UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2753

September Term, 2014

ISHMAEL DEBRUHL

v.

STATE OF MARYLAND

Krauser, C.J.,
Woodward,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: July 12, 2016

Following a trial in the Circuit Court for Baltimore City, a jury convicted appellant, Ishmael Debruhl, of second-degree assault.[1] The trial court sentenced appellant to 10 years in prison, after which he filed a timely notice of appeal.

Appellant presents the following question for our consideration:

> Did the trial court err in allowing improper and prejudicial closing argument depriving Appellant of a fair trial?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of October 19, 2013, Darryle Langley was in his 2013 Chevy Cruze, stopped at a traffic light in the 5300 block of Harford Road in Baltimore City.[2] A car occupied by a man and a woman pulled up next to him; the occupants exited the car, employed a baseball bat to break the windows of Langley's car, pulled Langley out of the car, beat him about the head and back with the bat, and took his wallet and cell phone. Langley characterized the attack as an incident of "road rage," resulting from the other driver's belief that Langley had cut her off in traffic.

[1] The jury acquitted appellant of armed robbery, conspiracy to commit armed robbery, robbery, conspiracy to commit robbery, conspiracy to commit second-degree assault, theft under $1000, conspiracy to commit theft under $1000, and carrying a concealed dangerous weapon.

[2] Despite being subpoenaed to testify, Darryle Langley, in jail at the time of appellant's trial, invoked his Fifth Amendment right against self-incrimination and refused to testify against appellant, insisting, "I don't know nothing about this case. I never saw this man a day in my life." The facts stem largely from witness accounts, including that of the responding police officer.

Seven witnesses dialed 911 to report the assault. Six of the callers described a man and a woman fighting with another man in the street and hitting him with a baseball bat or hammer; two of those callers described the male assailant as a light skinned black man wearing brown or tan shorts and a blue hoodie. One witness inconsistently described four or five assailants exiting a white pickup truck and beating a silver vehicle with a bat.

At the time of the assault, Baltimore City Police Officer Eric Hinton was conducting a "business check" at a Royal Farms convenience store around the corner. After being alerted of the assault by a witness, Officer Hinton approached the scene in his marked police vehicle. He observed a woman placing a "thin metal" item into a gray vehicle. He then observed the male and female entering the vehicle themselves; in court, he identified appellant as the man.[3] Officer Hinton also observed Langley standing beside his own car, bleeding from the head. His head was covered in blood, and his shirt was torn and also covered in blood. Langley was yelling excitedly that appellant and the female had just hit him with a bat and took his wallet and phone.[4]

Officer Hinton positioned his vehicle in front of the assailants' vehicle so it was unable to enter a turn lane and leave the scene. When appellant saw the police officer, he

[3] The woman was apparently later identified as Oluwa Kamara. Kamara was subpoenaed, but she, too, invoked her Fifth Amendment rights and refused to testify.

[4] Langley was removed from the scene to Johns Hopkins Hospital, where he received staples to close the scalp laceration that he suffered. Photos of his injuries were introduced into evidence.

exited the car from the front passenger door and fled. After calling for backup, Officer Hinton gave chase, caught up with appellant, and placed him into custody. The woman was apparently able to maneuver the vehicle around the police car, as she and the vehicle were gone by the time Officer Hinton returned to the scene with appellant. When Officer Hinton returned appellant to the scene, Langley continued yelling excitedly that appellant had assaulted and robbed him.

DISCUSSION

Appellant contends that the prosecutor, during her closing argument, argued facts not in evidence when she misrepresented to the jury that six out-of-court witnesses identified appellant as the man who had assaulted Langley with a baseball bat when, in fact, only a single caller identified a male as hitting the victim with a bat and the majority of the calls referred to a male and a female hitting the victim and participating in the assault together. Notwithstanding his failure to object to the closing argument at the time it was made, appellant concludes that the prejudicial effect of these inaccurate statements deprived him of a fair trial and comprised plain error, which necessitates reversal.

Officer Hinton testified that during his on-view observation of the tail end of the assault upon Langley, several witnesses dialed 911 to report the incident. The State introduced the 911 recordings and CAD printouts relating to the information relayed to the 911 operator during seven such calls.

During her opening closing argument, the prosecutor summarized the evidence the State had adduced to inculpate appellant, including Officer Hinton's eyewitness testimony of part of the assault, Langley's excited utterances that appellant and his female companion hit him with a bat and took his phone and wallet, and Langley's medical records from Johns Hopkins Hospital. She continued:

> What other evidence do we have? Well, we have the 911 calls—multiple 911 calls—more than six—from different people all describing what they observed at the corner of Harford Road and Echodale. Citizens just like yourselves. You're able to listen to the 911 calls, if you so want to. If you want to, of course, you're able to do that, but just focusing on certain aspects of these 911 calls, six of them, they are constantly repeating "they," "they," "They beat him with a bat," "They assaulted him." They describe him. The [sic] described the defendant and what he's wearing. I had a photo of the defendant when I was playing the 911 calls—(unintelligible) the 911 calls—that describe two individuals, a male and a female, assaulting Darryle Langley. And what do they say? Tan shorts, dark-blue hoody, light skinned, describing the defendant, the same defendant that was stopped running away from the scene of the incident by Officer Hinton, the same person that got out of the vehicle and ran, the same person that beat Darryle Langley over the head with a bat, the defendant, Ishmael Debruhl.

In his closing, defense counsel also referred to the 911 recordings, attempting to cast doubt on the eyewitness reports by singling out the one inconsistent call that claimed that four or five people exited a pickup truck and beat a silver vehicle with a bat:

> Now, then we go back to the last part of the KGA tape and I don't understand this, but it says 11:30:13. Somebody states that four or five people are beating on a silver vehicle with a baseball bat. Suspects got out of a white pickup truck. I tried to have the officer explain that, but he said he never heard it, but if that's what they said, that's what they said.

* * *

> You've got six phone calls. Did they see it? How far were they from the scene? What was blocking their view? I don't know. The tape doesn't tell you that. It just says this is what they claim they saw. Well, I can't cross-examine a tape as to "Where were you?" "What about traffic conditions?" We know this was a busy intersection. "Was there anything blocking your view?" I don't know.

* * *

> Now, I'm still confused because the officer admitted that this CAD report involving four or five people beating a silver vehicle, which is the silver vehicle, got out of a pickup truck. I don't understand how they investigate cases. Why don't you go back and find out what else do you know about these people. Did you go into the neighborhood? Did you knock on doors, anything? I don't know.

In her rebuttal closing argument, the prosecutor responded to defense counsel's comments, as follows:

> The defense attorney mentioned a CAD report, one of the calls made by a 911 caller. There were seven in total. I talked about six. He talked about one. **Obviously, he talked about the one because he wants you to ignore the other six and just focus on that one. Just ignore the other six that are right on point, identifying his client's clothing and the fact that the male was hitting the victim with a bat. Just ignore all six of those and focus on this one that's inconsistent.** That's what he wants you to do. If I asked each and every one of you what I was wearing yesterday, I would probably get about 12 different responses, especially when you get down to the details. They're not all going to be on point. Everybody has their different perspective. Everybody sees different things because they're in different areas, different locations, different experiences you draw them from. Don't ignore six calls

> for one, which is what the defense attorney wants you to do. That doesn't make any sense. Logically, it doesn't make any sense.

(Emphasis added).

Appellant now claims that the prosecutor's rebuttal closing argument comprised facts not in evidence, that is, a misrepresentation of the content of the six 911 calls, as only one caller identified the male, specifically, as hitting the victim with the bat, two referred to more than one person hitting the victim with the bat, and only three contained a description of the male assailant's clothing. Consequently, according to appellant, the prosecutor's claim that six callers identified the male as the lone assailant was misleading and unfairly prejudicial.

We first point out that appellant neither objected when the prosecutor made the statement about which he now complains, nor requested a mistrial or a curative instruction. Thus the alleged error appellant raises on appeal was never presented to the trial court and thus is not preserved. *See* Md. Rule 8–131(a) ("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[.]"). He now asserts, however, that plain error review is warranted because the prosecutor's above-referenced comments "were highly prejudicial and had such a 'devastating and pervasive effect' that Appellant was undoubtedly deprived of a fair trial."

When a defendant fails to lodge an objection to an action of the trial court, an appellate court indeed possesses plenary discretion to notice plain error material to the

rights of a defendant, even though the matter was not raised below. *Frazier v. State*, 197 Md. App. 264, 278, *cert. denied*, 419 Md. 647 (2011). But, an appellate court should "'intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial.'" *James v. State*, 191 Md. App. 233, 246 (quoting *Richmond v. State*, 330 Md. 223, 236 (1993)), *cert. denied*, 415 Md. 338 (2010). Even reversible error invites plain error review only when "the unobjected to error is 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Id.* at 246-7 (quoting *Stone v. State*, 178 Md. App. 428, 451 (2008)). We perceive no error, plain or otherwise, here.

In general, attorneys are afforded great leeway in presenting closing arguments to the jury. *Lee v. State*, 405 Md. 148, 163 (2008) (citing *Degren v. State*, 352 Md. 400, 429-30 (1999)). Such wide latitude is permitted because "'[s]ummation provides counsel with an opportunity to creatively mesh the diverse facets of trial, meld the evidence presented with plausible theories, and expose the deficiencies in his or her opponent's argument.'" *Id*. at 162 (quoting *Henry v. State*, 324 Md. 204, 230 (1991)).

The Court of Appeals explained in *Mitchell v. State*, 408 Md. 368, 380 (2009) (quoting *Wilhelm v. State*, 272 Md. 404, 412 (1974)):

> As to summation, 'it is, as a general rule, within the range of legitimate argument for counsel to state and discuss the evidence and all reasonable and legitimate inferences which may be drawn from the facts in evidence; and such comment or argument is

> afforded a wide range. Counsel is free to use the testimony most favorable to his side of the argument to the jury, and the evidence may be examined, collated, sifted and treated in his own way. . . . Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; 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.'

And,

> [t]here 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.

Wilhelm, 272 Md. at 413.

Despite this wide latitude, however, there are limits on what a prosecutor may say in closing arguments so that a defendant's right to a fair trial is protected. *Degren*, 352 Md. at 430. What exceeds the limits of permissible commentary during closing argument depends on the facts of each case. *Id.* at 430-31 (citing *Wilhelm*, 272 Md. at 415). Even if an improper remark is made during closing argument, reversal is only required when "'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.'" *Id.* at 431 (quoting *Jones v. State*, 310 Md. 569, 580 (1987)).

The first step in our analysis is a determination of whether the prosecutor's comment—"Just ignore the other six [911 calls] that are right on point, identifying his client's clothing and the fact that the male was hitting the victim with a bat. Just ignore all six of those and focus on this one that's inconsistent"—standing alone, was improper. *Carrero-Vasquez v. State*, 210 Md. App. 504, 510 (2013). We conclude that it was not, which ends our analysis.

Appellant contends that the prosecutor argued facts not in evidence by inaccurately promising the jury that each and every one of six 911 callers identified appellant as the person who hit Langley with a baseball bat. In our view, however, the prosecutor's rebuttal closing argument did not overstep the wide range of legitimate rhetorical flourish established by reference to reasonable inferences the jury could have drawn from the facts in evidence.

The State introduced both a CD of recordings of the pertinent 911 calls and a document setting forth the subject of all the 911 calls made by eyewitnesses to the attack against Langley. Thus, facts relating to those calls were clearly in evidence, and it was up to the jury to determine the weight to be given to that information. Indeed, the jury had the ability to listen to the 911 calls and to view the CAD printout relating to the calls and to draw its own conclusions about the strength of that evidence.

Moreover, we do not perceive the prosecutor's comments as a guarantee that each of the six callers specifically identified appellant as the assailant, as appellant claims.

Instead, her comments during rebuttal closing argument pointed out that, although appellant referred to the single caller who stated that four or five people exited a pickup truck and attacked the victim's car, the remaining six calls, as a whole, circumstantially contradicted that observation and generally were consistent with each other in describing a black man and black woman attacking the victim with a baseball bat. As a result, the prosecutor reasonably advised the jury not to "ignore six calls for one," as every person's perspective of an event is different.

Given Officer Hinton's eyewitness testimony and Langley's excited utterances that it was appellant and his female companion who hit him and stole his wallet and phone, we cannot say that the single comment by the prosecutor, which merely rebutted defense counsel's attempt at creating reasonable doubt by placing blame elsewhere, influenced the verdict to appellant's prejudice, particularly in light of the jury's acquittal of appellant on all but the single charge of second-degree assault. *See Carrero-Vasquez,* 210 Md. App. at 511 (prosecutorial impropriety in closing argument is harmless if we can say that it did not contribute to the verdict beyond a reasonable doubt). *See also Jones-Harris v. State*, 179 Md. App. 72, 108 (2008) ("The difficulty in persuading a jury to acquit under such circumstances was unlikely to have been caused by the isolated remark by the prosecutor."), *cert. denied*, 405 Md. 64 (2008).

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