterson parked it a short distance away. They exited the car and, while Peterson's mother attended to their child in the back seat, they began slowly walking to the Mall. As they did so, they heard a car engine "revving" and saw appellant a distance away sitting in his car stopped at the top of an incline in the parking lot. Botts started walking toward the car, and in response, the car came accelerating down the hill toward them. Botts pushed Peterson out of the way and then he jumped out of the car's path. Appellant drove off. As Peterson and Botts gathered themselves together, they

noticed that the car had returned to the same incline. The car again approached them going "full speed." Botts again pushed Peterson out of the way, but this time the car clipped him and he rolled over the hood landing on his hand, breaking it. The car backed up and drove toward them a third time. This time appellant lost control of his car, ran over a median, and crashed into a parked car.

At this point, appellant exited his car, yelled that his daughter was in his car, and charged at Botts with a knife. Appellant swung at Botts, who fell. He was "crab walking" backward to get away from appellant who continued swinging his knife at him. When Peterson ran over and tried to push appellant away from Botts, appellant turned around and stabbed her in the abdomen. Appellant then got back into his car and drove away.

Both Peterson and Botts were taken to the hospital where she immediately underwent surgery to repair her lacerated liver and to close the stab wound. She spent almost a week in the hospital. Botts was treated for a two-inch cut to his face, a deep two-to-three inch cut to his upper arm, and a puncture wound on his back shoulder. While his injuries were non-life threatening, they resulted in permanent scarring and decreased movement to the side of his face.

Three eyewitnesses, who saw various parts of the above event, also testified for the State. Lisa Bartlett testified that she was in her car at the Montgomery Mall when she heard squealing tires and then saw a car accelerating toward a man and a woman. When the couple jumped out of the way, the car slammed on the brakes, accelerated backwards very

quickly, and drove at the couple again, hitting another car instead. The driver of the car then "[v]ery quickly" exited his car, and "ran over" to the couple – the woman was sitting on the curb and the man was sitting in front of her with his back to the driver. The driver made a downward "pounding" motion and then fled back to his car. He drove off, with pieces of his car falling off and liquid coming out of it. A second bystander testified that while he was walking from the Mall to his car his attention was drawn to the sound of tires screeching and a revving engine. He saw a car with smoke coming from its tires weaving around the parking lot and traveling at a "very high rate of speed." The car eventually stopped when it hit another car. A third bystander testified that as he walked out of the Mall he heard screeching tires and saw a car racing back and forth three or four times, seemingly to "antagonize" two people in the parking area.

Appellant, who was arrested at the Mall, was taken to a police station where the police noted that he showed no sign of injuries – he had no bruising, abrasions, or redness to his face. Additionally, appellant did not complain of any injuries and did not ask for any medical treatment. The owner of the car that appellant hit testified that he had put on his parking brake when he parked his car. He also testified that his car had been knocked over the curb and sustained $5,000 worth of damage.

Appellant testified in his defense to a markedly different version of events than the State's witnesses. Appellant testified that he drove his car to the Mall to pick up a present and talk to his manager at the Macy's Department store. His two-year-old daughter was in

a car seat in the back. As he proceeded through a four-way stop near the Mall another car came into the intersection from his left. The car honked at him, and he honked back, telling them "[Y]ou have a stop line, too." Although he had intended to turn left, he proceeded straight through the intersection and into the Mall parking area where he stopped at another intersection. He heard a horn and saw the same car stopped behind him. The passenger exited the car and ran up to his window causing appellant to lock his doors. The man punched his window twice and tried to pull the driver's side door open.

Appellant sped off and drove into the parking garage near Macy's. Instead of going to the top of the garage as he had originally intended, however, he mistakenly drove out of the garage the way he had driven in. As he did so, the man ran toward his car, jumped into the air, and kicked his window and his door twice with his boot. At this point, the woman approached and started smacking the driver's side window of his car while the man punched the window. When appellant yelled for them to leave him alone, he heard the man tell the woman, "Go get the car, we're going to get this guy."

Appellant testified that he drove away but then found that his car was facing the woman and the man, who were standing in the roadway. The man made a "'bring it on' type motion" with his hands. Appellant drove toward them although he testified he did not intend to hit them, explaining that it was "either drive at them or wait for whatever they might do." The couple moved out of the way. Appellant said he drove back around to try to get to security and saw the man in the road again. As he swerved to miss the man, he lost

control of his car, hitting a median and a parked car. He then saw the man walk quickly toward his car and, because his car would not start, he grabbed a knife he kept in his car and jumped out of his car to scare him.[2] The man swung his fist at appellant grazing his face, and appellant swung back hitting the man. The man fell and appellant yelled at him, "Leave me alone. Leave me alone. I've got my daughter in my car." He then turned around and accidentally stabbed the woman because she was standing so close to him. Appellant got back into his car and drove it to the top of the parking garage where he called the police. The parties stipulated that when appellant spoke to the police he told them that Peterson and Botts had repeatedly punched him in the face and he could not get away.

On cross-examination, appellant testified, among other things, that he was driving a 300 horsepower sports car that could go from zero to 60 miles in 4.9 seconds, that there were no dents to the side of his car although he testified that Botts kicked the side of his car at least twice, that he never ever squealed his tires or revved his engine, and that he drove at a normal speed during the incident.

DISCUSSION

I.

Appellant argues that the trial court erred in permitting the State, in closing argument, to argue extensively about his "rage" and directs our attention to 11 statements in the State's

[2] Appellant testified that he kept a knife in his car so that if he were in an accident he could cut himself free from his car.

closing argument where the State stressed appellant's anger.[3] Appellant argues that by allowing the State to make the references to his anger, the State was "able to argue an entire theory in closing that was not supported by the evidence in the case[,]" noting that the trial court had earlier denied his motion for a hot-blooded response jury instruction. The State responds that appellant has not properly raised his argument for our review, and even if he had, it has no merit.

Appellant was charged with two counts of attempted first-degree murder, two counts of attempted second-degree murder, and seven counts of first-degree assault. Prior to closing, defense counsel asked the court to give an instruction on hot-blooded response, which mitigates first- and second-degree murder to voluntary manslaughter. *See* MPJI-Cr. 4:17.4(c). The court declined to do so. Defense counsel then moved *in limine* to preclude the State from arguing in closing that appellant was "enraged." The court again declined to do so, explaining that each party had their own version of events – the State believed

[3] The State's closing argument covers 55 pages of typed transcript. Appellant directs our attention to the following State's remarks: referring to appellant as "ticked", "irate", and "livid"; appellant's primary concern was not his daughter but "his rage and his vigilantism"; he left his daughter in the car to "engage his rage"; his actions were "purposefully direct and rage filled"; the photograph of the damage to his car shows "how ridiculous[ly] he was driving, how rage fueled"; he came "flying out of the car, running in a rage towards them"; even though Botts was not smart in his actions it "does not allow [appellant] to act in this murderous rage"; "premeditation" formed in appellant's mind "with his rage"; appellant was so "mad" and "filled with rage he [did] not drive away from this situation"; appellant "was in such a rage he couldn't let it go"'; and appellant "was angry. He had a vendetta. . . . He was a lunatic that day."

appellant's actions were the result of "road rage" while appellant denied any anger and testified that he was only frightened and acting to protect his daughter. After the court's ruling, the parties discussed a witness credibility instruction, and then defense counsel asked the trial court for "a continuing objection to that," which the court granted. It is unclear from the record as to what defense counsel was asking for a continuing objection of. Appellant made no objection during the State's closing argument.

The State sets forth two reasons that appellant has failed to preserve his argument for our review. The State argues that because appellant made a motion *in limine*, he was required to, but made no contemporaneous objection during closing argument to preserve his argument on appeal. *See Boyd v. State*, 399 Md. 457, 478 (2007)(an *in limine* ruling admitting evidence does not ordinarily affect the requirement of Md. Rule 4-323(a) requiring a contemporaneous general objection when the evidence is introduced). Additionally, the State argues that appellant is impermissibly asserting a position on appeal that is inconsistent to the position he asserted at trial. *See Burch v. State*, 346 Md. 253, 289 (1997)(defendants are not permitted to assert one position at trial and another, inconsistent, position on appeal). The State argues that at trial appellant sought a hot-blooded response jury instruction that he was enraged, yet on appeal appellant claims that there was no evidence that he was enraged. Regardless of whether appellant's argument is properly before us, we are persuaded based on our independent view of the record that it has no merit.

The Court of Appeals has often reiterated the law regarding closing argument:

> Generally, . . . the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is accused's counsel to comment on the nature of the evidence and the character of witnesses which the [prosecution] produces.
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> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined-no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Lee v. State, 405 Md. 148, 163 (2008)(citations omitted). The determination of whether counsel's closing argument is "prejudicial or simply rhetorical flourish lies within the sound discretion of the trial court." *Degren v. State*, 352 Md. 400, 431 (1999)(citing *Grandison v. State*, 341 Md. 175, 225 (1995), *cert. denied*, 519 U.S. 1027 (1996) and *Wilhelm v. State*, 272 Md. 404, 413 (1974)).

Not every improper remark requires reversal of the conviction. *Hill v. State*, 355 Md. 206, 224 (1999)(citations omitted). Rather, "[r]eversal is only required where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused." *Degren*, 352 Md. at 431(quotation marks and citation omitted). After determining that improper remarks were made and in

assessing whether reversible error occurred, "a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005)(citations omitted).

We are persuaded that appellant's argument has no merit for two reasons. First, there was more than sufficient evidence elicited by the State to support its closing argument that appellant acted in a rage. Both Botts and Peterson testified that when they first met in the intersection, appellant yelled out, "[B]ack the fuck up before I fuck you up." They both testified that three-times appellant revved his engine and accelerated toward them in his car in an attempt to run them over, after which he came charging out of his car with a knife, slashing at Botts and then Peterson. Three eyewitnesses supported the State's theory as to appellant's actions. Moreover, the severity of Peterson's and Botts' injuries support an inference that appellant was angry when he stabbed them.

Second, appellant's attempt to use the jury instruction on hot-blooded response to support his argument that the State's argument in closing was in error, is misplaced for it is "comparing apples and oranges." The standard required to generate a jury instruction and required to draw inferences during closing argument are very different. Accordingly, we are persuaded that the trial court committed no abuse of discretion in permitting the State to draw inferences in its closing argument that appellant was in a rage during the incident in the Mall parking lot.

II.

Appellant argues that the State impermissibly shifted the burden of proof when it: 1) repeatedly asked appellant during cross-examination about whether he would be offering fingerprint evidence to support his testimony that both Peterson and Botts touched his car with their hands, and 2) referred in closing argument to: A) the lack of fingerprint evidence to support appellant's testimony, and B) that hand prints on glass would have left "perfect fingerprints." Appellant recognizes that he did not object below but asks us to review for plain error and reverse.

As appellant concedes, he did not object at trial during cross-examination or closing argument to those things that he now complains about on appeal, and so his arguments are not preserved for our review. *See* Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived."). *See also Austin v. State*, 90 Md. App. 254, 264-65 (1992)(the timely objection requirement of Md. Rule 4-323(a) "is not an arbitrary one. . . . At the most basic level, it recognizes that appellate courts do not range forth, like knights errant, seeking flaws in trials. Their quest is far more modest. They monitor a trial for the limited purpose of seeing if the trial judge committed error.")(citations omitted).

Md. Rule 8-131(a) provides, "Ordinarily, 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[.]" *See Valiton v. State*, 119 Md. App. 139, 149-50 (1998) (failure to object in any way to the delayed waiver inquiry of the constitutional right to a jury trial fails to preserve claim on appeal). "The purpose of Maryland Rule 8-131(a) is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge." *Sydnor v. State*, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002). "The Rule is also designed to prevent lawyers from 'sandbagging' the judge and, in essence, obtaining a second 'bite of the apple' after appellate review." *Id*.

The use of the word "ordinarily" in Rule 8-131(a) permits "exceptions and we have occasionally decided cases on issues not previously raised." *Taub v. State*, 296 Md. 439, 441-42 (1983) (citations omitted). An appellate court should take cognizance of unobjected to error when it is "'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *State v. Brady*, 393 Md. 502, 507 (2006)(quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). "[S]ome typical considerations that may influence us to exercise our discretion[] includ[e], *inter alia*: (1) the egregiousness of the error; (2) its impact upon the defendant; and (3) the degree of lawyerly diligence or dereliction involved." *Danna v. State*, 91 Md. App. 443, 450, *cert. denied*, 327 Md. 627 (1992)(citation omitted). Although we have not "'set forth any fixed formula for determining when discretion should be exercised . . . we do expect that the appellate court would review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely

technical, the product of conscious design or trial tactics or the result of bald inattention[.]'" *Collins v. State*, 164 Md. App. 582, 603 (2005)(quoting *Hutchinson*, 287 Md. at 202-03), *cert. denied*, 390 Md. 501 (2006).

In *Eley v. State*, 288 Md. 548, 555 n.2 (1980), the Court of Appeals stated in dictum that references by the State to a defendant's failure to present evidence to refute the State's evidence *may* impermissibly shift the burden of proof to the defense. More recently in *Mines v. State*, 208 Md. App. 280, 293-302 (2012), however, we held that there was no improper shifting of the burden of proof during cross-examination by the State nor during the State's closing argument, when the State questioned the defendant, as to why the alibi witnesses appellant referred to in his testimony were not present. We have said that *Mines* stands for the proposition that "[c]ommentary on the lack of corroborating witnesses is permissible when a defendant elects to testify." *Marshall v. State*, 213 Md. App. 532, 540 (2013).

In light of *Mines*, *supra*, we fail to see that there was error, let alone plain error. Additionally, the State's closing remark that if Botts and Peterson had touched the car window it would have left "perfect" fingerprints is not the kind of remark that we would review for plain error for it is debatable whether it is common knowledge. Therefore, even if we were persuaded that the State committed error in making the above remarks, the error,

if any, was certainly not plain. Accordingly, we decline to exercise our unfettered discretion under Rule 8-131(a) and shall affirm the judgments.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.