Circuit Court for Prince George's County
Case No. CT160037X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1809

September Term, 2016

MARCUS BRADFORD

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Zarnoch, Robert A. (Senior Judge,
Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: July 13, 2017

A jury in the Circuit Court for Prince George's County convicted Marcus Bradford, the appellant, of driving under the influence ("DUI"), DUI *per se*, driving while impaired by alcohol ("DWI"), failure to remain at the scene of an accident, failure to stop at an accident involving damage to an attended vehicle, and possession of a firearm while disqualified. The court sentenced the appellant to three years of imprisonment for DUI, and merged for sentencing the DUI *per se* and DWI convictions; one year concurrent for failure to remain at the scene of an accident; one year concurrent for failure to stop at an accident involving damage to an attended vehicle; and fifteen years, suspend all but five years consecutive, for possession of a firearm.

The appellant presents three questions for review, which we have reordered and slightly rephrased:

I. Did the trial court commit plain error by failing to take curative action when the prosecutor made an improper closing argument?

II. Did the trial court err in its response to a note from the jury during deliberations?

III. Did the trial court impose an illegal sentence for DUI?

For the reasons discussed below, we shall vacate the sentences, otherwise affirm the judgments, and remand for resentencing on all counts.

FACTS AND PROCEEDINGS

At about 7:00 p.m., on September 24, 2015, Maria Stransky was driving in the 15900 block of Annapolis Road when her vehicle was struck three times by another vehicle and pushed into a guardrail. Police responded to the scene and found Stransky

still in the driver's seat of her vehicle. (The driver's door was damaged, making it impossible to open.) The other vehicle and driver were no longer at the scene. Medical personnel arrived and while they were assisting Stransky, the appellant drove up in a BMW.

Officer Alexander Gonzalez, of the Prince George's County Police Department, was at the scene when the appellant arrived. Officer Gonzalez spoke to the appellant who told him that he had been driving the vehicle that struck Stransky's vehicle. Officer Gonzalez testified that the appellant told him that he had left the scene because his tires were flat and he didn't want to have his vehicle towed. While speaking with the appellant, Officer Gonzalez detected an odor of alcohol on his breath. Officer Gonzalez began to administer field sobriety tests, but the appellant refused to complete them. The appellant told Officer Gonzalez that if he were arrested for driving while intoxicated "he would blow his brains off with a gun that he had at his house." Officer Gonzalez told the other officers at the scene about this statement. The appellant was transported to the police station where he agreed to submit to an alcohol breath test. The result showed an alcohol concentration of .11 grams of alcohol per 210 liters of breath.

Sheila Bradford is the appellant's mother. At the relevant time, the appellant and his mother were living together at 13614 Gresham Court, in Bowie. At trial, Ms. Bradford testified that on the evening in question the appellant drove his truck to their home and then left in a BMW. The appellant later called her from the accident scene and asked her to come there because the police officers were being "aggressive" with him.

Ms. Bradford drove to the scene and spoke to the police officers. She then returned to the Gresham Court home with Officers David Freshley and Matthew Cotillo. Once there, she signed a consent to search form and allowed the officers to search the appellant's room.

The appellant's room contained a pull-out couch in which the police found a loaded revolver. The gun was shown to Ms. Bradford who said she did not know it was in the house and she thought it belonged to the appellant. The gun later was test fired and found to be operable. At trial, the parties stipulated that the appellant "was legally disqualified from possessing a firearm or ammunition at the time of the event charged."

DISCUSSION

I. Prosecutor's Closing Argument

The appellant contends that in closing argument the prosecutor "undermined and denigrated the reasonable doubt standard[,]" "engaged in improper argument [by] effectively shift[ing]the burden to the defense to call witnesses[,]" and, with no support, "accused [the appellant] of endangering children." The appellant concedes that he did not object during the prosecutor's closing argument and asks this Court to exercise plain error review. The State responds that we should decline to "exercise plain error review over [the] three unpreserved aspects of the prosecutor's closing argument." We decline to exercise plain error review.

Rule 8-131(a) provides that, "[o]rdinarily, 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[.]" "We have repeatedly held that pursuant to Rule 8–131(a), a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012).

"Plain error review is reserved for errors that are 'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Yates v. State*, 429 Md. 112, 130 (2012) (quoting *Savoy v. State*, 420 Md. 232, 243 (2011)). "Factors to consider in that determination include '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.'" *Savoy*, 420 Md. at 243 (quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). The reviewing court's "exercise of discretion to engage in plain error review is 'rare.'" *Yates*, 429 Md. at 131 (quoting *Savoy*, 420 Md. at 255). Four factors to consider when "determining whether improper prosecutorial comment constitutes plain error requiring reversal" are:

> (1) the degree to which the remarks had a tendency to mislead the jury and prejudice the defendant; (2) whether the remarks were isolated or expansive; (3) the strength of the competent evidence to establish guilt absent the remarks; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

McCracken v. State, 150 Md. App. 330, 362 (2003) (citing *United States v. Harrison*, 716 F.2d 1050 (4th Cir. 1983)).

A. Reasonable Doubt Standard

In closing argument, the prosecutor said:

> When you read [the instruction regarding direct and circumstantial evidence] and listened to the Court's instruction about beyond a reasonable

> doubt, it's not some abstract idea. It's something that would satisfy you in decisions you make in your ordinary course of business, in your life.

The appellant argues that this statement "undermined and denigrated the reasonable doubt standard."

The court gave Maryland Pattern Jury Instruction–Criminal ("MPJI–CR") 2:00 about the binding nature of the jury instructions:

> Members of the jury, the time has come to explain the law that applies to this case. The instructions that I give about the law are binding upon you. In other words, you must apply the law as I explain it in arriving at your verdict.

It further instructed the jury, using MPJI–CR 2:02, about the reasonable doubt standard:

> A reasonable doubt is a doubt founded upon reason. Proof 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.

The court also instructed the jury, using MPJI–CR 3:00, regarding what does not constitute evidence:

> Opening statements and closing arguments of lawyers are not evidence. They are intended only to help you to understand the evidence and to apply the law.

The Court of Appeals has recognized that "'our legal system necessarily proceeds upon the assumption that jurors will follow the trial judge's instructions.'" *Alston v. State*, 414 Md. 92, 108 (2010) (quoting *State v. Moulden*, 292 Md. 666, 678 (1982)). In *Morris v. State*, 153 Md. App. 480 (2003), we declined to exercise plain error review when the trial judge made a slip of the tongue and, instead of instructing the jury that the

State was "'not required to prove guilt beyond all possible doubt or to a mathematical certainty[,]'" instructed the jury that "'the State is not required to prove guilt beyond all reasonable doubt.'" *Id.* at 506. We held that the slip of the tongue, which none of the parties noticed, did not "call upon us to overlook the preservation requirement of Maryland Rule 4–325(e) and to exercise our extraordinary discretion by way of taking 'cognizance of any plain error in the instructions.'" *Id.*

Similarly, in the present case, we assume that the jury followed the court's properly given instructions. Furthermore, there is no indication that the prosecutor's minor misstatement of the standard had any dispositive significance and affected the appellant's right to a fair trial. Therefore we decline to exercise plain error review.

B. Shifting Burden to Call Witnesses

Next, the appellant argues that the "State also engaged in improper argument when it effectively shifted the burden to the defense to call witnesses." At trial, the State called Ms. Bradford to testify about a number of matters, including the consent to search form that she signed to allow the police to search the appellant's bedroom. When first asked whether she had signed the consent to search form, Ms. Bradford replied that she had. The prosecutor later asked her whether the last lines of the consent to search form, which read "this written permission is being given by me to the above named officers voluntarily and without threats or promises of any kind[,]" were true. She responded that she signed it, but "under duress[.]" The following exchange then occurred:

> [STATE]: When you said you were threatened, what other people, beside the officers –

S. BRADFORD: My husband was there.

[STATE]: He's here today?

S. BRADFORD: Yes, he is.

[STATE]: He's testifying today?

S. BRADFORD: He can.

[STATE]: Nothing further, Your Honor.

On cross examination, defense counsel asked Ms. Bradford a number of questions about why she had consented to the search. She repeated that she had not wanted to sign the form but had done so because she had been under duress. The entirety of defense counsel's cross-examination of Ms. Bradford consisted of questions about her consent to search and the "duress" she felt under when she signed the consent form.

On re-direct examination, the following exchange occurred:

[STATE]: You have absolutely no way of backing up your claim that there were threats, right?

S. BRADFORD: Yes, I do.

[STATE]: What?

S. BRADFORD: From what the officer told me.

[STATE]: No. Where is your evidence? You're claiming you were threatened. Do you have any evidence of that whatsoever?

S. BRADFORD: My husband is an eyewitness to that.

[STATE]: Do you have any evidence of that?

S. BRADFORD: Yes, I have evidence. My husband is an eyewitness to what happened.

[STATE]: We'll see if he testifies, then.

Ms. Bradford's husband did not testify at trial.

In closing, the prosecutor argued:

> Then [Ms. Bradford] comes in here and lies to your face, oh well, even though the last line says no threats, I was being threatened. And then she does what any liar will do. She invents completely unverifiable evidence to say you can't prove it. What evidence do you have? Well, my husband can testify. Maybe I missed that part of the trial where this husband, who was never identified, testified. I must have missed it.

There was no objection made to this argument.

The appellant argues that "[a]s the defense of course has no obligation to call witnesses, this argument was improperly burden-shifting." The State responds that "the prosecutor's argument was a permissible inference from the evidence adduced, as well as a permissible 'missing witness' argument."

"'[T]he missing witness rule applies where (1) there is a witness, (2) who is peculiarly available to one side and not the other, (3) whose testimony is important and non-cumulative and will elucidate the transaction, and (4) who is not called to testify.'" *Pinkney v. State*, 200 Md. App. 563, 578 (2011) (quoting *Woodland v. State*, 62 Md. App. 503, 510 (1985)). "A 'relationship' between a party and a witness in the missing witness instruction context generally refers to a 'family relationship, an employer-employee relationship, and, sometimes, a professional relationship.'" *Id.* at 578–79 (quoting *Christensen v. State*, 274 Md. 133, 134–35 (1975)) (additional citations omitted). "The

missing witness inference may arise in one of two contexts[,]" 1) a "party may request that a trial judge instruct the jury on the operation and availability of the inference where all the elements of the rule are present[,]" or 2) "a party may wish to call the jury's attention to this inference directly during closing arguments." *Davis v. State*, 333 Md. 27, 52 (1993).

Here, although the State called Ms. Bradford as a witness, consent was only one of a number of topics the prosecutor questioned her about. It was Ms. Bradford who offered that her consent was a product of duress. When asked by the prosecutor whether she could produce any evidence of that duress, Ms. Bradford responded that her husband was a witness who could corroborate her story. On cross-examination, defense counsel only asked questions about the alleged duress and the consent form. On re-direct Ms. Bradford again gave her husband as a witness to the alleged duress.

Given that Ms. Bradford initially injected the issue of duress into the trial, defense counsel expounded upon it on cross-examination, and Ms. Bradford said her husband could verify her testimony, it was a reasonable inference to be made in closing that Ms. Bradford's husband would not have supported Ms. Bradford's testimony. Under the circumstances, plain error review is not warranted.

C. Endangering Children

Finally, the appellant argues that, "with no evidentiary support, the State accused [him] of endangering children." During the prosecutor's closing argument, he referred to the loaded gun found in a couch in the appellant's room, commenting:

> You think anyone else ever sit on the couch, you think? Any children ever sit on the couch, you think? A loaded working gun.

No objection was made.

Attorneys, including prosecutors, are granted "a great deal of leeway in making closing arguments." *Whack v. State*, 433 Md. 728, 742 (2013). "'The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Spain v. State*, 386 Md. 145, 152 (2005) (quoting *Degren v. State*, 352 Md. 400, 429–30 (1999)).

The evidence at trial showed that the appellant slept on a pull out couch. The loaded firearm, which belonged to him, was found inside that couch. While there was no evidence that other people sat on the couch, it is a reasonable inference that other people, including children, did in fact sit on the couch. Any error in allowing the prosecutor's argument did not rise to the level of plain error.

II. Jury Note

Before trial, the appellant moved to suppress the evidence that he was in possession of a firearm, arguing that his mother's signed consent to search his room was not valid due to duress. The court held a suppression hearing, at which Ms. Bradford and Officers Gonzalez and Freshley testified. At the conclusion of the hearing, the court stated that it did not find Ms. Bradford credible and denied the motion. As we have noted, at trial Ms. Bradford testified that she signed the consent to search form, but did so under duress.

During deliberations, the jury sent a note that read:

If the consent to search was signed under duress, does it invalidate the search consent?

The court heard argument of counsel about the appropriate response. Defense counsel initially argued that it was "up to [the jury] to decide" whether duress invalidated the search. After further arguments from both parties, the following exchange occurred:

THE COURT: Do you believe that since we had the motions hearing and I found that the consent was valid and allowed the gun in, that they now can go behind my ruling and make their own decision as to that issue?

[DEFENSE COUNSEL]: Your Honor, I do think that they can because of what the testimony was as to why [Ms. Bradford] signed the consent form.

THE COURT: I understand her testimony. That's not my question.

Can they now consider it and sort of almost have their own mini hearing on whether or not there was consent after we had one? That's what I'm asking you. Is that something that's in the province of the judge only, or are you saying it's something that they can do, as well?

[DEFENSE COUNSEL]: I believe it's in the province of the judge only, once you have allowed it.

THE COURT: So, then, why would the answer not be no?

[DEFENSE COUNSEL]: Your Honor, since you stated it that way, then, I believe you can answer them.

THE COURT: Thanks.

THE STATE: So I would just ask that you say no, the search incident was valid. Either way.

THE COURT: I'm just saying no.

The appellant contends his convictions should be reversed because the "trial court erred in its response to a note received from the jury during its deliberations." Specifically, he argues that when the jury asked whether duress invalidates a consent to search, the "court's answer to the question incorrectly conveyed that coerced consent justifies a search and that the State had the better of a contested issue." The State responds that this "contention is both unpreserved and without merit." Further, it argues that "any possible error in this regard was harmless." We conclude that the appellant has waived this issue.

Rule 4-325(e) provides the following:

> **Objection.** No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

When a party agrees to a jury instruction and expresses "satisfaction with the instructions actually given, [that party] waive[s] any objection and fail[s] to preserve this issue for appellate review." *Choate v. State*, 214 Md. App. 118, 130 (2013). Further, "where [a party] affirmatively (as opposed to passively) waive[s] his objection by expressing his satisfaction with the instructions as actually given," we are "especially disinclined to take the extraordinary step of noticing plain error[.]" *Id.*

Here, after initially arguing that it was within the purview of the jury to decide whether duress invalidated the consent to search, defense counsel agreed that the issue of

duress was only for the court to decide and further agreed with the court that the answer to the jury question should be a simple "no." Indeed, the appellant has abandoned this initial argument and argues instead that the court's response to the jury question had the effect of "endorsing the conduct of the police officers." This argument was not made below and therefore is not properly before us, as required by Rule 4-325(e); and the appellant's initial argument was waived.

III. Sentences

The appellant was sentenced to three years imprisonment for DUI, as a subsequent offender. He contends that this sentence is illegal because the State did not show that he had two prior DUI convictions so as to warrant the three-year-enhanced sentence. The State does not agree that the sentence is illegal but agrees that it was imposed in error because the evidence at sentencing did not support it.

Md. Code (1977, 2012 Repl. Vol.), section 27-101(k) of the Transportation Article ("TA"), sets forth the penalties for DUI:

> (1) . . . any person who is convicted of a violation of any of the provisions of § 21-902(a) of this article ("Driving while under the influence of alcohol or under the influence of alcohol per se") or § 21-902(d) of this article ("Driving while impaired by controlled dangerous substance"):
>
> (i) For a first offense, shall be subject to a fine of not more than $1,000, or imprisonment for not more than 1 year, or both;
>
> (ii) For a second offense, shall be subject to a fine of not more than $2,000, or imprisonment for not more than 2 years, or both; and
>
> (iii) For a third or subsequent offense, shall be subject to a fine of not more than $3,000, or imprisonment for not more than 3 years, or both.

> (2) For the purpose of second or subsequent offender penalties for violation of § 21-902(a) of this article provided under this subsection, a prior conviction under § 21-902(b), (c), or (d) of this article, within 5 years of the conviction for a violation of § 21-902(a) of this article, shall be considered a conviction under § 21-902(a) of this article.

In addition, TA section 21-902(e) states:

> *Crime Committed in another jurisdiction.* – For purposes of the application of subsequent offender penalties under § 27-101 of this article, a conviction for a crime committed in another state or federal jurisdiction that, if committed in this State, would constitute a violation of subsection (a), (b), (c), or (d) of this section shall be considered a violation of subsection (a), (b), (c), or (d) of this section.[1]

The appellant's pre-sentencing investigation shows a conviction on June 1, 2009, in Stafford County, Virginia, for "DWI." It also shows an arrest on August 5, 2015, in Prince William County, Virginia, on charges of "DWI 1st Offense" and "DWI Refusal Test," with no disposition.

The appellant argues that the Stafford County conviction cannot be used as a predicate for an enhanced penalty under TA section 27-101(k) due to its age and the fact that it took place out-of-state. He emphasizes that "27-101(k) lists as predicates prior convictions under specified *Maryland* statutes" (emphasis in brief); and the Prince William County charges do not evidence a prior conviction. The State agrees that the Prince William County charges had not resulted in a conviction before the convictions in

[1] Subsections (a),(b), (c), or (d) pertain to DUI, DWI, driving while under the influence of drugs and/or alcohol, and driving while under the influence of a controlled dangerous substance. TA § 21-902(a)-(d).

this case and therefore are not convictions for purposes of subsequent offender penalties. With regard to the Stafford County "DWI" conviction, the State argues that it "appears" that that conviction was for a violation of Va. Code Ann. section 18.2-266, which "appears" to be the equivalent of TA section 21-902(a). Therefore, the State continues, pursuant to TA section 21-902(e), that conviction constitutes a violation of TA section 21-902(a) for subsequent offender purposes. The State further argues that the five-year limitation imposed by TA section 27-101(k)(2) only limits prior convictions for TA section 21-902(b), (c), or (d), not prior convictions for TA section 21-902(a) or its out-of-state equivalents.

The "burden is on the State to prove, by competent evidence and beyond a reasonable doubt, the existence of all the statutory conditions precedent for the imposition of enhanced punishment." *Jones v. State*, 324 Md. 32, 37 (1991). At sentencing in this case, there was no proof of the Virginia statute that may have been the basis for the appellant's 2009 "DWI" conviction in Stafford County.[2] Therefore, there was no proof that the Stafford County conviction was for a crime that would be a violation of TA section 21-902(a) if committed in Maryland (which we agree with the State would render the five-year limitation inapplicable).

[2] It appears, although it is not clear, that the subsequent offender penalty was imposed based on the prosecutor's argument below that the convictions *in this case* could count for purposes of subsequent offender penalties. That is incorrect.

Pursuant to *Twigg v. State*, 447 Md. 1 (2016), we shall vacate the sentences imposed on all the convictions in this case, as they were imposed as a package, and remand for resentencing.[3]

SENTENCES FOR ALL CONVICTIONS VACATED. CASE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID TWO-THIRDS BY APPELLANT AND ONE-THIRD BY PRINCE GEORGE'S COUNTY.

[3] The enhanced sentence imposed was erroneous because it was not supported by the evidence. It was illegal to the extent that it was based on two prior convictions, because at most there could have been one prior conviction. If on remand an enhanced sentence is imposed based on one prior conviction, not two, and upon sufficient evidence, it will not be an illegal sentence.